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Ethan Katsh

Janet Rifkin

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# THE NEW MEDIA AND A NEW MODEL OF CONFLICT RESOLUTION: COPYING, COPYRIGHT, AND CREATING†

ETHAN KATSH\*  
JANET RIFKIN\*\*

A man might write the works of others, adding and changing nothing, in which case he is simply called a 'scribe' (scriptor). Another writes the work of others with additions which are not his own; and he is called a 'compiler' (compiler). Another writes both other's work and his own for purposes of explanation; and he is called a 'commentator' (commentator). . . . Another writes both his own work and others' but with his own work in principal place adding others' for purposes of confirmation; and such a man is called an 'author' (auctor).

-St. Bonaventure<sup>1</sup>

In the thirteenth century world of St. Bonaventure, language and tradition, more than law, shaped the manner, nature and value of creative work. Working with text could occur in a variety of ways and non-legal norms dictated how the work was to be evaluated and what the level of originality was. Creators today have available to them a much broader range of tools for their creative endeavors than existed in times past, yet contemporary copyright law is much less specific about models of crea-

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\* Professor of Legal Studies, University of Massachusetts at Amherst.

\*\* Professor of Legal Studies, University of Massachusetts at Amherst.

1. ELIZABETH L. EISENSTEIN, 1 THE PRINTING PRESS AS AN AGENT OF CHANGE 121-22 (1979).

tion than was the language of Bonaventure's time. As creative works have become legally protected properties, and as originality has become defined more by legal sanction than by language, ethics or tradition, our categories for evaluating creative contributions have narrowed rather than expanded.<sup>2</sup>

Under current copyright law, one can secure a copyright only for "original" works.<sup>3</sup> All works granted a copyright receive identical protection and no distinctions are made among copyrighted works based on how original the work is. In deceptively simple terms, it has been written that "[o]riginality means only that the work owes its origin to the author, i.e. is independently created, and not copied from other works."<sup>4</sup> One is an "author" whether one's works are literary masterpieces or pulp novels, whether one is highly creative and innovative or mundane and superficial, whether one has merely described the works of others or presented new ideas. Both the most original and least original writers are authors with the same legal rights to their work. If a book consists only of selections from other books, the author may be transformed into an "editor," but we have no other words to describe the varying degrees of originality that may be present in different works. Both our language and our law are limited in this regard.

Using Bonaventure's model, probably none of the four persons mentioned above would produce a non-infringing work. Unless permission had been obtained, there would simply be too much copying by "scribe," "compiler," "commentator" or "author" to satisfy the copyright law's definition of originality. Imitation may or may not be the "sincerest form of flattery," but under copyright law, unlike many ancient and medieval traditions, copying is, as a general rule, an unlawful activity.<sup>5</sup>

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2. The one notable exception to this is plagiarism, which is a non-legal sanction that overlaps with copyright. See THOMAS MALLON, *STOLEN WORDS* (1989); ALEXANDER LINDEY, *PLAGIARISM AND ORIGINALITY* (1952).

3. MELLVILLE B. NIMMER ET AL., *COPYRIGHT* 2 (1991).

4. *Id.* at 3.

5. It is interesting that the quotation at the beginning of this article, by being attributed to a St. Bonaventure, itself reveals some of the differences between scribal and print culture concerning the ownership of information. Daniel Boorstin has observed that:

There were special problems of nomenclature when books were commonly composed as well as transcribed by men in holy orders. In each religious house it was customary for generation after generation of monks to use the same names. When a man took his vows, he abandoned the name by which he had been known in the

Copyright law is today struggling with the enormous impact of new information technologies; technologies that store, process and communicate data in electronic form. This struggle is reflected both in increased numbers of conflicts,<sup>6</sup> a situation that creates ambiguities and poses problems for the creative community, and in the need to adapt laws which originated during the print era to forms of creative work that employ and exploit the electronic media. At this point in time, conflict is manifested both in increased activity involving lawyers and also, in less noticeable fashion, in concerns raised by librarians, scholars, journalists, business people, and others about how information can be protected that needs to be protected, about what activities involving information are legally permitted, and about what activities should be legally permitted.<sup>7</sup>

The new information technologies provide the means used in many creative endeavors today. Authors, artists, and musicians, as well as professionals such as lawyers and journalists, have had the context in which they work transformed by the new media. The central theme of this article is that this is a time of transition, not simply in technology, but in law, in language, and in the manner of creative work as well. In an era of changing information technologies, one should not expect either legal processes or legal doctrines to remain unchanged. Certainly, an era of technological change is an appropriate time

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secular world, and he took a name of one of the monastic brothers who had recently died. As a result, every Franciscan house would always have its Bonaventura, but the identity of 'Bonaventura' at any time could only be defined by considerable research.

All this . . . gave a tantalizing ambiguity to the name by which a medieval manuscript might be known. A manuscript volume of sermons identified as *Sermones Bonaventurae* might be so called for any one of a dozen reasons. . . . Was the original author the famous Saint Bonaventura of Fidanza? Or was there another author called Bonaventura? Or was it copied by someone of that name? Or by someone in a monastery of that name? Or preached by some Bonaventura, even though not composed by him. Or had the volume once been owned by a Friar Bonaventura, or by a monastery called Bonaventura? Or was this a collection of sermons by different preachers, of which the first was a Bonaventura? Or were these simply in honor of Saint Bonaventura?

DANIEL BOORSTIN, *THE DISCOVERERS: A HISTORY OF MAN'S SEARCH TO KNOW HIS WORLD AND HIMSELF* 530 (1983).

6. Victoria Slind-Flor, *High Tech, High Stakes*, NAT'L L.J., July 22, 1991, at 1.

7. Robert Oakley, *Pathways to Electronic Information: Copyright Issues for the Creators and Users of Information in the Electronic Environment* (1991) (unpublished manuscript on file with author).

for a reassessment of practices and methods as well as policies. This is particularly the case in an area such as copyright, whose very origin is linked to the medium of print, whose concept of the creative process reflects a print orientation, and whose ideas of what is proper and not proper, of what should be rewarded and what should not, are also an outgrowth of the technology of print.<sup>8</sup>

This paper focuses more on processes and methods that might be employed to resolve copyright problems than on suggesting revisions to copyright doctrine itself. For a variety of reasons outlined below, we suggest that it would be preferable to resolve some kinds of copyright disputes through non-adversarial means. There has been considerable discussion about the challenges posed by the new media to copyright doctrine,<sup>9</sup> but negligible attention has been paid to the manner in which copyright conflicts are typically resolved.<sup>10</sup> Rights and remedies are, of course, related,<sup>11</sup> and the question of what rights should be protected will be touched on. But our principal concern will be more on why a legalistic or adversarial model might not be appropriate at this time for resolving many of the copyright disputes that will be emerging due to increased use of the electronic media.

## I. COPYING AND THE ELECTRONIC ENVIRONMENT

The great contribution of the technology of printing was to create multiple uniform copies of a work.<sup>12</sup> Unlike scribes, who made a limited number of copies which typically were not uniform or error-free, Gutenberg provided society with a medium that could distribute identical copies to a mass market.

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8. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 172-80 (1989).

9. See generally OFFICE OF TECHNOLOGY ASSESSMENT, *INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION* (1986); Donald S. Chisum et al., *Last Frontier Conference Report on Copyright Protection of Computer Software*, 30 JURIMETRICS J. 15 (1989).

10. See Anita Stork, Note, *The Use of Arbitration in Copyright Disputes: IBM v. Fujitsu*, 3 HIGH TECH. L.J. 241 (1989); see also William F. Heinze, *Patent Mediation: The Forgotten Alternative in Dispute Resolution*, 18 AIPLA Q.J. 333 (1991); David Bender, *Alternative Dispute Resolution and the Computer-Related Dispute: An Ideal Marriage?*, 7 COMPUTER LAW. 9 (1990).

11. "It is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal." *Ashby v. White*, 87 Eng. Rep. 808, 812 (Q.B. 1702) (Holt, C.J.).

12. See EISENSTEIN, *supra* note 1, at 80.

This had a large impact on the development of social, scientific, and political institutions<sup>13</sup> and a large impact on law as well.<sup>14</sup>

Among the legal doctrines spawned by printing was copyright. Prior to Gutenberg, there was no clear concept of ownership over written information.<sup>15</sup> Information was common property and "ideas that we associate with such terms as 'plagiarism,' 'copyright,' or 'author's rights' simply did not exist and were not likely to exist until the invention of printing had revolutionized methods of production."<sup>16</sup> There were no copyright laws because "there did not have to be. The scribes were scattered, working on single manuscripts in monasteries."<sup>17</sup> Frequently, authors were not known, and even today we have difficulty in knowing who wrote many manuscripts that have been preserved.<sup>18</sup> The methods of producing manuscripts encouraged those who owned them to take liberties that might be unlawful today.

The development of copyright law after printing reveals not simply a legal change, the establishment of a new property right, but a shift in attitudes about the influence and value of information, about the role of authors, and about the creative process.<sup>19</sup> It was a shift from a time when it was "felt that all the literature that existed in their time was a fund of man's knowledge, rather than belonging to its individual authors"<sup>20</sup> to a time when just the opposite attitude came to predominate.

Given this historical link between copyright and print, it is reasonable to expect that the evolution of copyright law will continue to be affected by changes in the nature of authorship and in the kinds of creative activities that are fostered by a new

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13. *Id.*

14. *See generally* KATSH, *supra* note 8.

15. *See* EDWARD PLOMAN & L. CLARK HAMILTON, COPYRIGHT 4 (1980).

16. HENRY CHAYTOR, FROM SCRIPT TO PRINT 123 (1966).

17. ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 14 (1983).

18. The author's role became highlighted after the spread of printing when the author appeared for the first time on a title page, in a book that was no longer produced piecemeal by separate hands, and in a manner that suggested that the author was responsible for everything contained between the covers. Partly as a result of this, all of the different kinds of copyists and scribes that had previously existed were replaced by "author" and "publisher."

19. *See* KATSH, *supra* note 8, at 172-75.

20. MARC DROGIN, ANATHEMA! MEDIEVAL SCRIBES AND THE HISTORY OF BOOK CURSES 18 (1983).

medium.<sup>21</sup> The value and perception of creation, it has been observed:

is at least in part determined by our current tools for technological creativity. Indeed, what we can make in our own technological world influences our beliefs about the world of nature and how it came to be: hence the ambiguity of the term 'creation,' which refers to both the act of making and the world as a product of (divine) creation. Here again, technology and philosophy interact. The computer, the most philosophical of machines with its preoccupations with logic, time, space, and language, suggests a new view of human craftsmanship and creativity as well.<sup>22</sup>

To the extent that copyright law reflects a print-oriented model of the creative process, it can be expected to be transformed as the manner of creation and the forms of creative work change. The current copyright model, which relies heavily on a distinction between ideas, which may be copied, and expressions of the ideas, which may not be copied, is a natural outgrowth of the use of print and the manner of authorship of someone who uses printed works. Such works are read, ideas are taken and even reworked, but the exact words, the expression of the ideas, may not be taken and reused.

New questions arise in the electronic age. For example, is the manner of creation likely to be different in an electronic age? Can and should the print paradigm of what is legitimate and what is illegitimate activity continue to dominate the electronic era? In an environment of changing technologies and increasing levels of information-related conflicts, should litigation continue to be the preferred method of dispute settlement? These are not the questions that courts or students of copyright policy typically ask, but we believe that they are central to understanding how different kinds of copyright disputes should be approached and of the dilemmas that copyright law will face in the future. Before discussing the qualities of mediation and what kinds of copyright disputes might be most appropriate for mediation, however, we provide some perspective on changing processes of creation and on increases in copyright disputing.

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21. See, e.g., Pamela Samuelson, *Digital Media and the Changing Face of Intellectual Property Law*, 16 *RUTGERS COMPUTER & TECH. L.J.* 323 (1990).

22. J. DAVID BOLTER, *TURING'S MAN: WESTERN CULTURE IN THE COMPUTER AGE* 166 (1984).

### A. *The Changing Creative Environment*

The dilemma for copyright law in the electronic era arises not only because increased copying occurs, but because, much more than at any time since the advent of printing, copying becomes a more obvious, accepted, fundamental and even legitimate part of some creative processes. The electronic media are fostering a proliferation of new creative forms, some of which involve, require, encourage or facilitate copying.<sup>23</sup> With print, the act of copying the author's work occurred in a remote factory and into a form that encouraged that it be treated as a whole. Most electronically obtained information, however, is essentially information that, with some technological help, one has copied oneself.<sup>24</sup> Unlike print, one participates in the act of copying and in choosing which information will be copied and which will not. The number of tasks one could perform on a printed book or article was limited. One could read it, take notes from it, or summarize it. Mostly, one could think about it. One could not edit it, revise it or otherwise transform it without, at the same time, destroying it. The copying of electronic information, on the contrary, allows it to be processed, manipulated and put to use in ways not possible with print.

Copyright law takes a hard line on copying, assuming that copying anything greater than what might be considered "fair use"<sup>25</sup> is unlawful. It also gives the copyright owner control of

23. See generally OFFICE OF TECHNOLOGY ASSESSMENT, *INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION* (1986).

24. "All digital machines," it has been written, "copy in order to communicate. They are essentially repeaters, able to regenerate perfect copies with abandon." To say that a file is sent from one computer to another or that electronic mail is sent is to use an anachronistic metaphor. It is always a copy of a file that is transmitted. Corresponding through a computer, or even broadcasting a television signal, involves keeping the original and sending a copy of the source information to the person who requests it. See Richard J. Solomon, *Computers and the Concept of Intellectual Copyright*, in *ELECTRONIC PUBLISHING PLUS* 231, 238 (Martin Greenberger ed., 1985). The late Ithiel de Sola Pool recognized that

[t]o read a copyright text is no violation, only to copy it in writing. The technological basis for this distinction is reversed with a computer text. To read a text stored in electronic memory, one displays it on the screen: one writes it to read it. To transmit it to others, however, one does not write it; one only gives the password to one's computer memory. One must write to read, but not to write.

ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 214 (1983).

25. 17 U.S.C. § 301 (1989). See also *Basic Books v. Kinko's*, 758 F. Supp. 1522 (S.D.N.Y. 1991).



all "derivative works."<sup>26</sup> These approaches are consistent with, if not inspired by, the print paradigm where words are either copied verbatim or are simply read, and where the question in disputes involving text, at least, is more often how much was copied rather than the nature of the copying or how different the new copy is from the original. Thus, even though almost all words that appear in print today pass through an electronic stage, and even though more and more print materials are electronically accessible through various databases, the idea/expression dichotomy may survive as it is applied to text.

What is less clear is whether the idea/expression dichotomy can survive as a structure upon which copyright law for all media can be built, as is currently the case.<sup>27</sup> Word processors and the ability to expedite the typesetting process through electronic means have fueled the increase in book and periodical production in recent years. Yet, an even greater impact of the new electronic tools has been felt by non-text activities, such as graphics and sound. While electronic tools make many things easier for those who work with text, they open up altogether new and different activities for those who work with digitized images (see Figure 1 for one example of new image processing capabilities)<sup>28</sup> or sounds.<sup>29</sup> The capabilities of the electronic tools encourage large numbers of people to become involved in a broader spectrum of graphically oriented activities. In one sense, change is more dramatic in non-textual areas because print was not as supportive of these activities as it was for text. Thus, the electronic tools are most liberating for those who found print to be most constricting. The new medium opens up more opportunities for those involved in non-text activities because print was a much less flexible, accepting and nurturing medium for those involved with the

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26. 17 U.S.C. § 101 (1989).

27. "Technological change also challenges traditional copyright concepts. For example, with developments in artificial intelligence and in interactive software and database systems, it will likely become increasingly difficult to draw the line between derivative works and new creations, and to determine what constitutes 'authorship'." OFFICE OF TECHNOLOGY ASSESSMENT, COMPUTER SOFTWARE AND INTELLECTUAL PROPERTY: BACKGROUND PAPER 5 (1990).

28. See also Benjamin R. Seecof, *Scanning Into the Future of Copyrightable Images: Computer-based Image Processing Poses a Present Threat*, 5 HIGH TECH. L.J. 371 (1990).

29. See Bruce J. McGiverin, Note, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723 (1987); Aaron Keyt, *An Improved Framework for Music Plagiarism Litigation*, 76 CAL. L. REV. 421 (1988).

FIGURE 1

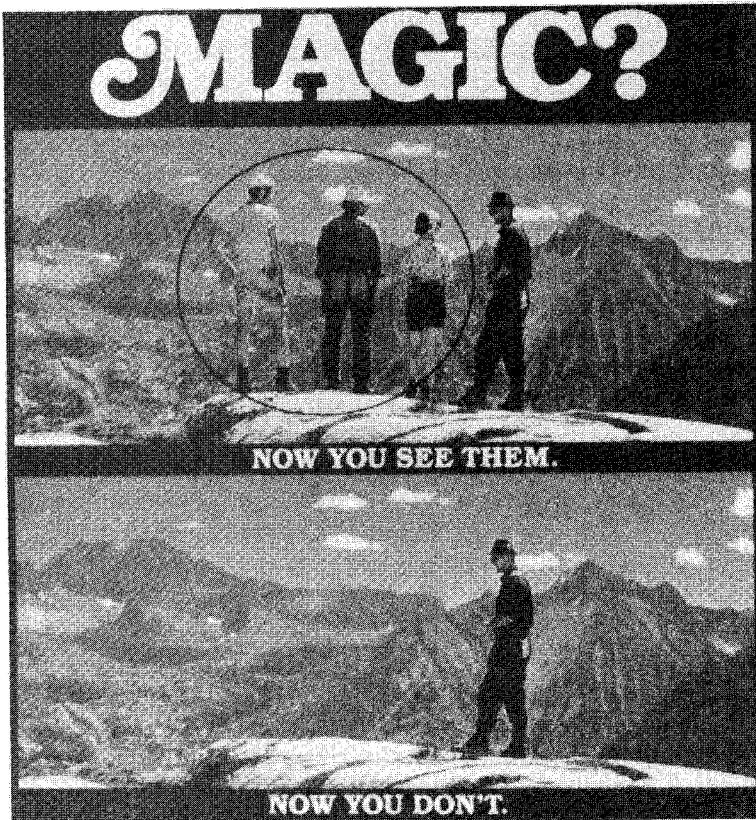


Photo credit: Pacific Lithograph Co., San Francisco CA

This demonstration of digital retouching was put together by Pacific Lithograph Co. What appears to be two separate photographs is actually only one. By digitizing the photograph of the four hikers, it becomes possible to capture and then manipulate information about color, patterns, and texture. With a Chromacom machine, a computer-driven device, it becomes a simple matter to copy the color or texture at one point and slide it over to another. Distinctive patterns are copied exactly. Thus the three people standing in the top scene were not removed; instead they were “washed over” with sky and mountain bits, taken from the scene. Each move of the cursors brings the seams of the changes closer and closer together. While requiring skill, the digitizing process appears to be almost a routine operation.

Source: U.S. Congress, Office of Technology Assessment, *Intellectual Property Rights in an Age of Electronics and Information* (Washington, D.C.: Government Printing Office, 1986), p. 140. For further details, see “Image Processing,” *Byte*, March 1987, pp. 141-198.

visual media. For example, images, particularly color images, cost substantially more to print than did text. Today, however, working with images electronically, either in color or black and white, is essentially no more difficult than working with text. The electronic medium, therefore, is an equalizing force, eliminating constraints and impediments for non-text artists that existed in the print era.

One consequence of this fact is that if text served as the paradigm for copyright law during the age of print, the visual will compete with textual works for this status and may gradually supplant printed text in this position during the electronic era.<sup>30</sup> As we become a more visually-oriented culture, the redefinition of copyright begins to occur because much more of the act of creation in the future, particularly where graphics are concerned, will involve working with copied information. This is important because one tends to work with visual and graphical material differently from the manner in which one works with text.<sup>31</sup> There are opportunities to manipulate and process visual material and not simply to read it or look at it, which is all that copyright lawfully allows the user. Like practices in the world of music,<sup>32</sup> the copying of visual material does not occur in isolation and is not done necessarily as an act of piracy solely to make a profit off of someone else's work. Copying may occur as a stage in the creative process and not be an end in itself but a means toward some legitimate end. In any event, the fact that more copying is occurring and will occur as part of the creative process by itself makes copying more problematic than it has been in the past, particularly where it is less clearly plagiarism or piracy and as it becomes part of a process in which new tools are applied to data in new ways. In many ways it is true, as Justice Holmes observed, that "the life of the law has not been logic; it has been experience."<sup>33</sup> New attitudes and practices concerning copying and creating constitute a new "experience" for the law and, as we discuss below, we are con-

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30. DUNCAN DAVIES ET AL., *THE TELLING IMAGE: THE CHANGING BALANCE BETWEEN PICTURES AND WORDS IN A TECHNOLOGICAL AGE* (1990).

31. This point can be made for those who are involved in creating musical works as well. Aaron Keyt has written that "While copying words from another author's book without some form of acknowledgement is generally considered plagiarism, the music world functions according to different social expectations and has done so for centuries. Composers historically have drawn heavily from folk music and current popular music." Aaron Keyt, *An Improved Framework for Music Plagiarism Litigation*, 76 CAL. L. REV. 421, 424 (1988) (footnotes omitted).

32. *Id.*

33. OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (1881).

cerned about the adversary model's capacity to respond to these changes.

### B. *Increasing Litigation Rates*

A second and more quantitative consequence of the development of new tools for working with information is that there is an ongoing increase in the number of information transactions occurring in an "information society."<sup>34</sup> There are greater opportunities for communication, a greater demand for information in an information-dependent economy, more information transactions, a greater value placed on information, and a diminished ability to inhibit the flow of information. More people work with information, more people need information, and, quite inevitably, there will be more disputes over information than in the past.

One would expect that more information transactions would also lead to more disputes involving information, particularly electronic information. As part of a study funded by the National Institute of Dispute Resolution, we have tried to develop some understanding of current litigation patterns in the copyright area. More specifically, we were concerned with whether there are increasing litigation rates, changes in types of litigated cases, and changes in how cases are being resolved. The data we found did suggest, in a number of ways, several changing patterns of information-based disputing.

It is not easy to obtain a definitive picture of litigation patterns involving intellectual property because there is no complete source of information about such cases. It is an interesting irony that in a study of the impact of the information society on an information-related legal doctrine, some basic data is relatively inaccessible. Before outlining the current pattern of disputing, therefore, we identify briefly each of the three data sources we used.

#### 1. Reported Cases

The most accessible sources of information are LEXIS and WESTLAW, which contain rulings by courts in individual cases. In general, such rulings do provide information not only about the legal issue in the case but about many of the facts of the dispute. Reported cases, however, are only a relatively small sample of all cases filed in court. Most cases which are filed do not end up being represented in either the printed or elec-

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34. See JAMES R. BENIGER, *THE CONTROL REVOLUTION* (1986).

tronic reports, either because the case was resolved at an early stage or because it proceeded without an opinion picked up by the reporting services.

## 2. Case Filings

The Administrative Office of the United States Courts compiles statistics each year on how many cases are filed, involving what legal areas, and indicating how long it took to resolve the cases. This data makes it possible to compare litigation over some time period, but the statistics provide no data about the facts of particular cases. In other words, while it is possible to know how many copyright cases were filed in a particular year, it is not possible to know why people were suing or how many of them involved computers or books or some other copyrighted material.

## 3. Federal Court Dockets

Because of the limitations of both reported cases and the Administrative Office statistical summaries, we decided to look more closely at a sample of cases pending in the federal district courts during the spring of 1990. We examined all of the copyright cases pending in district courts in Massachusetts, Georgia, Texas, Arizona, and the District of Columbia.<sup>35</sup>

Our principal findings about how infringement claims are being pursued and resolved are as follows:

### C. *Litigation Patterns*

The number of federal cases filed between 1979 and 1989 increased by approximately fifty percent, from 154,666 to 233,529. The number of copyright cases during the period, however, more than doubled, from 1144 to 2298.<sup>36</sup> Of the approximately 2300 copyright cases filed in 1990, we estimate

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35. The Administrative Office of the Federal Courts provided us with docket numbers of pending copyright cases in these five districts. These districts were selected because they were part of a pilot project allowing electronic access to court dockets. The district court in Massachusetts was selected because of its accessibility. Using the docket numbers, we were able to access the docket, obtain the names of the parties' attorneys, and, from the attorneys, obtain copies of complaints and other documents that provided detailed information about the nature of the dispute.

36. See DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S.: 1979 ANNUAL REPORT 363 (1979) (Table C2); REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S.: 1989 ANNUAL REPORT 179 (1989) (Table C2).

that approximately 185 were computer related disputes.<sup>37</sup> There is no way to know how many computer related copyright cases were in the courts in 1979 but, as Figure 2 shows, there has been a fairly consistent increase in computer-related copyright cases reported in LEXIS during the ten year period.

#### D. *Patterns of Settlement*

Figure 3 presents some comparisons between the settlement of copyright cases and the settlement of all federal cases. It indicates that changes have occurred in the pattern of how copyright cases have been resolved during the last decade. From 1979 to 1989, for all federal district court cases, there was an increase in the percentage of cases settled in the pre-trial stage and a 33% decline in cases going to trial. For copyright cases over the same period, the pie chart acquired a new look, so that it more closely resembles the chart for all federal cases now than it did ten years earlier.

This changing image came about because more cases are now being resolved with court involvement than without court action. In addition, the percentage of copyright cases going to trial has been increasing although the percentage of cases going to trial generally has been declining. Overall, therefore, copyright cases are being settled at a later point in time than was the case in 1979. It still remains, however, that a smaller percentage of copyright cases go to trial than of other federal cases.<sup>38</sup>

#### E. *Nature of Cases*

Table 1 shows that in 1989, ninety-five copyright cases were reported in LEXIS. In looking at these cases, we were interested in whether the seventeen computer cases differed in

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37. We found twelve computer related copyright cases in the one hundred and forty nine pending copyright cases in our sample. If this were a representative sample of the 2300 cases filed, there would be about 185 cases pending in all of the federal district courts.

38. One reason a smaller percentage of copyright cases go to trial may be that a significant number of copyright cases involve music piracy, and these cases tend to be settled rather than tried. A typical case of this kind would involve a bar which plays music from a jukebox but does not pay royalties. There are many such cases among the copyright cases filed each year.

One possible explanation for why the number of copyright-related trials has been increasing is that more non-music cases are surfacing. Such cases, among which would be computer copyright cases, inevitably involve more factual and legal questions than the music cases.

Figure 2  
**Computer Copyright Cases 1979-1989**  
**Cases Reported in LEXIS**

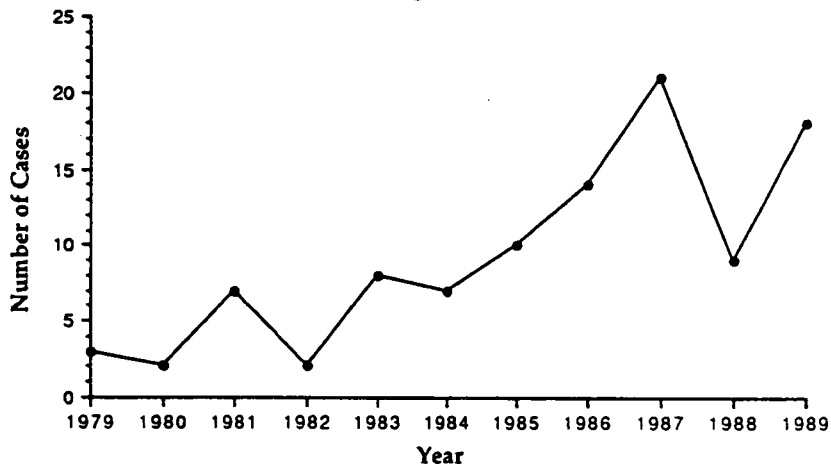
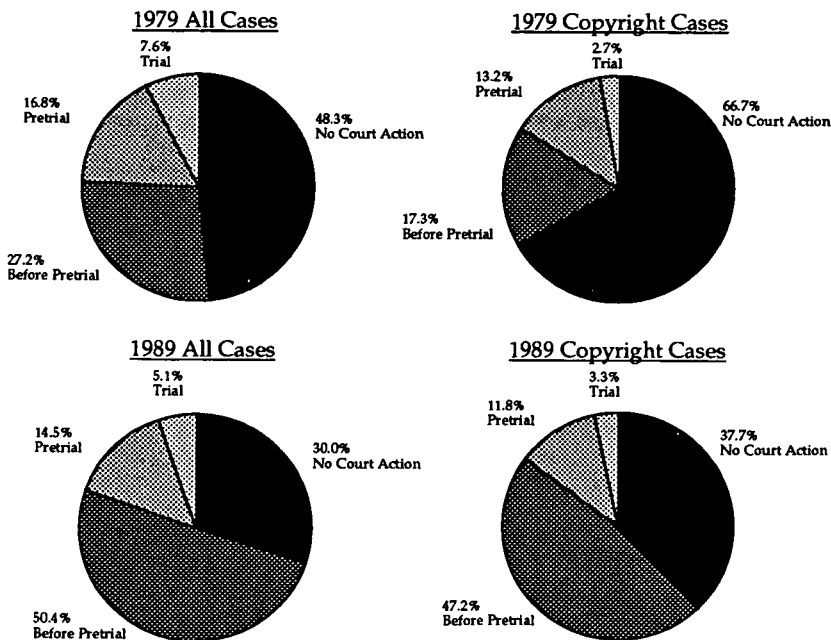


Figure 3

**When Cases Terminated**



Source: Administrative Office of the United States Courts

some way from cases involving some other medium. Seven of the cases involved not a question of copying but a dispute over who owned a copyrighted work. The remaining disputes divided fairly evenly into cases of piracy, where a copy was simply used without permission in lieu of the original, and cases of substantial similarity, where copying was not admitted but could be inferred from the appearance of the contested object. Looked at in this way, there were differences among media. Cases involving music inevitably involved piracy whereas a high percentage of the computer cases involved a determination of substantial similarity. If nothing else, piracy cases can be expected to be resolved more quickly than the substantial similarity cases. A growing number of computer related cases, therefore, can be expected to change the topography of copyright disputing. If no attention is given to alternatives to litigation, growing numbers of computer related cases could be expected to encourage increases in the average amount of time it takes to settle copyright disputes.

TABLE 1  
Copyright Cases in Federal District Court  
Reported Cases - 1989

<u>Medium</u>	<u>Total</u>	<u>Substantial Similarity</u>	<u>Unauthorized Use</u>	<u>Ownership</u>
Print (books, magazines & scripts)	17	9	6	2
Computer	17	13	3	1
Design	30	22	7	1
Music	26	0	21	5
Photographs	3	2	1	0
Television and video	13	4	9	0
Miscellaneous (architecture, billboards, courses, racetrack guides, directories)	5	2	3	0
TOTAL:	111	52	50	9

Source: LEXIS

## II. ALTERNATIVE DISPUTE RESOLUTION

During the last decade, many legal scholars and practitioners have examined the problems associated with reliance on the formal legal system as the main mechanism for conflict resolu-



tion.<sup>39</sup> Not only have changes in litigation patterns been noted,<sup>40</sup> but there has been growing consensus that the adversary process often exacerbates rather than settles disputes,<sup>41</sup> that the process itself intensifies the already hostile feelings that exists between parties. The recognition of these problems has catalyzed interest in Alternative Dispute Resolution (ADR) processes such as mediation, arbitration, negotiation and Mini-trials. ADR has attracted a broad range of supporters, including bar associations,<sup>42</sup> governmental agencies,<sup>43</sup> universities,<sup>44</sup> and corporations.<sup>45</sup> There has been a great deal of experimentation with the use of various ADR processes<sup>46</sup> to assist in the resolution of a wide range of disputes. There are, for example, close to 500 mediation programs in which volunteer or paid

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39. See AMERICAN BAR ASSOCIATION ACTION COMMISSION TO REDUCE COURT COSTS AND DELAY, *ATTACKING LITIGATION COSTS AND DELAY* (1984); Vilhelm Aubert, *Courts and Conflict Resolution*, 11 J. CONFLICT RESOL. 40 (1967); THE ROLE OF COURTS IN AMERICAN SOCIETY (Jethro K. Lieberman ed., 1984); JETHRO K. LIEBERMAN, *THE LITIGIOUS SOCIETY* (1981).

40. See Marc Galanter, *Reading the Landscapes of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Maureen Cain & Kalman Kulsar, *Thinking Disputes: An Essay on the Origins of the Dispute Industry*, 16 LAW & SOC'Y REV. 381 (1982).

41. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1979); Carrie Menkel-Meadow, *The Transformation Of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 MO. J. DISP. RESOL. 25.

42. See AMERICAN BAR ASSOCIATION, *ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION* (1982); AMERICAN BAR ASSOCIATION, *CONSUMER DISPUTE RESOLUTION: EXPLORING THE ALTERNATIVES* (1983); AMERICAN BAR ASSOCIATION, *DISPUTE RESOLUTION PROGRAM DIRECTORY* (1983).

43. See GAIL BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES* (1986); Gail Bingham & Daniel S. Miller, *Prospects of Resolving Hazardous Waste Siting Disputes Through Negotiation*, 17 NAT. RESOURCES LAW. 473 (1985); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982); Philip J. Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, *Symposium on Dispute Alternative Dispute Resolution*, 29 VILL. L. REV. 1393 (1984).

44. See Janet Rifkin et al., *Training Student Mediators*, in *RESEARCH ON NEGOTIATIONS IN ORGANIZATIONS* (Roy J. Lewicki et al. eds., 1986); JOSEPH P. FOLGER & J. JANELLE SHUBERT, *RESOLVING STUDENT INITIATED GRIEVANCES IN HIGHER EDUCATION: THE DESIGN AND ENACTMENT OF DISPUTE RESOLUTION INITIATED PROCEDURES IN NON ADVERSARIAL SETTINGS* (1984) (report to NIDR).

45. See American Bar Association Committee on Corporate Counsel, Subcommittee on Alternative Dispute Resolution, *Court Annexed Arbitration* (1984) (ABA unpublished report).

46. See Dennis S. Deutsch, *Litigate and Arbitrate: A Hybrid Method of Alternative Dispute Resolution*, 10 COMPUTER L.J. 517 (1990).

mediators are referred cases for settlement.<sup>47</sup> ADR processes such as the mini-trial have been used to expedite settlement in a number of complex corporate lawsuits<sup>48</sup> and negotiation has been incorporated into the rule making procedures for a number of federal agencies, such as the Environmental Protection Agency.<sup>49</sup>

Although ADR appears to be growing as a national trend, it is interesting that little use has been made of these processes in the area of copyright litigation.<sup>50</sup> Based on our research, including a review of the cases and interviews with attorneys and litigants, it is clear that the common wisdom is to seek formal legal redress for perceived copyright wrongs. We argue, nonetheless, that formal litigation is not the presumptively appropriate path to follow in the effort to settle copyright disputes involving electronic media. We suggest that formal litigation not only lengthens the time but also increases the cost of the conflict. Even more fundamentally, and in spite of the fact that it may lead to an articulation of new legal principles, litigation leaves the disputing parties in unsatisfactory positions in the aftermath. For example, it has been noted that,

current copyright law does not provide adequate legal safeguards to protect the intellectual property embodied in computer software. Although copyright laws were intended to protect and encourage innovation, the uncertainty concerning the copyrightability of certain types of software and the threat of endless litigation have produced the opposite effect. Traditionally dispute resolution by litigation has only exacerbated the problem. Litigation of such cases is extremely costly and takes

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47. See AMERICAN BAR ASSOCIATION, DISPUTE RESOLUTION PROGRAM DIRECTORY (1983).

48. See Eric D. Green et al., *Settling Large Case Litigation: An Alternative Approach*, 11 LOY. L.A. L. REV. 493 (1978).

49. Lawrence Susskind & Connie Ozawa, *Mediating Public Disputes: Obstacles and Possibilities*, 41 J. Soc. Iss. 145 (1985).

50. The American Arbitration Association maintains a committee to promote arbitration of computer related disputes. There are no statistics available, however, of how many of these disputes involve copyright. The Association of Shareware Professionals maintains an ombudsperson to resolve conflicts involving shareware produced by its members. There are no reported copyright disputes that have been resolved by that office. The computer trade association ADAPSO has established an alternative dispute resolution program for its members but it is too early to judge whether copyright issues will be a large part of the caseload. The most notable copyright conflict that has been arbitrated involved IBM and Fujitsu. See Stork, *supra* note 10, at 241.

years to reach a final conclusion. By that time, the software at issue is usually antiquated and no longer in use. Moreover, the issues involved in software copyright disputes are too technical and complex to be adequately explained to a judge and jury who are unfamiliar with the technology. In any event, the courts continue to apply general copyright principles which have little application in the context of high technology copyright disputes.<sup>51</sup>

In addition to this rationale which draws on the pragmatic consequences of using ADR,<sup>52</sup> there is another, perhaps more compelling rationale, for using ADR processes in the resolution of copyright disputes involving the electronic media. This is that ADR

should not simply be a new marketing tool . . . but rather should become a discipline that studies and finds the causes of problems facing society and which develops creative and innovative responsive measures. . . . Adversarial extremism permeates judicial dispute resolution, encouraging subversive litigation tactics that cast doubt on the credibility and integrity of the system to handle public interest cases in the best interest of society.<sup>53</sup>

While court battles may result in the articulation of new legal rights and principles, they do not necessarily end the dispute for the people involved. This is particularly true when the parties are involved in ongoing business or creative relationships. Although clearly some cases, such as those involving outright piracy, require judicial rulings, many conflicts are simply intensified as a result of litigation and the articulation of the legal precedent is not directly relevant or responsive to their situation. Formal litigation transforms disputes into legally actionable claims. In the process, the parties themselves are removed from the discussion and from the negotiation process. As a result, they lose the opportunity to forge a consensus about the particular dispute and about the complex scientific and technological questions that gave rise to the conflict.

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51. Alisa E. Anderson, *The Future of Software Copyright Protection: Arbitration v. Litigation*, 12 HASTINGS COMM. & ENT. L.J. 1, 31 (1989).

52. WILLIAM URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988).

53. Milton R. Wessel, *Alternative Dispute Resolution for the Socioscientific Dispute*, 1 J.L. & TECH. 1 (1985); see also Milton R. Wessel, *Adversary Science and the Adversary Scientist: Threats to Responsible Dispute Resolution*, 28 JURIMETRICS J. 379 (1988).

In contrast, mediation and other ADR mechanisms draw on the participation of the parties. Unlike judges, mediators attempt to facilitate discussion, and to enhance the exchange of information using a problem solving rather than an adversarial orientation. Mediators, unlike judges, seek to expand rather than narrow the issues, broadening the possible bases for settlement. Whereas formal court proceedings seek to narrow issues into litigable issues, mediation seeks to expand the range of issues to widen the scope of possible agreement. Although mediation and other ADR processes have not been widely utilized in the copyright field, there is no reason to believe that these disputes would be less amenable to mediated solutions than other types of conflicts in which mediation has been proven to be a valuable resource. While copyright disputes are often marked by strong and antagonistic feelings between the parties, so are other kinds of disputes, such as divorce, where mediation has been found to be an effective alternative to litigation.

#### A. *The Case for Mediation*

Mediation offers disputants a very different process for airing and resolving their differences than the formal adversary process.<sup>54</sup> The concept of mediation itself is premised on a view of conflict and an approach to resolution that differs from the legalistic model.<sup>55</sup> Formal law involves a model in which fairness and justice are linked to procedural rights. Thus conflicts which begin, even in the electronic media arena, as disputes between people, have to be transformed into legally actionable claims, in order to be formally litigated. Although one outcome of pursuing a formal legal claim may be the articulation of a legal precedent, the other inevitable outcome is that one side wins and the other loses (some would argue that the costs of litigation are so great and so protracted that both sides lose).<sup>56</sup> Some commentators have implied that the legal forum, with its reliance on cross-examination and the impeachment of the credibility of witnesses, offers the opportunity to make determinations about right and wrong and "good and evil." This view suggests that litigation is a socially important tool in the pursuit of ethical standards of conduct. For exam-

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54. See LINDA R. SINGER, *SETTLING DISPUTES* (1990).

55. See, e.g., K. KENNETH ET AL., *MEDIATION RESEARCH* (1989); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS* (1986); JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* (1984).

56. See ROGER FISHER & WILLIAM URY, *GETTING TO YES* (1981).

ple, in reviewing one copyright case involving electronic media, the conclusion was "at the core, most copyright cases have the same point: The vindication of Good and the vanquishing of Evil."<sup>57</sup> This idea which is echoed by many in the copyright field sees formal law as an avenue through which stories about the truth will emerge.

In contrast, the mediation process is not primarily oriented toward finding the truth. Mediators seek to discover the stories of all parties, not to discover whose story is right and whose is wrong.<sup>58</sup> Mediators facilitate discussions between the parties, by meeting separately and in joint meetings. The goal is to facilitate discussion and communication.<sup>59</sup> In formal legal proceedings, lawyers seek to narrow the issues into legally actionable claims. In contrast, mediators seek to expand the issues, widening the possibilities for settlement. Mediators attempt to find common concerns and issues that exist between the parties. Whereas the adversary process polarizes the parties into opposing sides, the mediation process emphasizes those areas in which there are joint interests.<sup>60</sup> Mediators are legally bound to maintain confidentiality,<sup>61</sup> an element of the process that can encourage frank disclosures and exploration of settlement possibilities. Finally, in legal proceedings, the emphasis is on what happened in the past. In mediation proceedings, the emphasis is on the future. Mediators help parties articulate their prospective interests rather than to defend their past actions.

Mediators are neutral facilitators who are selected by each party.<sup>62</sup> Although it is not always necessary for the mediator to have knowledge of the substantive area of the dispute, for copyright conflicts involving electronic media, which often

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57. ANTHONY L. CLAPES, *SOFTWARE, COPYRIGHT AND COMPETITION* (1990).

58. See Susan S. Silbey & Salley E. Merry, *Mediator Settlement Strategies*, 8 *LAW & POL'Y* 7 (1986); John W. Keltner, *Mediation: Toward a Civilized System of Dispute Resolution*, in ERIC CLEARINGHOUSE ON READING AND COMMUNICATION SKILLS (1987).

59. See Kenneth R. Feinberg, *Mediation: A Preferred Method of Dispute Resolution*, 16 *PEPP. L. REV.* S5 - S42 (1989).

60. See Leonard L. Riskin, *Mediation and Lawyers*, 43 *OHIO ST. L.J.* 41 (1982).

61. See Michael L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 *SETON HALL LEGIS. J.* 1 (1988).

62. See, e.g., Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 *J.L. & SOC. INQUIRY* 35 (1991); Janet Rifkin et al., *Toward a New Discourse for Mediation: A Critique of Neutrality*, in *Mediation*, 9 *MEDIATION Q.* 151 (1991).

involve complex factual and legal issues, the mediator should have expertise in this area. Mediators could be lawyers, retired judges, selected members of the industry or academics who work in this field. Regardless of the background of the mediator, there are certain skills that are fundamental to this process, including the ability to function as a neutral third party, the ability to listen, the ability to discover issues, and the ability to enlarge and logically reframe the issues so that all sides see possibilities for beneficial outcomes.<sup>63</sup>

There are many potential benefits of using mediation to resolve certain copyright disputes. The following list<sup>64</sup> summarizes the features of mediation which parties need to consider when deciding how to proceed with a claim.

1. Mediation Puts Decision Making Back in the Hands of the Parties<sup>65</sup>

Normally litigants receive information from the other party only after it has been filtered through the attorneys. In mediation, they would have a greater opportunity to hear all sides of the conflict and assess the strength of their case or their company's case and assess the risks involved in going to court. Mediation, even when lawyers are present, thus empowers the parties and moves control of the discussion away from the attorneys.

2. Mediation Offers Parties the Opportunity to Vent Emotions<sup>66</sup>

One of the most common complaints that people express about participating in a lawsuit is that they are denied the opportunity to tell their story as they experienced it and that they are not able to express their emotions. Mediators encourage people to express their feelings and often find these expressions vital to the settlement process. It is interesting that one of the most significant findings of evaluations of mediation practices is the high degree of satisfaction that parties experience with the process.<sup>67</sup> Parties seem satisfied, even with

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63. See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (1986).

64. See LESTER EDELMEN ET AL., *THE MINI-TRIAL* (1988) (pamphlet produced by the U.S. Army Corps of Engineers).

65. JAY FOLBERG & ALLISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 7-8 (1984).

66. *Id.* at 10-11.

67. See ROYER F. COOK ET AL., *THE NEIGHBORHOOD JUSTICE CENTERS FIELD TEST: FINAL EVALUATION REPORT* (1980); Craig A. McEwen & Richard

outcomes that may be less monetarily rewarding than a judicial award, because they claim that they had the opportunity to tell their story, to hear the other side, and to express their feelings about the problem.

### 3. Mediation Offers Greater Flexibility in Possible Settlements<sup>68</sup>

Judicial decisions involve a determination of which side is right and which is wrong, resolving the legal issues but potentially destroying the business relationship between the parties. Judges are often forced to base decisions on a narrow legal issue, focusing on whether proper procedures have been followed, rather than on the equity of the decision. These issues are argued and developed by lawyers who often are less familiar with the work than the parties themselves. In mediation, those who are most knowledgeable have the ability to participate in the discussion about how to work through a dispute. The presence of the parties in all discussions allows for immediate feedback to suggestions and proposals and thus enhances the opportunity for creative solutions to surface.

### 4. Mediation Protects Relationships<sup>69</sup>

Many people in these kinds of conflicts have either worked together in the past or want to work together again in the future. Their interest in working together in the future may be jeopardized if the issue is decided by a court. This is a particularly important issue where future creative or business opportunities are at stake, and we provide a more detailed discussion of this below.<sup>70</sup>

### 5. The Mediation Process is Informal

In mediation and other types of negotiated settlements, participants are not bound by strict rules of evidence. They can decide for themselves what procedures they want to use, what roles people will play and what issues will be discussed.

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J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC. REV. 11 (1984); ROBERT C. DAVIS ET AL., *MEDIATION AND ARBITRATION AS ALTERNATIVES TO PROSECUTION IN FELONY ARREST CASES: AN EVALUATION OF THE BROOKLYN DISPUTE RESOLUTION CENTER (1980)*; Jessica Pearson & Nancy Thoennes, *A Preliminary Portrait of Client Reactions to Three Court Mediation Programs*, 3 MEDIATION Q. (1984).

68. *Id.*

69. *Id.*

70. *See infra* pp. 71-74.

## 6. Mediation Saves Time<sup>71</sup>

It is typical for disputes to take years to go to trial. This is due in part to the time spent in discovery. Mediation and other negotiation processes can expedite the discovery process, saving valuable time for litigants.

## 7. Mediation is Cost Effective<sup>72</sup>

Potential cost savings are a consequence of a shorter settlement period and reduced discovery costs and attorneys' fees.

## 8. The Mediation Process is Confidential<sup>73</sup>

Since it is not clear whether mediation will result in a settlement, all parties want to protect their ability to go to court if an agreement is not reached. Confidentiality is essential so parties can feel assured that statements they make during the mediation process won't be used against them later at trial. Confidentiality protects against this possibility, making it possible for parties to speak frankly to the mediator during the mediation.

### B. *Reassessing Litigation*

As noted above, one of the most marked differences in outlook between mediation and adjudication is that mediation values relationships more than rights, whereas the opposite is generally true for adjudication. Mediation also assumes that economic value might be more obtainable through repairing a relationship than protecting a right. While many copyright cases involve competitors who may appear to have no ongoing or contemplated relationship, the mingling of hardware and software producers, the need to bring products to market quickly, and the frequent licensing of technological advances, mean that skillful mediators may be able to find some common interest upon which a mutually beneficial settlement might be grounded.

The paradigm case for mediation is one where there is an existing relationship and each side has contributed to a productive, creative, or commercial endeavor. Such cases highlight the choice between "claiming value," a zero sum game or win-

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71. See, e.g., Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420 (1982); Janice A. Roehl & Royer F. Cook, *Issues in Mediation: Rhetoric and Reality Revisited*, 41 J. Soc. Iss. 161 (1985).

72. *Id.*

73. See Prigoff, *supra* note 61.



lose situation where a fixed asset will be divided up in some way, and "creating value," a win-win situation where the asset is perceived to be potentially expandable. Unlike fully adjudicated cases where there will be a declaration of winner and loser, successfully mediated cases will not only resolve the dispute in some way that is mutually acceptable to the parties but will do so in a manner that enhances opportunities for the future.<sup>74</sup>

In a mediated settlement, there may indeed be no declaration of rights and wrongs and, since the process is private, no broad declaration of principles, standards, or rights. It is debatable, however, whether landmark legal cases have provided any stability or certainty to creators.<sup>75</sup> It may be useful, in this regard, to look at one landmark case and raise some questions about the benefits and drawbacks of proceeding through litigation.

The case is *Whalen v. Jaslow*,<sup>76</sup> in which a copyright holder's rights in the "look and feel" of software were upheld. The plaintiff was a computer programmer who had created software that was used to automate the defendant's dental laboratory. The software, which ran on a minicomputer, satisfied the defendant and the two parties began a joint venture, using Whalen's programming expertise and Jaslow's contacts in the dental service industry, to market the program, which was called Dentalab. Relationships between Whalen and Jaslow were not harmonious, but the business venture was viable and survived until a significant event in the history of computing occurred, the arrival of the IBM Personal Computer in 1981.

The Dentalab program, which was owned by Whalen, would not run on the IBM PC, and Jaslow decided that he could successfully develop and market a dental program by

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74. THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* 22 (1960).

75. A noted copyright litigator was asked, in an off-the-record interview, whether litigation could be relied on to establish principles and standards. His response: "If you want to establish legal principles, don't go to court, write a book." A recent Office of Technology Assessment paper notes that "computer software and hardware technologies are changing rapidly, both qualitatively and quantitatively. This makes the crafting and refining of software protections akin to aiming at a target that isn't there (or doesn't yet exist)." OFFICE OF TECHNOLOGY ASSESSMENT, *COMPUTER SOFTWARE AND INTELLECTUAL PROPERTY: BACKGROUND PAPER 2* (1990).

Interviews with other copyright attorneys revealed more favorable feelings about the precedential value of court decisions. A clear argument in support of the value of litigation can be found in CLAPES, *supra* note 57.

76. 609 F. Supp. 1307 (E.D. Pa. 1985), *aff'd*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

himself for PCs. In creating this program, however, Jaslow not only looked at the source code for Dentalab but modeled many of the screens and functions of the new program on Dentalab. The similarities between the two programs were so stark that the judge ruled that Whalen's rights had been infringed. Whalen was awarded attorneys' fees and \$101,000, the amount of the profits Jaslow had made from sales of his PC program. The judge refused to award punitive damages.

In a recent book,<sup>77</sup> IBM counsel Anthony Clapes argues that the decision in this case clarified an important point in copyright law. Yet, Clapes also points out that this case was "a clash of wills, an emotional tempest based on strongly held convictions. That it was also a complete waste of their time and money was beside the point."<sup>78</sup> Thus, while the court did clearly rule that screen displays are protectable, it is equally clear that the business partnership was ruined and economic opportunities were lost. There is, of course, no guarantee that mediation would have been successful and that the Whalen-Jaslow partnership would have conquered the turbulent 1980s software environment. Our point simply is that the kinds of skills mediators bring to such conflicts at least leave us optimistic about that possibility.

We have no doubt that the attorneys, and probably the parties as well, saw the Whalen-Jaslow relationship, at the time the litigation commenced, as being over and without any possibility of salvaging. That is a common attitude, however, at the beginning of a mediation process. The difference between litigation and mediation is that mediators recognize that by maintaining lines of communication, by placing few or no limits on what issues are raised, and by placing the burden for resolution on the parties, more often than not the unanticipated result occurs and the seemingly unresolvable is resolved.<sup>79</sup> That ideas for how this relationship might have been restored are difficult to imagine and, at this date, is of little concern. Imagining reasonable outcomes is often a fruitless exercise at the beginning of a mediation. What mediators realize is that the mediation process is able to tap into the creativity of the parties and to elicit ideas that were hidden or appeared to be irrelevant. As a result, it often occurs that damaged relationships are

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77. CLAPES, *supra* note 57, at 99.

78. *Id.*

79. Sam Kagel & Kathy Kelly, *The Anatomy of Mediation: What Makes It Work*, 1990 J. DISP. RESOL. 201.

rebuilt or reestablished in ways that had not appeared possible at the start.

### III. CONCLUSION

It has not been our intention to suggest that all electronic copyright disputes be mediated rather than litigated. As such cases increase in number in the coming years, and as the processing of information occurs in ways that have not been anticipated by the copyright model, it will be appropriate to direct more attention to the processes employed to deal with the conflicts. Mediation can yield many potential benefits which are not available through the traditional litigation emphasis. There is no evidence to suggest that either innovation or economic well being would suffer.<sup>80</sup> Where new relationships are rapidly being fostered, and where both creative and commercial opportunities are involved, therefore, mediation should receive much more careful scrutiny than it has in the past.

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80. An interesting comment on the drawbacks of overzealousness in protecting copyrights is Mitch Kapur, *Litigation vs. Innovation*, BYTE, Sept. 1990, at 520.