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Internet-Based Fans: Why the Entertainment Industries Cannot Depend on Traditional Copyright Protections

I. INTRODUCTION

Jesse installs the free one-month Internet trial on his computer in about ten minutes. When he signs on, he goes to one of the dozens of free e-mail services and gets a new e-mail address. This process, which takes another five minutes, involves filling out a number of forms asking for such information as Jesse's age. Jesse puts down fictional data for all the questions. The last page of the application is a huge block of fine print, which he scrolls past—without reading—to click on the "Accept" button. He does not bother to write down his password; he does not intend to ever check the new account. Then he heads over to a free homepage provider.¹ It takes him fifteen minutes to sign up for a free homepage. It only takes that long because everybody has already taken the names he wants.² He finally settles on "QUAKE," drawing inspiration from one of his favorite computer games,³ and enters a fake name and address to obtain his fifty megabytes of free web space. Jesse gives his new e-mail address as his contact information. Again, the last page of the application is a massive block of text. He scrolls past it, again without reading, and hits the "I agree" button. Next, Jesse spends a half-hour designing a front page for his website. He uses a shareware program he downloaded from the Net to convert a song from a popular movie soundtrack into an MP3 file he can load to his website. As he closes the MP3 converter, a window comes up telling him the program's shareware license expired a month ago and he must purchase the program. As he has regularly done for the last month, he clicks the "OK" button and the window goes away. Jesse goes to his friend's website. The friend, Kevin, has a variety of screen shots from a recent, popular movie on his homepage. Kevin obtained the pictures from his computer's DVD player, which allows him take screen shots at any point in the movie. Jesse saves a couple of Kevin's pictures to his website. Just to make Kevin mad, he puts Kevin's shot of the Miss July Playmate on his own front page. While doing so, he notices the white lettering "Copyright Playboy Entertainment" written on

1. *E.g.*, <http://www.tripod.com>. Tripod.com is a registered name belonging to Lycos Networks. Lycos is a registered trademark of Carnegie Mellon University.

2. Tripod.com, one of several free homepage providers on the Internet, has over one million subscribers. *See About Tripod*, at <http://www.tripod.lycos.com/about/> (last visited Feb. 4, 2001).

3. Quake is a popular computer game copyrighted and trademarked by id Software. *id Software*, at <http://www.idsoftware.com> (last visited Apr. 8, 2001).

one side of the picture. Jesse opens the picture using a common program that comes packaged with most computer operating systems and clips the lettering off the picture. As he uploads his new website to the Internet, he realizes how long it is taking. He swings over to an auction site and checks on a bid he made yesterday on a DSL modem. He is on his fifth month of free Internet offers, and it is about time to move up in the world.

The Internet is a vastly different place than it was even five years ago. Bandwidth—the speed at which one can access the Internet—is higher, due to new uses of technology like cable modems, satellite Internet service providers, and school networks; MP3, DVD, and other new digital data formats allow huge amounts of music, movies, pictures, or other information to be compressed and downloaded in minutes.⁴ Web pages are available to the masses through free services that offer everything from e-mail to drag-and-drop code editors.⁵

But the biggest difference of all may be the people on the Net. The Internet is populated by a generation introduced to the Net as already being one of the most popular past times, shopping tools, and communication methods in history.⁶ The generation moving onto the Net now is not used to being told what it is not permissible to do because, as recent history has shown, one will likely soon have the technology, awareness, and even legal permission to do the supposedly offensive act after all.⁷

Try explaining to Jesse that he just "infringed" on a copyrighted game title, an MP3 of a copyrighted song, an editing program, movie screen shots, and magazine pictures. When one has explained infringement to him, then one can move on to contract-violating e-mail addresses. While on the topic of personal ethics, one might as well raise the issue of abusing limited-license trials for Internet access. Unfortunately, Jesse probably would not know or care about what he was hearing.⁸ In fact, as this Comment will argue, most of the people he infringed on will most likely never take action against him, either.

This Comment examines the relationship between the most prominent entertainment industries on the Internet—traditional (movies, music, television) and interactive (software and console video games)—and their Web-based fans.

4. See S. E. Oross, *Fighting the Phantom Menace: The Motion Picture Industry's Struggle to Protect Itself Against Digital Piracy*, 2 VAND. J. ENT. L. & PRAC. 149, 150-152; see also Charles R. McManis, *Taking Trips on the Information Superhighway: International Intellectual Property Protection and Emerging Computer Technology*, 41 VILL. L. REV. 207, 207 (1996).

5. See, e.g., *Welcome to Tripod!*, at <http://www.tripod.com> (last visited Feb. 4, 2001) (offering fifty megabytes of free web space).

6. See Eric Schlachter, *The Intellectual Renaissance in Cyberspace: Why Copyright Law Should be Unimportant on the Internet*, 12 BERKELEY TECH. L.J. 15, 36-37 (1977).

7. See *id.* at 36.

8. See Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 50-51 (1994) ("The current copyright statute has proved to be remarkably education-resistant [O]ur current copyright statute could not be taught in elementary school, because elementary school students couldn't understand it. Indeed, their teachers couldn't understand it. Copyright lawyers don't understand it.").

The conclusion is simple: current intellectual property law cannot adequately protect the entertainment industries' intellectual property from casual "fan" infringers on the Internet.

Part II of this Comment is a survey of issues in copyright and other intellectual property ("IP") law, particularly in light of new technology.⁹ Part III is a detailed look at issues and cases that define current Internet law.¹⁰ Part IV is a summary of the entertainment industries and the status of their copyrights on the Internet.¹¹ Part V is an analysis of the obstacles that prevent the entertainment industries from rescuing their intellectual property from their fans.¹² Part VI is a brief look at some alternative ways to protect entertainment intellectual property on the Internet.¹³ Finally, Part VII concludes that the entertainment industries are more likely to benefit from the changes than to lose.¹⁴

II. COPYRIGHT LAW

Copyright protection in the United States derives from the first article of the Constitution, which authorizes laws "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹⁵ Congress enacted the first Copyright Act in 1790.¹⁶ In the intervening two hundred years, Congress has amended the Copyright Act several times, largely due to developments in technology.¹⁷

9. See *infra* notes 20-105 and accompanying text.

10. See *infra* notes 106-175 and accompanying text.

11. See *infra* notes 176-222 and accompanying text.

12. See *infra* notes 223-238 and accompanying text.

13. See *infra* notes 239-246 and accompanying text.

87. Litman, *supra* note 8, at 68.

15. U.S. CONST. art. I, § 8, cl. 8.

16. See Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831). This first Copyright Act protected only "any map, chart, book or books already printed." *Id.*

17. Congress gave copyright protection to designs, prints, etchings, and engravings in 1802, musical compositions in 1831, dramatic compositions in 1856, photographs and the "negatives thereof" in 1865, and statuary and "models or designs intended to be perfected as works of the fine arts" in 1870. See Act of Apr. 29, 1802, ch. 36, § 2, 2 Stat. 171, 171, *repealed by* Act of Feb. 3, 1831, ch. 16, §§ 1, 14, 4 Stat. 436, 436, 439, *amended by* Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 139, *amended by* Act of Mar. 3, 1865, ch. 126, §§ 1, 2, 13 Stat. 540, 540, *repealed by* Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (repealed 1909). In 1909, Congress tried to give more extensive protection, stating that "all the writings of an author" were now protected. Act of Mar. 4, 1909, ch. 320, § 4, 35 Stat. 1075, 1076 (previously codified at 17 U.S.C. § 4, *reprinted in* 17 U.S.C.A. App. § 4 (West Supp. 1990); recodified 1947; repealed 1976). However, Congress was again forced to amend the Copyright Act as a result of technological developments. In 1912, motion pictures were protected (Act of Aug. 24, 1912, ch. 356, § 5(l)-(m), 37 Stat. 488, 488 (previously codified at 17 U.S.C. § 5(l)-(m), *reprinted in* 17 U.S.C.A. App. § 5(l)-(m), recodified 1947, repealed 1976)), and sound recordings in 1972 (Act of Oct. 15, 1971, Pub. L. No. 92-140, § 1(b), 85 Stat. 391, 391 (previously codified at 17 U.S.C. § 5(n), *reprinted in* 17 U.S.C.A. App. § 5(n), (repealed

In 1976, Congress culminated decades of study and stopgap measures with the Copyright Act of 1976 ("1976 Act").¹⁸ The 1976 Act attempted to compensate for the massive surge in technological advances with intense study and careful language.¹⁹ For example, the 1976 Act extended copyright protection to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."²⁰ This broad definition allows protection for a remarkable variety of data, including pseudo-tangible materials such as electronic information on computers.²¹ However, this broad definition has also been at the heart of heated litigation as the courts struggle to draw the lines between the rights of the creator and the needs of the user.²² The task of trying to protect electronic-based works, particularly computer software, has deeply challenged experts.²³ "Defining the scope of software copyright has become one of the most intractable problems in the emerging field of computer law."²⁴

Today, a prima facie case for copyright infringement of computer software involves establishing ownership of a work and that the work was copied.²⁵ Ownership is most easily demonstrated by a Certificate of Registration.²⁶ Copying is often the most difficult prong to prove, because direct copying is so easy to disguise.²⁷

1976)).

18. See Pub. L. No. 94-553, 90 Stat. 2541, amended by Act of Dec. 12, 1980, Pub. L. No. 96-517, §§ 9-10, 94 Stat. 3015, 3028 (codified at 17 U.S.C. §§ 101-1010 (1988 & Supp. IV 1992)).

19. For example, in 1974, Congress created the National Commission for New Technological Uses of Copyrighted Works ("CONTU") to study ways to apply the copyright laws to "automatic systems capable of storing, processing, retrieving, and transferring information." Pub. L. No. 93-573, § 201(b)-(c), 88 Stat. 1873, 1873-74 (1974). For a thorough discussion of CONTU, see generally Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 HARV. L. REV. 977 (1993).

20. 17 U.S.C. § 102(a) (1996) (emphasis added).

21. See generally Miller, *supra* note 19, at 982-85.

22. See generally *id.*

23. See, e.g., Miller, *supra* note 19, at 980; John W. L. Ogilvie, *Defining Computer Program Parts Under Learned Hand's Abstractions Test in Software Copyright Infringement Cases*, 91 MICH. L. REV. 526, 526-27 (1992); Mary L. Mills, *New Technology and the Limitations of Copyright Law: An Argument for Finding Alternatives to Copyright Legislation in an Era of Rapid Technological Change*, 65 CHI.-KENT L. REV. 307, 309 (1989).

24. Richard A. Beutel, *Software Engineering Practices and the Idea/Expression Dichotomy: Can Structured Design Methodologies Define the Scope of Software Copyright?*, 32 JURIMETRICS J. 1, 1 (1991).

25. See *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1231 (3d Cir. 1986); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977); *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir. 1976).

26. 17 U.S.C. § 410(c) (1996).

27. *Whelan Assocs.*, 797 F.2d at 1231; see also *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970). Copying may be "proved inferentially by showing that the defendant had access to the allegedly infringed copyrighted work, and that the allegedly infringing work is substantially similar to the copyrighted work." *Whelan Assocs.*, 797 F.2d at 1231-32.

Computer programs²⁸ have tested the limits of traditional copyright language at every stage. Before 1980, the 1976 Act did not specifically mention computer programs.²⁹ Despite this fact, Congress did intend that software be protected.³⁰ The 1976 Act and its later amendments seek to establish this fact beyond doubt.³¹ One example of 1976 Act language used to cover software is the phrase "literary works," defined in section 101 as including "numbers, or other . . . numerical symbols or indicia."³² Courts such as that in *Apple Computer v. Franklin Computer* have taken this to mean that a computer program is a "literary work" and is protected from infringement of its object or source code.³³

Early software copyright cases such as *Apple Computer* struggled primarily with exactly what types of software should be protected.³⁴ Often, the question was whether the programs were subject to any copyright protection at all.³⁵ Today, no one disputes the copyrightability of literal manifestations of computer programs (i.e., the actual language or code used to make the program work).³⁶ A more pressing issue has been what degree of protection to afford non-literal manifestations of computer programs (i.e., the display or output of the computer program).

*Whelan Associates v. Jaslow Dental Laboratory*³⁷ dealt with this specific issue. Whelan developed a laboratory management program for Jaslow.³⁸

28. Computer programs and software are synonymous. See *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 706-07 (2d Cir. 1992). The Copyright Act defines a computer program as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." 17 U.S.C. § 101 (1988).

29. See *Lotus Dev. Corp. v. Paperback Software Int'l*, 740 F. Supp. 37, 49 (D. Mass. 1990).

30. *Id.* at 48. See also Robert D. Sprague, *Multimedia: The Convergence of New Technologies and Traditional Copyright Issues*, 71 DENV. U.L. REV. 635, 645 (1994) (discussing the evolution of copyright law in the face of new technologies).

31. See *Lotus Dev. Corp.*, 740 F. Supp. at 49.

32. 17 U.S.C. § 101 (1996).

33. 714 F.2d 1240, 1249 (3d Cir. 1983).

34. See generally *id.*; see also Sprague, *supra* note 30, at 646. Computer programs consist of source code—a human-readable programming language—that is implemented by a computer in the form of object code, a machine language. Ogilvie, *supra* note 23, at 531; *Lotus Dev. Corp.*, 740 F. Supp. at 44. Computer programs have also been categorized as either application programs or operating systems. See *Apple Computer*, 714 F.2d at 1249-52; see also Sprague, *supra* note 30, at 646 n.76 (summarizing the holding in *Apple Computer* that operating systems should not be given less copyright protection than applications).

35. See *Apple Computer*, 714 F.2d at 1253; see also *Apple Computer v. Formula Int'l*, 725 F.2d 521, 524-25 (9th Cir. 1984).

36. See *Lotus Dev. Corp.*, 740 F. Supp. at 45 (listing citations for the modern trend in copyright protection for software).

37. 797 F.2d 1222 (3d Cir. 1986).

38. *Id.* at 1225.

Whelan retained ownership of the computer program.³⁹ Jaslow later created its own version.⁴⁰ However, Jaslow used a different computer language, resulting in the two programs not being literally similar.⁴¹ Nonetheless, the *Whelan* court found that the two programs were substantially similar in overall structure and organization.⁴²

Literal similarities have never been an absolute requirement for infringement in any copyright action. "An infringement is not confined to literal and exact repetition or reproduction; it includes also the various modes in which the matter of any work may be adopted, imitated, transferred, or reproduced, with more or less colorable alterations to disguise the piracy."⁴³ Copyright protection "cannot be limited literally to the text, else a plagiarist would escape by immaterial variations."⁴⁴

Life has proven to be more complicated. Instead, an infringement analysis must ask whether similarities between two works constitute impermissible copying, or "unlawful appropriation."⁴⁵ The critical issue is often whether the defendant copied too much.⁴⁶ "[N]o one infringes, unless he descends so far into what is concrete [in a work] as to invade . . . [its] expression."⁴⁷

Judge Learned Hand developed a test for this type of analysis in *Nichols v. Universal Pictures Corp.*, now infamous as the "abstractions test":

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.⁴⁸

To establish infringement, plaintiffs must show two things: that two works are substantially similar; and that the similarities involve protected expression.⁴⁹ There "must be substantial similarity not only of the general ideas but of

39. *Id.*

40. *Id.*

41. *Id.* "Each programming language has a unique grammar and set of meanings. Two programs may perform the same functions despite differences in their source code. Conversely, two programs with nearly identical source code can perform very differently." Ogilvie, *supra* note 23, at 531.

42. *Whelan Assoc.*, 797 F.2d at 1248.

43. *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 360 (9th Cir. 1947).

44. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

45. *See Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1164-65 (9th Cir. 1977).

46. *Id.* at 1163; *see also Sprague*, *supra* note 30, at 647.

47. *Nat'l Comics Publ'ns, Inc. v. Fawcett Publ'ns*, 191 F.2d 594, 600 (2d Cir. 1951).

48. 45 F.2d 119, 121 (2d Cir. 1930).

49. *Sid & Marty Krofft Television Prods.*, 562 F.2d at 1164.

the expressions of those ideas as well."⁵⁰ In the past, courts have applied an "extrinsic/intrinsic" analysis to determine substantial similarity.⁵¹

The "extrinsic" test determines whether there is substantial similarity of ideas.⁵² The "intrinsic" test determines whether there is substantial similarity in expressions.⁵³ This second test has also been referred to as the "ordinary observer" test and has caused considerable headache for courts.⁵⁴ As Judge Hand noted: "Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc."⁵⁵

It is also difficult to apply the extrinsic/intrinsic test to determine whether the non-literal elements of computer programs are substantially similar. How does the average, ordinary observer know what a computer program looks like?⁵⁶ Instead, courts have begun to rely on experts to determine whether the dissected elements are substantially similar.⁵⁷

Another significant issue, and one of the biggest obstacles to the substantial similarity analysis, is how does one distinguish protectable expression from its underlying ideas?⁵⁸ Courts must distinguish abstract ideas from protectable expression.⁵⁹ The *Whelan* court's attempt to resolve this resulted in the holding that "the purpose or function of a utilitarian work would be the work's idea, and everything that is not necessary to that purpose or function would be part of

50. *Id.* at 1164.

51. *Id.* at 1164-66; *see also* Sprague, *supra* note 30, at 648.

52. *Sid & Marty Krofft Television Prods.*, 562 F.2d at 1164. The court explained that the test is extrinsic because it depends on specific, definable criteria, as opposed to a basic determination by the trier of fact. *Id.* The court noted that unlike the intrinsic prong of the test, technical analysis and expert testimony are permitted, and the court usually decides the issue as a matter of law. *Id.*

53. *Id.*

54. *See Whelan Assocs., Inc. v. Jaslow Dental Lab.*, 797 F.2d 1222, 1232 (3d Cir. 1986) (criticizing the ordinary observer test).

55. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

56. *Whelan Assocs.*, 797 F.2d at 1232-33. Note that the "ordinary observer" of the second step is usually the finder of fact and has just finished observing expert testimony about the first step. In an ideal world, the ordinary observer/fact-finder then forgets everything he or she saw to draw a conclusion for the second step. We do not live in a perfect world. This transition has often proven to be difficult for juries. *See id.*

57. *See, e.g., Gates Rubber Co., Inc. v. Bando Am.*, 798 F. Supp. 1499, 1513-1514 (D. Colo. 1992), *aff'd in part, vacated in part*, 9 F.3d 823 (10th Cir. 1993).

58. *See Sid & Marty Krofft Television Prods.*, 562 F.2d at 1163.

59. *See* 17 U.S.C. § 102(b) (1995) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."); *see also Baker v. Selden*, 101 U.S. 99 (1879) (holding that a copyrighted book on a bookkeeping system was not infringed by a similar book when the alleged infringer used a different arrangement of the system elements).

the expression of the idea.”⁶⁰ Later courts criticized this holding as too simplistic in the context of complex computer programming.⁶¹ Unfortunately, it seems practically impossible to come up with a bright-line test to differentiate ideas underlying a computer program and the protectable expression.⁶²

Another abstractions test issue is the “merger doctrine.” Basically, if there is only a single way to express an idea, the idea and its expression will be judged to have merged, and no protection will be granted to the expression; doing so would, in effect, grant copyright protection to—and a monopoly in—the underlying idea.⁶³

Hard on the heels of the merger doctrine in any abstractions analysis are concerns about efficiency.⁶⁴ It may be possible that there is only one “right” way, ultimately, to create a computer program for a specific purpose:

[W]hen one considers the fact that programmers generally strive to create programs “that meet the user’s needs in the most efficient manner,” the applicability of the merger doctrine to computer programs becomes compelling. In the context of computer program design, the concept of efficiency is akin to deriving the most concise logical proof or formulating the most succinct mathematical computation. Thus, the more efficient a set of modules are, the more closely they approximate the idea or process embodied in that particular aspect of the program’s structure.⁶⁵

Courts have constructed further restrictions on copyrightability based on originality concerns. One restriction on protection comes in the form of the *scenes a faire* doctrine. This principle allows courts to refuse to protect expression that is “standard, stock, or common” to a specific topic, or that logically follows in a particular setting (e.g., hardware specifications).⁶⁶ Where an expression is automatic in the treatment of a certain idea, the expression falls short of the requisite level of originality.⁶⁷ Additionally, facts are not afforded

60. *Whelan Assocs.*, 797 F.2d at 1236. Because the idea of dental laboratory management could be accomplished in a variety of ways, the Dentalab program was part of the program’s expression, not its idea. *Id.* at 1236 n.28.

61. *See, e.g.*, *Computer Assoc. Int’l v. Altai, Inc.*, 982 F.2d 693, 705-06 (2d Cir. 1992).

62. *Sprague*, *supra* note 30, at 650. *See, e.g.*, *Gates Rubber Co.*, 9 F.3d at 834-35 (“Application of the abstractions test will necessarily vary from case-to-case and program-to-program. Given the complexity and ever-changing nature of computer technology, we decline to set forth any strict methodology for the abstraction of computer programs.”); *see also* *Lotus Dev. Corp. v. Paperback Software Int’l*, 740 F. Supp. 37, 60 (D. Mass. 1990) (noting that in determining “copyrightability,” one is forced to choose from options along a continuum of specificity for a standard distinguishing an idea from its expression).

63. *Sprague*, *supra* note 30, at 651. *See, e.g.*, *Gates Rubber Co.*, 9 F.3d at 838; *see also* *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971).

64. *Computer Assoc. Int’l*, 982 F.2d 693, 708 (2d Cir. 1992)

65. *Id.* (citation omitted).

66. *Gates Rubber Co.*, 9 F.3d at 838.

67. *Id.*

copyright protection. Facts exist independently of the discoverer; he cannot be their author.⁶⁸ Another restriction concerns expressions that are in the public domain, perhaps due to time, careless error, or deliberate abandonment, and are therefore not protected.⁶⁹

Other tests have attempted to improve on the Whelan Associates court's approach for determining infringement for non-literal elements. In *Lotus Development Corp. v. Paperback Software International*, Judge Keeton discussed a three-part test.⁷⁰ First, he suggested, identify the underlying idea of the work.⁷¹ Second, evaluate the individual elements of expression that comprise the work to determine whether each expression is within the functional requirements of the work or whether it is in the public domain, as opposed to being an original expression.⁷² Third, to determine the work's copyrightability, the trier of fact must determine whether any of the elements deemed to be original expression constitute a substantial part of the work.⁷³

Currently, the trend is toward the use of the "abstraction-filtration-comparison" test.⁷⁴ In step one of this test, the court applies a traditional abstractions test.⁷⁵ In step two, expressive elements that do not qualify for protection are filtered out in order to separate protectable expression from non-protectable material.⁷⁶ In the third step, the court's "substantial similarity inquiry focuses on whether the defendant copied any aspect of this protected expression, as well as an assessment of the copied portion's relative importance with respect to the plaintiff's overall program."⁷⁷

The Tenth Circuit adopted this test in *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*⁷⁸ In *Lotus Development Corp. v. Borland International, Inc.*, Judge Keeton ruled that his three-part test was fundamentally compatible with the abstraction-filtration-comparison test.⁷⁹ The Ninth Circuit and the District Court for the Northern District of California have also adopted the

68. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991); see also *Gates Rubber Co.*, 9 F.3d at 837.

69. *Gates Rubber Co.*, 9 F.3d at 837-38; see also *Computer Assoc. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 710 (2d Cir. 1992).

70. 740 F. Supp 37, 60-61 (D. Mass. 1990).

71. *Id.* at 60.

72. *Id.* at 61.

73. *Id.*

74. This test first appeared in *Computer Assoc. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 706 (2d Cir. 1992).

75. *Id.* at 706-07.

76. *Id.* at 707.

77. *Id.* at 710.

78. 9 F.3d 823, 834 (10th Cir. 1993) (stating that the difficult task of determining what parts of a program are protectable can be accomplished by the use of the "Abstraction-Filtration-Comparison" test).

79. 799 F. Supp. 203, 211-12 (D. Mass. 1992).

test.⁸⁰ This trend suggests that courts may be moving toward a consensus on software copyright analysis.

This consensus could be jeopardized if some courts choose to take the test to its logical extreme by finding that if there are no protectable elements of expression, then there is nothing to protect in the software as a whole. In other words, how can the sum of nothings be something? The *Whelan Associates* court considered this issue and resorted to simply looking to the Copyright Act and a few earlier decisions to support its holding that the structure and organization of a computer program can be protected.⁸¹ Furthermore, the Supreme Court has expressly stated that a work containing no individual protectable expressions can still be copyrightable. For example, in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, the Supreme Court's conclusion was that even merely choosing how to arrange facts, if adequately creative, could constitute enough originality to be protected.⁸²

A plaintiff in a software copyright infringement must show that the defendant "copied protectable elements of the plaintiff's program and that those protectable elements comprise a substantial part of the plaintiff's program when it is considered as a whole."⁸³ However, what non-literal elements of an allegedly infringed computer program can be protected, and do those elements comprise a substantial part of the program? Judge Keeton, for example, gave little

80. See *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1525 (9th Cir. 1993); see also *Atari Games v. Nintendo of Am.*, No. C 88-4805 FMS, C 89-0027 FMS, 1993 WL 207548, at *1-3 (N.D. Cal. May 18, 1993); *Apple Computer v. Microsoft*, 821 F. Supp. 616, 623 (N.D. Cal. 1993).

81. See *Whelan Assocs. v. Jaslow Dental Lab.*, 797 F.2d 1222, 1239 (3d Cir. 1986). The court stated: The Copyright Act of 1976 provides . . . support . . . that Congress intended that the structure and organization of a literary work could be part of its expression protectable by copyright. Title 17 U.S.C. § 103 (1982) specifically extends copyright protection to compilations and derivative works. Title 17 U.S.C. § 101, defines "compilation" as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship," and it defines "derivative work," as one "based upon one or more preexisting works, such as . . . abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted." Although the Code does not use the terms "sequence," "order" or "structure," it is clear from the definition of compilations and derivative works, and the protection afforded them, that Congress was aware of the fact that the sequencing and ordering of materials could be copyrighted, i.e., that the sequence and order could be parts of the expression, not the idea, of a work.

Id.

The *Whelan* court also based its decision on early cases which held that a copyright infringement can exist in the absence of literal similarities. *Id.* at 1234; see also *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1329 (9th Cir. 1983) (finding that thirteen plot similarities between *Battlestar Galactica* and *Star Wars* could be basis for a holding of copyright violation); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977) (similarities between McDonaldland characters and H.R. Pufnstuf characters could be shown by "total concept and feel" of the two works).

82. 499 U.S. 340, 344, 348-49 (1991).

83. See *Gates Rubber Co. v. Bando Chem. Indus.*, 9 F.3d 823, 833 (10th Cir. 1993) (citing *Autoskill v. National Educ. Support Sys.*, 994 F.2d 1476, 1496-98 (10th Cir. 1993)).

guidance for these questions in *Lotus Development Corp.*⁸⁴ Judge Keeton examined the non-literal elements of the Lotus 1-2-3 spreadsheet program.⁸⁵ He did find that the structure, sequence, and organization of the program's menu command system constituted a substantial part of the alleged copyrighted work.⁸⁶ But then Judge Keeton merely concluded that "copyrightability of the user interface of Lotus 1-2-3 is established."⁸⁷

In *Gates Rubber Co. v. Bando American, Inc.*, the plaintiff had presented evidence to the district court below that the defendants had copied the plaintiff's copyrighted computer program.⁸⁸ The Tenth Circuit, however, returned the case to the district court on the issue of copyright infringement.⁸⁹ The circuit court instructed the lower court to use the abstraction-filtration-comparison test to determine whether the defendants' copying was actionable infringement.⁹⁰

It must be emphasized that the balance between protection of original work and "dissemination of information has . . . tilted toward dissemination."⁹¹ For example, one common judicial theme has been that producing work does not mean a person should be rewarded with copyright protection simply because of his or her effort.⁹²

Computer programmers are therefore free to use the ideas contained in other programs as long as they do not copy protected expression, a process called "reverse engineering."⁹³ Reverse engineering has been considered by a number of courts.⁹⁴ The legal controversy surrounding this practice stems from the fact that this reverse engineering process requires the making of intermediate, direct copies of the other work.⁹⁵ Both the Federal and Ninth Circuits have

84. 740 F. Supp. 37 (D. Mass. 1990).

85. *See id.* at 51-52.

86. *Id.* at 42.

87. Litman, *supra* note 8, at 68.

88. 798 F. Supp. 1499, 1515, 1519-20 (D. Colo. 1992).

89. *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 849 (10th Cir. 1993).

90. *Id.* at 834, 849.

91. Robert D. Sprague, *Multimedia: The Convergence of New Technologies and Traditional Copyright Issues*, 71 DENV. U. L. REV. 635, 657 (1994).

92. Courts developed a theory known as the "sweat of the brow" doctrine with "the underlying notion . . . that copyright was a reward for the hard work that went into compiling facts." *Feist Publ'ns v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 352 (1991). In *Feist*, the Supreme Court rejected the "sweat of the brow" doctrine: "The 1976 revisions to the Copyright Act leave no doubt that originality, not 'sweat of the brow,' is the touchstone of copyright protection in directories and other fact-based works." *Id.* at 359-60.

93. *See* Karen E. Georgenson, *Reverse Engineering of Copyrighted Software: Fair Use or Misuse?*, 5 ALB. L.J. SCI. & TECH. 291, 292 (1996).

94. *See, e.g.*, *NEC v. Intel*, 645 F. Supp. 590 (N.D. Cal. 1989); *Computer Assocs. Int'l v. Altai, Inc.*, 775 F. Supp. 544 (E.D.N.Y. 1991).

95. *See Sega Enters. v. Accolade*, 977 F.2d 1510, 1518 (9th Cir. 1993).

held that making such intermediate copies is “fair use.”⁹⁶ Noting that the legislative history of the fair use provisions of the Copyright Act “suggests that courts should adapt the fair use exception to accommodate new technological innovations,”⁹⁷ the Federal Circuit in *Atari Games Corp. v. Nintendo of America, Inc.* held that “when the nature of a work requires intermediate copying to understand the ideas and processes in a copyrighted work, that nature supports a fair use for intermediate copying.”⁹⁸ Likewise, the Ninth Circuit held in *Sega Enterprises, Ltd. v. Accolade* that “where disassembly is the only way to gain access to the ideas and functional elements embodied in a copyrighted computer program and where there is a legitimate reason for seeking such access, disassembly is a fair use of the copyrighted work, as a matter of law.”⁹⁹ The *Sega* court further stated:

Disassembly of object code necessarily entails copying. . . . If disassembly of copyrighted object code is *per se* an unfair use, the owner of the copyright gains a de facto monopoly over the functional aspects of his work—aspects that were expressly denied copyright protection by Congress. . . . In order to enjoy a lawful monopoly over the idea or functional principle underlying a work, the creator of the work must satisfy the more stringent standards imposed by the patent laws.¹⁰⁰

To conclude this legal overview and put this discussion in context, one should note that these are some of the more significant copyright issues related to software and data, and the controversies caused in those areas by new technology and uses are similar struggles faced by intellectual property owners present on the Internet. However, as will be noted below, the difficulties faced by courts in intellectual property cases are magnified exponentially when dealing with the entertainment industries.¹⁰¹ These industries are dependent on media expressing imagination and ideas, and that media is inevitably discussed constantly on the Internet, where infringement can occur instantly, cheaply, and repeatedly thousands of times a day. The plodding “case-by-case” analysis strategies of the courts, as well as the absence of bright-line standards for protecting data, do little to discourage casual and routine infringement by millions of fans. As the first case law on these issues makes its way into the books, the entertainment companies seem on a crash-course with their own fans.

96. See *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 842-43 (Fed. Cir. 1992). The *Atari* court stated: “Section 107 of the Copyright Act states that ‘fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship or research’ is not an infringement.” *Id.* (quoting 17 U.S.C. § 107 (1988)).

97. *Id.* at 842-43 (referring to H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5679-80).

98. *Id.* at 843.

99. 977 F.2d at 1527-28.

100. *Id.* at 1526 (citation omitted).

101. See *infra* Parts IIIff.

III. INTERNET LAW: ISSUES AND CASES

The Internet is the Pandora's Box of copyright infringement. Once copyrighted material is uploaded, not only does the Internet allow free, fast, perfect copying and unlimited distribution, but the copying can be virtually anonymous: anyone, anywhere in the world could be responsible for the appearance of infringing material on the Internet.¹⁰² The cases below reflect the judicial system's ultimate purpose: to adapt copyright law to new media in a way that protects authors without unduly restricting people's enjoyment of the Internet.¹⁰³

A. Liability

One significant issue, typically the first one to be considered, is who should be held liable? Internet service providers ("ISPs"), who furnish the connections users dial into to get to the Internet, are often the operators of the user's homepages, chat rooms, bulletin boards,¹⁰⁴ and other areas where copyright infringement may take place.¹⁰⁵ Copyright holders such often argue that web site operators and access providers should be held liable for their users' actions (particularly when—as is usually the case—the users are difficult to locate or "judgment-proof").¹⁰⁶ But web site operators and access providers argue that the measures needed to regulate their users would significantly damage the Internet. Courts, as well as Congress with the passing of The Digital Millennium Copyright Act, have tried to balance the opposing interests.¹⁰⁷

1. Cases

In *Sega Enterprises, Ltd. v. MAPHIA*,¹⁰⁸ the court made a finding of fact that the defendant was likely infringing when the defendant was aware its electronic bulletin board was being used for distribution of unlawful copies of the

102. See Schlachter, *supra* note 6, at 20.

103. See John F. Delaney et al., *The Law of the Internet: A Summary of U.S. Internet Caselaw and Legal Developments*, 545 PLI/PAT 61, 76 (Jan. 1991).

104. As used by this author, the term bulletin board refers to a computer service similar to the Internet in that users remotely access a unique server to leave messages and files for others to view and use. See, e.g., Delaney, *supra* note 103, at 77.

105. *Id.*

106. *Id.*

107. *Id.*

108. 857 F. Supp. 679 (N.D. Cal. 1994).

plaintiff's video games.¹⁰⁹ The court also held that specific knowledge of incidents of infringement were not necessary to show contributory infringement if, as was the case, the defendant actively facilitated and encouraged the copying (here, by designing the machine that did the copying).¹¹⁰ Finally, the court rejected the defendant's fair use defense, finding that the four fair use factors—purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used; and the effect of the use upon the market for the copyrighted work—all weighed against MAPHIA.¹¹¹ The court was particularly persuaded by the fourth factor, noting there could be a significant adverse effect on the market for Sega's copyrighted video games.¹¹²

In *Playboy Enterprises, Inc. v. Frena*,¹¹³ the court held that the defendant, Frena, directly infringed the plaintiff's works when the customers of the bulletin board uploaded and downloaded the materials, even though Frena's only involvement with the copyrighted material was that he allowed the photographs to be stored on his bulletin board.¹¹⁴ The court found that Frena's display of Playboy's photographs violated the exclusive right of a copyright owner to publicly display the owner's work.¹¹⁵ The court rejected Frena's fair use argument, saying, "There is irrefutable evidence of direct copyright infringement in this case."¹¹⁶ The court held that even if Frena had no intent to infringe Playboy's copyrights, "[i]ntent or knowledge is not an element of infringement."¹¹⁷

2. The Digital Millennium Copyright Act

The Digital Millennium Copyright Act ("DMCA" or "Act") describes the liability of Internet service providers ("ISPs") for infringement by users of their services.¹¹⁸ The new Act protects ISPs that unknowingly transmit or store copyrighted material, but also requires ISPs to perform certain prerequisites in order to qualify for that protection.¹¹⁹ According to the DMCA, ISPs do not commit copyright infringement when they "transmit, route or provide 'interme-

109. *Id.* at 687.

110. *Id.* at 686-87.

111. *Id.* at 687.

112. *Id.*

113. 839 F. Supp. 1552 (M.D. Fla. 1993).

114. *Id.* at 1557.

115. *Id.*

116. *Id.* at 1559.

117. See also *Marobie-FL, Inc. v. Nat'l Assn. of Fire Equip. Distrib.*, 983 F. Supp. 1167 (N.D. Ill. 1997) (finding a host server was not liable for direct infringement when it only provided the means for the other party to transmit the infringing work, but may still be liable for contributory infringement); *Playboy Enters., Inc. v. Webworld, Inc.*, 968 F. Supp. 1171 (N.D. Tex. 1997) (holding that a pay-service for showing images was not protected as merely being funnel to Internet because the purpose of the business was to show images, not provide Internet access).

118. See Delaney, *supra* note 103, at 94.

119. *Id.*

diate and transient storage' for information provided by their customers or other persons."¹²⁰ For example, an ISP might "transmit, route or provide . . . storage" by caching infringing materials on their servers, hyperlinking to infringing materials on other servers, or storing users' infringing materials at users request by hosting a website.¹²¹

When an ISP receives proper notice from an copyright owner that a work is being infringed on the ISP's service, the ISP must remove or block access to the material.¹²² The Act exempts the ISP from liability for taking down or blocking access to such material in response to the required notice and provides that failure to take down or block access pursuant to notice will result in loss of the ISP's statutory exemptions from liability.¹²³

In practice, targeting ISPs has been a major tactic of IP owners,¹²⁴ particularly the traditional entertainment companies, which have been more aggressive in their enforcement efforts. However, the sheer practical logistics of this tactic cast its actual effectiveness into doubt. An IP owner must identify possible infringement and notify the ISP in each case and yet, it seems, has no assurance that the infringing fan will not simply move to a new ISP.

B. Criminal Prosecution

In *United States v. LaMacchia*, the court held that the defendant, a bulletin board operator who distributed illegally copied, popular software for free, was not punishable under current law because his actions were not for profit, and ruling otherwise would criminalize even the creation of a single copy of a computer program by a home computer user.¹²⁵ However, Congress recently enacted the No Electronic Theft Act, a law that criminalizes a variety of willfully infringing acts without requiring proof of financial gain, thus overruling the *LaMacchia* decision.¹²⁶ The new law applies to "individuals who reproduce or distribute, by electronic or other means, 10 or more copies of a copyrighted work during any 180 day period."¹²⁷ The act requires that the retail value of the infringing copies be at least five thousand dollars.¹²⁸

120. *Id.*

121. *Id.*

122. *Id.* at 97.

123. *Id.*

124. *See, e.g., Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995); *Zeran v. Am. Online, Inc.* 129 F.3d 327 (4th Cir. 1997).

125. 871 F. Supp. 535, 544 (D. Mass. 1994).

126. Delaney, *supra* note 103, at 106.

127. *Id.*

128. *Id.* at 106-07.

C. Jurisdiction

In a traditional jurisdictional analysis, the first question is whether the defendant's contacts with the forum state satisfy the requirements of that state's "long-arm statute."¹²⁹ The next question is whether the statute's exercise of jurisdiction over the defendant satisfies traditional notions of "fair play and substantial justice."¹³⁰ In answering this question, a court must ask whether the defendant has contacts with the state such that the defendant could reasonably anticipate being haled into a court in that state.¹³¹

Unfortunately, the Internet has wreaked some havoc with traditional jurisdiction. Courts have had to consider the extent to which Internet-only contacts should count in establishing jurisdiction over a defendant in a particular forum.¹³² The Internet effortlessly spans state and even national boundaries; the operation of a web site could arguably subject that web site operator to limitless jurisdiction, according to a traditional analysis.¹³³

Courts have generally followed three categories of electronic minimum contacts.¹³⁴ The first type is "clear, regular business over the Internet with the forum state"; courts have generally found proper exercise of jurisdiction in these situations.¹³⁵ The second type of contact is when "a user in the forum state exchanges information with the defendant through the defendant's website."¹³⁶ In those cases, courts assess the level and commercial nature of the contacts in order to find jurisdiction.¹³⁷ The third type of contact concerns "the posting of information or advertisements on a universally accessible web site," and courts have generally declined to find personal jurisdiction in these cases.¹³⁸

1. Cases establishing jurisdiction

In *CompuServe Inc. v. Patterson*, the appellate court found a defendant had sufficient contacts with the forum state when a CompuServe subscriber had consented to the basic CompuServe service agreement, which states that

129. Long-arm statutes are enacted by each of the states to give guidelines for the exercise of personal jurisdiction over nonresidents of the state. See, e.g., JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 3.12 (1985).

130. See *id.*

131. *Id.* at 3.10.

132. See, e.g., John A. Lowther IV, *Personal Jurisdiction and the Internet Quagmire: Amputating Judicially Created Long-Arms*, 35 SAN DIEGO L. REV. 619, 619 (1998).

133. *Id.*

134. Delaney, *supra* note 103, at 184.

135. See, e.g., Part III.C.1 *infra*.

136. Delaney, *supra* note 103, at 184.

137. *Id.*

138. *Id.* Finding otherwise would mean that there very well could be worldwide personal jurisdiction over anyone with a web site, a rather jarring concept. See Lowther, *supra* note 132, at 619.

the agreement would be governed and construed in accordance with Ohio law.¹³⁹ In addition, Patterson had entered into a shareware registration agreement with CompuServe that was, by its terms, entered into in Columbus, Ohio.¹⁴⁰ Finally, Patterson sold copies of his software to Ohio residents.¹⁴¹ The court concluded that Patterson knowingly tried "and, in fact, purposefully contracted-to market a product in other states," with Ohio-based CompuServe operating as his distribution center.¹⁴² The court made clear that, because of his marketing and sale of software, Patterson was "far more" than a purchaser of on-line services.¹⁴³ The court also found that Patterson originated and maintained contacts with Ohio when, believing that CompuServe was the company infringing his software, he sent electronic and regular mail to CompuServe in Ohio, and posted messages to one of its electronic forums.¹⁴⁴ However, recognizing the potential implications of its decision, the Sixth Circuit specifically did not hold that Patterson would be subject to jurisdiction in every state in which his software was purchased.¹⁴⁵ Nor did it hold that a third party could sue Patterson in Ohio for claims solely arising out of the software's use.¹⁴⁶ Lastly, the court did not address whether any regular subscriber could be sued for nonpayment in Ohio, as had been suggested by the district court.¹⁴⁷

In *Inset Systems v. Instruction Set Inc.*, the court found that advertising on the Internet was sufficient to confer personal jurisdiction over a nonresident defendant.¹⁴⁸ In support of its finding, the court noted that, at the time, there were at least ten thousand Internet users in the state of Connecticut toward whom the defendant directed its advertising activities on a regular basis.¹⁴⁹ In addition, the court noted that Connecticut had an interest in adjudicating the dispute, which concerned issues of state statutory and common law.¹⁵⁰

Similarly, in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, the court concluded that by knowingly conducting two-way electronic commerce with at least 3,000 Pennsylvania residents, Dot Com had "purposeful[ly] avail[ed itself] of doing business in Pennsylvania."¹⁵¹ Accordingly, the court could exer-

139. See 89 F.3d 1257, 1260 (6th Cir. 1996).

140. *Id.* at 1260-61.

141. *Id.* at 1265.

142. *Id.* at 1263.

143. *Id.* at 1264.

144. *Id.* at 1266.

145. *Id.* at 1268.

146. *Id.*

147. *Id.*

148. 937 F. Supp. 161, 165-66 (D. Conn. 1996).

149. *Id.* at 165.

150. *Id.*

151. 952 F. Supp. 1119, 1126 (W.D. Pa. 1997).

cise personal jurisdiction over the defendant.¹⁵² The court was careful to note that Dot Com "repeatedly and consciously" accepted Pennsylvania residents' applications, knowing that these contracts would result in the transmission of electronic messages into Pennsylvania.¹⁵³

In *Digital Equipment Corp. v. Altavista Technology, Inc.*, personal jurisdiction was established when a defendant did business in Massachusetts via its web site and committed a tort that it knew would be felt Massachusetts, even though the defendant had attempted to avoid contact with the forum state.¹⁵⁴ The court noted that companies that choose to do business on the Internet because of the relatively low start-up costs may have to factor in the costs of being sued in many different jurisdictions.¹⁵⁵

2. Cases not finding jurisdiction

In *Transcraft Corp. v. Doonan Trailer Corp.*, a Kansas defendant provided its dealer and sales information, including phone numbers, addresses, and electronic mail addresses, but it did not specifically invite Illinois residents to transact business with the defendant.¹⁵⁶ The court found the information to be similar to a national advertisement, which generally would not subject a defendant to jurisdiction in Illinois.¹⁵⁷ The court reasoned that advertisements on the Internet could subject a defendant to personal jurisdiction only if there was evidence that the defendant intended its advertisement reach the forum state.¹⁵⁸

In *Expert Pages v. Buckalew*, the court found that the defendant had directed his activities toward the forum state, but finding personal jurisdiction would be constitutionally unreasonable because of the difficulty of the forum for the defendant.¹⁵⁹ The court noted that the plaintiff had much greater resources at his disposal and could much more easily go to the defendant.¹⁶⁰

152. *Id.* at 1127.

153. *Id.* at 1126.

154. 960 F. Supp. 456, 472 (D. Mass. 1997).

155. *Id.* at 471.

156. No. 97 C. 4943, 1997 U.S. Dist. LEXIS 18687, at *26 (N.D. Ill. Nov. 12, 1997).

157. *Id.*

158. *Id.* See also *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997) (holding that without specific evidence that the defendant conducted or directed activities with or toward the forum state, no personal jurisdiction exists).

159. No. C-97-2109-VRW, 1997 U.S. Dist. LEXIS 12205, at *11 (N.D. Cal. Aug. 6, 1997).

160. *Id.*

D. Other Issues in Internet Law

1. Shareware¹⁶¹

In *Storm Impact, Inc. v. Software of the Month Club*,¹⁶² the defendant distributed shareware already freely available on the Internet to its customers for a membership fee.¹⁶³ The court held that the distribution was copyright infringement because the distribution violated the authors' written restrictions accompanying the shareware, and the potential market for the product was hurt because fees were charged and improper technical support was provided by the defendant.¹⁶⁴ The court found that the plaintiffs' free distribution of the software on the Internet was not consent for continued distribution because of the restrictions accompanying the product.¹⁶⁵

2. "Framing" and "linking"

A major feature of the Internet is the ability to follow links from site to site.¹⁶⁶ However, parties are beginning to attack unauthorized links to their sites.¹⁶⁷ "Framing" technology goes a little further into the realm of questionable tactics.¹⁶⁸ Framing occurs when a webpage allows visitors to view content from another website without actually leaving the original webpage; in effect, the "framed" website appears—whether obviously or subtly—to be part of the original webpage.¹⁶⁹

In *Futuredontics, Inc. v. Applied Anagramics, Inc.*, the Ninth Circuit Court of Appeals affirmed the district court's denial of a preliminary injunction restraining Applied Anagramics' use of a framed link to Futuredontics's Internet

161. As used in this Comment, the term "shareware" indicates software offered for little or no cost to users as incentive for the users to purchase the developer's software. Sharon Williamson, *Recent Developments in Copyright Law*, 6 TEX. INTELL. PROP. L.J. 199, 209-10 (1998). Shareware software is usually limited in some way, such as by a time limit on use or by missing features that can only be found in the full version of the software program. *Id.*

162. 95 C 2154, 1998 U.S. Dist. LEXIS 11789 (N.D.Ill. E. Div., July 29, 1998).

163. *Id.*

164. See generally 95 C 2154, 1998 U.S. Dist. LEXIS 11789 (N.D.Ill. E. Div., July 29, 1998).

165. *Id.*

166. See Nicos L. Tsilas, *Minimizing Potential Liability Associated with Linking and Framing on the World Wide Web*, 8 COMMLAW CONSPECTUS 85, 85 (2000).

167. See *id.* at 85-86.

168. *Id.*

169. *Id.*

web site.¹⁷⁰ The Ninth Circuit held that Futuredontics had failed to demonstrate either the possibility of irreparable injury or that the balance of hardships tipped sharply in its favor.¹⁷¹ Specifically, the court noted that even if the framed link did imply that Anagramics—rather than Futuredontics—was responsible for the success of Futuredontics dental referral service, it was not tied to any tangible loss of business or customer goodwill.¹⁷²

3. Metatags and similar trademark infringement

Trademarks sometimes arise as an issue in Internet infringement cases when, without permission, someone places another company's trade name or trademark in the underlying source code of its web site.¹⁷³ Although the information is not visible to the Internet user, such information is read by search engines that then direct Internet searchers to that site.¹⁷⁴

In one dispute,¹⁷⁵ a law firm, Oppedahl & Larson, sued parties who had placed references to "Oppedahl" and "Larson" in the underlying source documents of their respective web sites.¹⁷⁶ In its complaint, the law firm alleged that the defendants used the terms "Oppedahl" and "Larson" in their respective underlying source documents to deceive the public into believing there is a connection between the plaintiff and the defendants.¹⁷⁷

Similarly, in another action, a federal judge ordered a web site operator to remove encoded phrases about *Playboy* magazine from the operator's source documents on two adult-oriented web pages that had not been authorized to use the Playboy name.¹⁷⁸ Playboy Enterprises, Inc. initiated the action after discovering that these two unauthorized sites appeared when a user ran a search using the terms "Playboy" and "Playmate."¹⁷⁹

4. Electronic contracts: "click-wraps"

More and more, website visitors are being confronted with "click-wrap" agreements: non-negotiable, electronic agreements that are accepted by clicking—appropriately enough—an "I ACCEPT" button.¹⁸⁰ The enforceability of these agreements is unclear, but commentators have analogized them to cases

170. No. 97-56711, 1998 U.S. App. LEXIS 17012, at *3 (9th Cir. July 23, 1998).

171. *Id.*

172. *Id.*

173. Delaney, *supra* note 103, at 121.

174. *Id.*

175. Oppedahl & Larson v. Advanced Concepts, No. 97-Z-1592 (D. Colo. July 24, 1997), available at <http://www.patents.com/ac/>.

176. *Id.*

177. *Id.*

178. Playboy Enters., Inc. v. Calvin Designer Label, 985 F. Supp. 1218, 1218 (order granting preliminary injunction).

179. *Id.*

180. Delaney, *supra* note 103, at 199.

involving "shrink-wrapping."¹⁸¹

In *ProCD, Inc. v. Zeidenberg*, the court found "shrink-wrap" licensing enforceable, if otherwise contractually valid.¹⁸² The court found that the software industry has a common practice of bundling license agreements with the plastic wrapping of a software box.¹⁸³ The licenses are effective as soon as the customer tears the wrapping from the box.¹⁸⁴ Similarly, in *Hill v. Gateway 2000, Inc.*, the computer manufacturer defendant bundled the terms of sale—including an arbitration clause—with a computer purchased by the plaintiffs, with the stipulation that if the buyer did not return the computer within a month, the buyer had accepted the terms.¹⁸⁵ The appellate court found this gave sufficient notice to the plaintiffs and enforced the terms of sale.¹⁸⁶

One click-wrap case that is available is *Hotmail Corp. v. Van\$ Money Pie, Inc.*¹⁸⁷ Several subscribers to Hotmail's e-mail account service failed to conform to Hotmail's "Terms of Service" click-wrap agreement, part of which prohibited use of the address for "spamming."¹⁸⁸ The court granted Hotmail's motion for a preliminary injunction, holding that Hotmail had demonstrated a likelihood of succeeding on all of its claims based on the defendants' breaching of the Terms of Service click-wrap agreement.¹⁸⁹

In surveying the current law, it is important to note that current law changes on a monthly basis as courts consider dozens of issues for first time.¹⁹⁰ The fact that courts or Congress could grant or deny protections at any moment makes protecting intellectual property on the Internet extremely difficult.¹⁹¹ As can be seen in Part IV *infra*, the entertainment industries have been dropped squarely into the thick of the morass.

181. See, e.g., *id.*

182. 86 F.3d 1447, 1448 (7th Cir. 1996). Shrink-wrap licensing derives its name from the fact that software is often sold wrapped in clear plastic, and the license agreement becomes active upon the tearing of that plastic wrapping. *Id.*

183. *Id.*

184. *Id.*

185. 105 F.3d 1147, 1148 (7th Cir. 1997).

186. *Id.* at 1148, 1150.

187. No. C98-20064, 1998 U.S. Dist. LEXIS 10729 (N.D. Cal. April 16, 1998) (order granting preliminary injunction).

188. *Id.* at 4-5. "'Spam' is unsolicited commercial bulk e-mail akin to 'junk mail' sent through the postal mail." *Id.* at 3.

189. *Id.* at 21-22.

190. See Delaney, *supra* note 103, at 76.

191. See *id.*

IV. THE ENTERTAINMENT INDUSTRIES AND THE INTERNET

A. *Traditional entertainment*

1. Generally

In 1896, Thomas Edison, inventor of the kinetograph and phonograph, showed the first movie to an audience in New York.¹⁹² By 1920, "talkies" had had a huge impact on the viewing public, and in the 1940s, the Hollywood studios were the ruling force in the movie industry.¹⁹³ There were five large studios—Warner Brothers (now part of Time Warner); Metro-Goldwyn-Mayer; Paramount (now owned by Viacom); Twentieth Century Fox; and RKO (which no longer makes movies).¹⁹⁴ Three smaller studios were Universal Studios (now part of Seagram); Columbia pictures (now owned by Sony); and United Artist Pictures (now a component of MGM).¹⁹⁵

In 1946, movie ticket purchases peaked at 4.7 billion, then decreased because of television.¹⁹⁶ Only in the 1970s would the rise of special effects blockbusters like *Star Wars* bring the movies back.¹⁹⁷ Perhaps enlightened by their lean years, the traditional entertainment companies have branched out in the years since and now control cable networks, record companies, film companies, and publishing businesses.¹⁹⁸

Despite their wariness, the movie businesses is far from suffering a return to those bleak years. The market has expanded to the point that traditional movie powerhouse like Walt Disney, Paramount, Warner Brothers, 20th Century Fox, and Sony have been joined by such newcomers as DreamWorks and Pixar, whose computer-animated movies (such as *Toy Story*, the highest-grossing movie of 1995) have revolutionized the industry.¹⁹⁹

The average cost of creating a movie in the United States is 50 million dollars.²⁰⁰ Some of the more special-effects-prone movies cruise well past the 100 million dollars mark.²⁰¹ That money is remade in a number of ways. First, about 7 billion dollars comes from movie theater tickets, and this number does

192. Jason Cother, *Movies & Music Industry*, at <http://www.hoovers.com/industry/snapshot/0,2204,30,00.html> (last visited Nov. 8, 1999).

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

not show any sign of shrinking: admissions increased seven percent in 1998.²⁰² However, this is not where the real money is.²⁰³ The distribution of movies to cable and satellite brings in about 32 billion dollars, while home videos add another 18 billion dollars.²⁰⁴

Music is also a traditional entertainment force significantly impacted by the Internet, perhaps even more so than movies, at least today.²⁰⁵ Recorded music brought in 12 billion dollars in 1998, and that number is expected to continue to increase. For example, rap and soundtrack albums both increased in sales more than 30 percent between 1997 and 1998.²⁰⁶

The international market is also a large moneymaker for the traditional entertainment industry. Movie companies made almost 7 billion dollars overseas in 1998.²⁰⁷ American music also dominates the world market.²⁰⁸

2. Protecting intellectual property on the Internet

Virtually all of the major studios have web sites, and copyrighted material can inevitably be found there.²⁰⁹ Music companies have web sites as well; in addition, because of the direct retail nature of their product, many Internet retailers advertise and distribute music IP.²¹⁰

The traditional entertainment companies tend to be extremely restrictive in their attitude toward unauthorized use of their copyrighted material and trademarks. Some of their tactics—both in and out of the adjudicative process—are described below.

202. *Id.*

203. *Id.*

204. *Id.*

205. Note the recent Napster crisis, as many commentators have. *See, e.g.,* Ariel Berschadsky, *RIAA v. Napster: A Window onto the Future of Copyright Law in the Internet Age*, 18 J. MARSHALL J. COMPUTER & INFO. L. 755, 758-59 (2000). Music has the disadvantage of being easily transportable even in its final form due to its small size, and pirated music is virtually as good as anything that someone could purchase from a retailer. *Id.* The movie industry has a limited advantage in the fact that piracy of movies in their final form is still a technologically significant challenge, and even a fully pirated copy of a movie still lacks the draw of a full movie theater. Valenti Warns the Dangers of Internet Piracy Before Congressional Subcommittee, at http://www.mpa.org/jack/99/99_10_28a.htm (Oct. 28, 1999) (“Currently our films are protected by two factors—the amount of time needed to download a full-length motion picture and the lack of unprotected digital copies of our works.”).

206. Cother, *supra* note 192.

207. *Id.*

208. For example, Australia’s top 10 best-selling albums of 1998 included country superstar Shania Twain, the Titanic soundtrack, and Madonna. *Id.*

209. *See, e.g.,* <http://www.disney.com> (containing pictures of Mickey Mouse and other copyrighted characters).

210. *See, e.g.,* <http://www.cdnw.com> (selling music by online orders; customers can preview music by listening to clips run from the web site).

a. Non-litigation tactics

The three most common non-litigation tactics are cease-and-desist letters, limited licenses with built-in repercussions for infringement, and the targeting of ISPs.²¹¹ Cease-and-desist letters—legal communications giving notice of the allegedly infringing behavior and making demands that the behavior stop—are the most common and, in some ways, the most risky tactic for the entertainment company.²¹² Fans tend to react rather strongly to perceived ingratitude from the objects of their affection.²¹³ A *Wired News* article quotes one fan-site creator about a threatened boycott after a Viacom copyright-enforcement campaign: "If they're not going to back down, and we have to make the ratings fall, we will."²¹⁴

Giving fans limited licenses to show material—accompanied with prominent disclaimers that the site is not affiliated with the entertainment company—has been suggested by some commentators and implemented by a few studios.²¹⁵ However, the effectiveness has yet to be shown. The only practical effect of this tactic might be to remove the entertainment company's right to legal recourse against casual infringers in exchange for a pat on the head by fans: "Yeah, I took it, but okay, it's still yours."²¹⁶

Finally, attacking ISPs that host fan sites is rapidly becoming a successful way to combat troublesome fans. This tactic has been discussed in more detail *supra* in Part III.A.²¹⁷ However, as discussed previously, the sheer impracticality of having to monitor and give notice to each ISP for each infringing fan site is staggering, particularly in light of the fact that each fan may promptly turn around and repost his material on a different ISP within hours.

b. Cases against non- or "semi-" profit infringers

Two important cases in which companies—entertainment and otherwise—acted to protect their intellectual property on the Internet are *Playboy*

211. See, e.g., *Religious Tech. Ctr. v. Netcom*, 907 F. Supp. 1361 (N.D. Cal. 1995); *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (interpreting the 1996 Communications Decency Act to bar action against ISP for negligent dissemination of defamatory messages when the ISP was unaware of the dissemination).

212. See Erika S. Koster & Jim Shatz-Akin, *Set Phasers on Stun: Handling Internet Fan Sites*, 15 NO. 1 COMPUTER LAW: 18, 21 (1998).

213. *Id.*

214. Steve Silberman, *The War Against Fandom*, WIRED MAGAZINE (visited Nov. 7, 1999), at <http://www.hotwired.com/packet/silberman/97/22/index3a.html> ("Silberman, *Fandom*").

215. See, e.g., Koster & Shatz-Akin, *supra* note 212, at 22.

216. See *id.* at 19 (observing that many fans even openly admit on their websites that the site contains copyrighted material).

217. See notes 121-27 *supra* and accompanying text.

*Enterprises, Inc. v. Frena*²¹⁸ and *Harley-Davidson Motor Co. v. Iron Eagle of Central Florida, Inc.*²¹⁹ In both cases, the companies acted to stop casual infringement of their intellectual property by fans. These cases are classic examples of the response and tactics of the traditional entertainment companies and are used regularly in legal action between fans and copyright holders.²²⁰ Another three recent examples of traditional entertainment's strategy for fan-control are Viacom's campaign against Star Trek fan sites,²²¹ Fox's campaign against Millenium fan sites,²²² and Sony's campaign against Oasis band fan sites.²²³

These campaigns are markedly different from the strategy used by the interactive entertainment industry.²²⁴ These two very different schools of thought on fans and copyright protection create an inconsistency that threatens reliable copyright protection.

B. Interactive entertainment²²⁵

1. Generally

Interactive entertainment has become a major industry only in the last decade.²²⁶ However, the industry exploded in the 1990s. Today, according to a recent survey, the number of people favoring computer and video games over television was double that of the television fans, and even more individuals think the games more entertaining than going out to the movies.²²⁷ Half of frequent video and PC game players say interactive entertainment offers the best entertainment value, far outstripping the next most common selection: reading

218. 839 F. Supp. 1552 (M.D. Fla. 1993). The importance of *Playboy v. Frena* is explained in Part III.A.1. *supra*.

219. 973 F. Supp. 1421 (M.D. Fla. 1997). The significance of *Harley-Davidson Motor Co. v. Iron Eagle of Central Fla., Inc.* is explained in detail in Part III.A.1. *supra*.

220. For discussion of these and similar actions, see Part III.A.1. *supra*.

221. See Silberman, *Fandom*, *supra* note 214.

222. Steve Silberman, *Fox Slams Bootleg Millenium Sites* (Nov. 7, 1999), at <http://www.hotwired.com/special/millennium/> ("Silberman, Fox Campaign").

223. *Oasis 'Netaction-report 1 13/5/97*, (May 13, 1997), at <http://www.thei.aust.com/bsite/asp2.html>.

224. See *infra* Part IV.B.

225. As used in this Comment, "interactive entertainment" means video and computer game developers and manufacturers.

226. *Americans Overwhelmingly Rate Video/PC Games as Most Fun Entertainment Activity for Second Straight Year*, BUSINESS WIRE, at <http://www.businesswire.com/webbox/bw.051399/191330282.htm> (May 13, 1999).

227. *Id.*

books.²²⁸ There were almost two interactive games sold for every household in America in 1998, or about 200 million units.²²⁹ The majority of video and computer game players are adults.²³⁰ Over half of the most frequent console game players and almost three-quarters of frequent computer gamers are age 18 or older.²³¹ Studies show that virtually all computer games and nine out of ten video games are purchased by adults.²³² Studies also show that one-third of all console gamers and half of all computer gamers are women, numbers that are increasing.²³³ The most popular types of computer and console games Americans buy are: 1) puzzle/board/card and learning games; 2) action games; 3) strategy, driving/racing, and adventure/roleplaying games; 4) sports; 5) simulation games and children's stories; and 6) creativity games.²³⁴

The last few years have seen consistent double-digit growth for the industry, generating 5.5 billion dollars of business.²³⁵ The video game industry grossed 20 percent more profit in 1999 than 1998.²³⁶ Eventual gross profit for 1999 exceeds 7.4 billion.²³⁷ Including computer games and "edutainment software," valued at 2 billion and 700 million, respectively, the interactive entertainment industry will gross over 10 billion dollars in 1999.²³⁸ Sales of console-style video games exceeded gross movie receipts for the first time ever in 1999.²³⁹

2. Protecting intellectual property on the Internet

The interactive entertainment industry's attitude toward fans and protection of their intellectual property gives new meaning to the term *laissez-fair*. For example, a fundamental marketing tool in the industry is the distribution of map editors and game "hacks" (programs to create "mods," or alternative versions of the games).²⁴⁰ The computer software developers also regularly release the programming source codes for adaptation and distribution by the public; for example, id Software has posted source codes and editors for several of its games and programming effects so that the public can create their own

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. Mike Snider, *Industry pockets sales as gamers choose Pikachu*, USA TODAY at 1 (Nov. 3, 1999), available at 1999 WL 6857461.

237. *Id.*

238. *Id.*

239. *Id.*

240. See, e.g., *Archives-Source* (last modified Dec. 21, 1999), at <http://www.idsoftware.com/archives/sourcearc.html>.

mods and levels.²⁴¹ John Carmack, a lead programmer at id Software, is credited with beginning the tradition of leaving computer games open for mods.²⁴² Finally, the game developers routinely release screen shots and game trailers to fan sites with only unofficial restrictions—if any—on use.²⁴³

There have been virtually no suits or other actions by interactive entertainment companies against fans,²⁴⁴ except when the "fan" was clearly operating for primarily commercial purposes.²⁴⁵

V. THE PROBLEMS FACING THE ENTERTAINMENT INDUSTRIES

As Internet piracy—much of it by well-meaning fans—reaches truly epidemic proportions, the time has come to decide: what must be done to salvage intellectual property on the Internet? Faced by conflicting strategies and a billion fans with their own minds made up, the courts may decide, "Nothing." With the problems facing traditional enforcement, and the success of the laissez-faire interactive entertainment model, courts may drop copyright and trademark law and look for something else.

A. Practical problems

First of all, there are a number of practical problems that pose serious challenges for entertainment companies on the Internet today and tomorrow. Four of these are: ease of piracy, jurisdiction, difficulty locating defendants, and the high cost of enforcement.

The ease-of-piracy problem represents a truly fearsome threat to intellectual property on the Internet. While the 1976 Copyright Act is a testament to Congress's ability to respond—sometimes at their own pace—to new technologies, the Internet may pose problems that outstrip the long arm of the legislative branch. At the turn of the century, the average speed at which a user connects to the Internet—and is thus capable of downloading or uploading infringing material—is less than 56 kilobytes a second.²⁴⁶ Three years ago, it was a

241. *Id.*

242. See Tom Chick, *It's a Mod, Mod, Mod World* (Nov. 7, 1999), at <http://www.gamecenter.com/Features/Exclusives/Mod/ss01.html>.

243. See, e.g., *Blues News*, at <http://www.bluesnews.com>.

244. As John Carmack of id Software has noted, without fan development of the game, Doom would not have gone on to be the entertainment-record-setting product that it was. However, in a legal sense, this tactic has the practical effect of a virtual surrender of fundamental intellectual property rights. See generally Chick, *supra* note 242.

245. See, e.g., *Sega Enter. Ltd. v. MAPHIA*, 857 F. Supp. 679, 687 (N.D. Cal. 1994).

246. Computer Partners, *High Speed Connections*, at <http://www.compar.com/infopool/articles/news1vs14.html> (April 2000).

fraction that fast. Three years from now, with the advent of ADSL, cable modems, satellite Internet access, network-level access through T1 or T3 lines to schools, etc., the average connection speed may have multiplied ten times.²⁴⁷ Considering the fact that even today, a relatively knowledgeable college student can download a full, digitized copy of a popular movie (sometimes days before its release in theaters) in a matter of hours in his dorm, the physical impediments to piracy are almost completely insignificant.²⁴⁸ In addition, improvements in such technologies as DVD, CD-recording drives, and MP3 encoders means that even a casual technology user can generate, store, and distribute massive amounts of directly infringing material in almost no time.²⁴⁹ These copies are usually perfectly similar to the originals.²⁵⁰

247. *Id.*

248. S.E. Ross, *Fighting the Phantom Menace: The Motion Picture Industry's Struggle to Protect Itself Against Digital Piracy*, 2 VAND. J. ENT. L. & PRAC. 149, 150-52.

249. *Id.* at 152.

250. *Id.* Fan copies of intellectual property may even be *better* than the original. For example, see reproduced *infra* the "read-me" attached to a fan re-digitized trailer of the Warner Brother's 1999 film *The Matrix* (actual document on file with author):

The Matrix Trailer - In Mpeg Format

MATRIX TRAILER SPECS

Type	MPEG-1
Size	48.7 MB
Video Size	480 x 320
Video Bit Rate	2400000 bits/sec
Audio Bit Rate	384 bits/sec
Audio Information	44.1 KHz 16-bit Stereo
Frame Rate	24 frames/sec
Media Length	02:25
Created	April 25, 1999

This trailer is a high resolution MPEG-1 that we decided to make because the only other quality trailer is the one found on www.whatisthematrix.com. However, that Quicktime trailer lacks audio mixing (the voices are in the left channel, the music in the right) and the video requires a Pentium II just to run the full frames.

Our version is re-encoded from the official Quicktime version into a high resolution MPEG-1 video format. We took the voices and music and mixed it together while adding some stereo effects and enhancing many portions of the trailer including the musical section featuring "The Eyes of Truth" by Enigma.

So you are asking, why did we do this? The reason is simple. The Matrix is an incredible movie that we both really enjoyed and we thought it would be cool if people had this high quality trailer that they could watch. If you haven't seen the movie yet, GO SEE IT!

If you are going to distribute this, please include this info file because it gives an explanation and we also don't want it to be mistaken as an "Official Release." (Although it could be heheh)

Dracore & [Zanatos] from EFnet

Special thanks to Nocturnal Fury, Dan-O, Syndicate and Emerald Phoenix for offering suggestions.

As discussed in Parts II and III, *supra*, jurisdiction is a huge obstacle to an entertainment company seeking to protect its copyrighted works. Under the analyses articulated by courts, the vast majority of Internet fans would not have minimum contacts with any state other than their own. Courts would almost certainly force the entertainment company to go to the defendant. In cases where the defendant may be international, the problem gets even thornier.

Even before jurisdiction can be established, an entertainment company may be faced by a much more fundamental problem: determining whom the infringer is. Internet culture thrives on its anonymity, and the incentives to avoid using one's true identity are significant: dodge junk mail, create a "new, improved" persona to interact with others, obtain more free e-mail addresses and free homepages for each fake identity, et cetera. Even with the help of a compliant ISP, a copyright holder may get no closer to the infringer than a misnomer and a fake address.

Assuming that an infringer can be identified, located, and served, the entertainment company must ask itself what the benefits are. The cost of going after an Internet fan are high, in terms of the effort to adjudicate a case based on the uneasy, gray law of copyright, the reputation damage with the fans who support the industry, and the lack of deep pockets at the end of the rainbow.

B. Psychology

Another practical concern of significant impact is, quite simply, the Internet culture itself. The Internet is regarded by many of its participants as a "borderless, self-policing domain where traditional laws do not and should not apply."²⁵¹ Regardless of how solid a copyright infringement action is, Internet citizens will most likely regard it extremely negatively.²⁵² Even Web authors who understand they are infringing copyrights view their web sites as beneficial to the copyright owners, and they regard efforts to enforce copyrights against them as unfair and ridiculous.²⁵³ Coupled with the speed of communication and close communities that characterize the Internet, an entire fan base will likely rise up in arms as an attack on one of its members.²⁵⁴ The amazing

251. Koster & Shatz-Akin, *supra* note 212, at 21.

252. *Id.*

253. *Boba Fett*, at http://www.frii.com/joe/bf_home2.html (last modified Dec. 15, 1997). This fan page, devoted to Boba Fett, a character from the Star Wars films, included the following "disclaimer": "Boba Fett, Star Wars, and all characters, events, etc. relating thereto are registered trademarks of LucasFilm and all rights for such are reserved. It [sic] is used here without permission in the hopes that they will be cool and not sue me over what is actually free advertising for them."

254. See Koster & Shatz-Akin, *supra* note 212, at 21.

speed at which information travels across the Internet, the close-knit nature of the virtual fan communities that form around fan sites, and the influence wielded by many fan-Web masters all amplify the potential downside to using traditional methods to police Web-based copyright infringers.²⁵⁵ In many cases where violators received standard cease-and-desist letters, fan web masters immediately posted the letters and complained to visitors that they were under attack by greedy corporate types.²⁵⁶

Repairing the damage done by angering a Web-based fan is difficult, considering the popularity of chatrooms and newsgroups. In addition, there is always the risk that another media outlet will catch wind of the story and turn it into a "David vs. Goliath" story.²⁵⁷

The entertainment industries have taken completely different paths into this mess. Interactive entertainment has generally embraced the Internet community.²⁵⁸ For example, the game companies regularly feed news to the myriads of fan news sites on the web, and game designers routinely give updates on their latest projects available to their fans; the updates are referred to as ".plans" and consist of personal notes by the designer.²⁵⁹ Faced by fan sites and web-based discussion forums that attract visitors by using game companies' intellectual property, some developers have even thrown up their hands and joined in. For example, at a fan site for the turn-based strategy game *Jagged Alliance*, the lead developer for the game series made thirty-one posts on the discussion board, none on which commented on the fact that the site—which sells advertising space—was decorated with his intellectual property and trademarks.²⁶⁰ On the other hand, traditional entertainment companies have some notoriety for picking fights with the fans.²⁶¹ Movie studios in particular have periodically carried out campaigns against fans, even those with a few small icons of copyrighted characters.²⁶² These campaigns have been fought by fans who see the legal action as the ultimate in betrayal.

The effect of this clash will likely be that the fans are left choosing for themselves what to believe. Their actual legal obligations are almost incomprehensible to them.²⁶³ A few pictures on their web sites do not seem harmful

255. *See id.*

256. *See, e.g.,* Silberman, *Fandom*, *supra* note 214.

257. *Id.*

258. *See supra* Part IV.B.2.

259. *See, e.g.,* *Blues News*, <http://www.bluesnews.com>.

260. *Jagged Alliance Galaxy*, at <http://www.ja-galaxy-forum.com/cgi-bin/ubb/search.cgi?action=simplesearch&ForumChoice=ALL&ExactName=yes&SearchUser=Ian+Currie> (February 13, 2000) (listing fan discussion group contributions by lead developer of *Jagged Alliance*).

261. *See supra* Part IV.A.2.

262. *See* Schlachter, *supra* note 6, at 23 nn.50-51; *see also* Michael T. Helfand, Note, *When Mickey Mouse Is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters*, 44 *STAN. L. REV.* 623 (1992) (explaining how the unauthorized use of fictional characters can result in a judgement of infringement).

263. *See* Litman, *supra* note 8, at 50-51.

to anyone.²⁶⁴ Legally, with one industry telling them that screenshots are great, and another industry threatening them with an injunction, courts may soon balk at telling the typical fan he or she is wrong.

C. Fair use

The fair use doctrine has always been a significant issue in software law. Courts have allowed copying as part of reverse engineering, for example.²⁶⁵ Game companies have generally not countered fans who create new games out of the old; in fact, the game companies have often directly encouraged the fan creativity by making available game editors, source code, graphics engine specifications, and so on.²⁶⁶ Today, the biggest action and strategy computer games routinely ship with editors bundled in the box.²⁶⁷

Some protection for fans may even be afforded by such holdings as that in *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*²⁶⁸ The defendants had created a device that significantly altered the plaintiff's games, and the plaintiff alleged the defendant had created an illegal derivative work.²⁶⁹ However, the court held that because every derivative work was based on a legally purchased copy of the Nintendo game, there was no infringement.²⁷⁰ *Nintendo* is generally understood as saying that the way a game is viewed may be changed without constituting infringement.²⁷¹

While the campaigns against infringing fan sites may help to preserve the studios' rights in their works, there is the new risk that the courts may set an unfavorable precedent by ruling the efforts are fruitless against the millions of Internet-borne fans, and it would be arbitrary and capricious to continue them against fans. For example, in *Harley-Davidson Motor Co. v. Iron Eagle of*

264. *Id.*

265. See *supra* notes 93-100 and accompanying text.

266. In fact, one common route into the gaming industry is to create mods for existing games. If your mod is liked by the game company, they may even purchase the distributing rights for your mod from you! One recent example at the time of this article would be *Gunman Chronicles*, published by Sierra Studios in 2000. *Gunman Chronicles* began life as an intricate derivative work of *Half-Life*, a game created by Valve in 1997. See Brian Rubin, *Game Reviews—Gunman*, at <http://www.ga-source.com/reviews/gunman.shtml> (Jan. 29, 2001).

267. See Marc Salzman, *3D Level Design: Expert Advice*, at http://www.gamespot.com/features/3d_design/conclusion.html (last visited April 17, 2001) (noting the trend for all major computer game developers to include game editors to extend the longevity and popularity of their products).

268. 964 F.2d 965 (9th. Cir. 1995).

269. *Id.* at 967.

270. *Id.* at 972.

271. See, e.g., Sprague, *supra* note 30, at 668 (arguing that *Nintendo* demonstrates the tenuousness of traditional copyright law when applied to multimedia intellectual property).

Central Florida, Inc., the court observed that the plaintiff's copyrighted material was widely available on the Internet, despite the plaintiff's claims that they attempted to protect their intellectual property.²⁷²

The effect of this confusion in the fans' eyes is that interactive entertainment is encouraging fans while traditional entertainment is over-aggressively attacking them. Courts may simply find that, for reasons of efficiency, most fan use of media that has become widely available on the Internet should be considered fair use.

D. Ineffective licenses

Commentators have observed that the Internet population is usually not adequately educated about the technicalities of copyright infringement, exclusive rights to distribute, and licensing.²⁷³ Although cases exist that lend support to the concepts of click-wrap and shrink-wrap licensing, these cases may not be binding when courts are confronted by a slew of users who could not have understood the licensing language even if they had read it, and would react with disbelief if they had.²⁷⁴

VI. ALTERNATIVE FORMS OF PROTECTION FOR INTELLECTUAL PROPERTY ON THE INTERNET

A small sampling of promising ideas for alternative protection are described below, demonstrating the breadth of possibilities.

A. Limited functionality

This is the shareware approach. Software developers distribute versions of their software with limited functionality; customers who like the shareware can purchase the software or data on the seller's terms.²⁷⁵

B. Copy protection

Some content-producing programs can encode content in a way that distorts copies. While this seems like the obvious solution to everyone's problems, the reality is more complicated. Not only is copy protection strongly

272. 973 F. Supp. 1421, 1423 n.2 (M.D. Fla. 1997).

273. Schlachter, *supra* note 6, at 20-21.

274. *See id.* at 36-37.

275. *Id.* at 38. *See, e.g., Release Software's Embedded SalesAgent Technology Superdistributes Software Over the Internet*, at <http://www.rsasecurity.com/news/pr/960729-1.html> (last visited Apr. 8, 2001); *see also* Lisa Bowman, *MS moves to mandatory registration*, at <http://www.zdnet.com/zdnn/stories/news/0,4586,2435946,00.html> (last visited February 10, 1999) (discussing anti-piracy measure implemented by Microsoft in Office 2000 that causes the product to malfunction after launching it fifty times without registering).

resented by customers, but the technology is easily penetrable by hackers.²⁷⁶ However, the technology is still being used in some situations.²⁷⁷ If nothing else, the technology could inhibit most casual infringement.²⁷⁸

C. Digital certificates

A certification authority can issue to a user a computer file (a "digital certificate") that identifies the user and the user rights associated with that person. In these ways, vendors can use digital certificates to control access to system resources, including intellectual property files, by making files available to users who can provide a digital certificate with specified rights. Material accessed in this way could be custom-marked for each user so that further distribution could be monitored.²⁷⁹

D. "Pay-per-view"

One commonly discussed solution is to make intellectual property available over the Internet, either for free—supported by advertising—or through an access fee.²⁸⁰ Napster and similar services are exploring this as a way to legally distribute intellectual property on the Internet.²⁸¹

VII. CONCLUSION

Despite the failure of IP law to provide any security to the entertainment industries from their Internet fans, this is not the death knell of intellectual property. First of all, IP law does not need to be perfect to work.²⁸² "Copyright doesn't work today because people pay 100 percent of the time. It works because people pay often enough that intellectual property owners make a profit."²⁸³ As history has shown, technologies that seem like terrible threats

276. Philip E. Ross, *Cops Versus Robbers in Cyberspace*, FORBES, Sept. 9, 1996, at 136, available at <http://www.forbes.com/forbes/090996/5806134a.htm>.

277. *Cf. id.* (describing how Macrovision "spoilers" are inserted into movies; the spoilers confuse VCRs and produce distorted versions of the movies if copied).

278. *Id.* at 139 (quoting Kenneth Spreitzer, president of Maximized Software, which produces one form of the copy protection technology).

279. *Id.*

280. *See, e.g.*, Oross, *supra* note 4, at 157-58.

281. Dennis Fisher, *Napster has serious catching up to do*, EWEK, at <http://www.zdnet.com/eweek/stories/general/0,11011,2654819,00.html> (Nov. 16, 2000).

282. Schlachter, *supra* note 6, at 51.

283. *Id.* (quoting Margie Wylie, *Can Copyright Survive the Digital Age? Should It?*, DIGITAL MEDIA: A SEYBOLD REPORT, July 3, 1995).

today often become key assets to the supposed victims.²⁸⁴ A good example can be found in the movie studios' action against video cassette recorder manufacturers, *Sony Corp. v. Universal City Studios, Inc.*,²⁸⁵ where the studios attempted to sink a technology that—in the form of video cassette rental—generated 13 billion in revenues for the studios in 1993,²⁸⁶ a figure that climbed to 18 billion by 1998 and continues to grow.²⁸⁷

In the future, Jesse may approach the Internet a little differently.

Jesse installs the free Internet trial on his computer in about fifteen minutes. When he signs on, he goes to an e-mail service and gets a free e-mail address, which takes only a minute. The digital certificate accompanying his parents' multimedia account enters the personal information for him. Then he heads over to a home page provider. It takes him fifteen minutes to sign up for a free homepage. He gives the new e-mail address as his contact information. Jesse then opens the page design tool and spends a half-hour designing a front page for his website. He runs into a problem when the shareware program he downloaded from the Net to convert his favorite MP3 will not open: "Your shareware period has expired." Shaking his head, he pulls out a credit card and pays the small fee, which has dropped drastically since the new shareware limits forced everybody to pay. One consolation is that he gets all the MP3s for free through his parents' flat-fee multimedia account. He selects an MP3 and converts it to a soundtrack for his website. Then he heads to his friend's website. The friend, Kevin, has a bunch of screen shots from a recent action blockbuster on display. Kevin got them free from Warner Brothers, some sort of a limited license in exchange for putting disclaimers on the bottom of his pages. Jesse tries to save some to his own website, but as usual, the embedded code distorts his copies.

"I gotta get one of those licenses."

He looks up Warner Brothers' e-mail address and writes a letter. After Warner Brothers' servers do a quick, automatic check of his digital certificate, Jesse begins downloading his own pack of screenshots. As the download continues, he realizes how long it is taking. He swings over to the auction website

284. See Litman, *supra* note 8, at 46 ("Whenever we have discovered or enacted a copyright exception, an industry has grown up within its shelter."); see also Oross, *supra* note 4, at 158 ("Make no mistake: Hollywood will survive the digital onslaught just as it and its industry compatriots have survived the many precursors.").

285. 464 U.S. 417 (1984).

286. *Current Revenue of Target Markets*, UPSIDE, Dec. 1994, at 18 (depicting a graph drawn from a Yankee Group study).

287. Cothier, *supra* note 192. The Napster situation could very well prove to be the next example of this. See, e.g., Fisher, *supra* note 281 (describing Napster's efforts to become a viable for-profit service). Napster was created as an Internet tool that allowed users to share music with exceptional ease, bringing to light the massive scale of online copyright infringement when it was discovered that a significant portion of the traded music had been pirated from compact discs. *Id.* After litigation, Napster and similar services such as MP3.com began licensing the music and distributing it for profit. *Id.* At the time of this writing, it remains to be seen whether this will be as successful as the entertainment industries' reluctant but fortuitous embrace of video cassette recorders.

and checks on a bid he made yesterday on a new modem. He is on his fifth month of legal Internet, and it is about time to move up in the world.

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288. J.D., M.D.R., Pepperdine University School of Law, 2001.

