# COPYRIGHT CLEARANCE IN THE INTERNET AGE: PRESENT PROBLEMS AND FUTURE SOLUTIONS

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I just returned from a Symposium on Intellectual Property Rights in the People's Republic of China.[1] In meetings with various governmental officials, and over dinner, one issue was constantly raised -- the Internet and the legal status of materials transmitted over it. Even developing countries recognize that the Internet represents the future. From its initial stages as a government-developed, global communications defense network,[2] there is little doubt that the Internet has revolutionized global communications.

Like every prior technological advance in communications media, the Internet is not "going away" simply because its presence poses what could be considered insurmountable problems in ascertaining the scope or degree of protection which should be available to material transmitting via this new means of communication. Similar to its ancestors the printing press, the telegraph, the radio, and television and satellite broadcasting, the Internet has broadened the possibility for global communication, while posing unique problems for those who attempt to "fit" the communicated materials within the confines of existing U.S. copyright law. These problems

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The focus of this paper is on the problems posed under U.S. copyright law for clearance of Internet communications. Clearance of materials for use on the Internet necessarily involves a wide variety of legal issues, beyond copyright, including, but not limited to, right of publicity, right of privacy, defamation and obscenity. Such issues are no less important than copyright considerations in clearing content for Internet transmissions but are beyond the scope of this paper.

[1] Symposium on Intellectual Property Protection, co-sponsored by the Chinese Patent Office, Zhegiang University, The John Marshall Law School and the Zheda-Marshall Center, held in Hangzhou, People's Republic of China, October 13-18, 1996.

[2] *See, e.g.,* Richard Raysman & Peter Brown, *Liability on the Internet,* 212 N.Y.L.J. 3 (1994)(containing brief history of Internet development).

are created largely by the new technological features embodied in the Internet. Despite dire predictions and loud insistence that copyright law has no application to Internet communications,[3] copyright law has met the technological challenge of new communications media before and, I think, it will meet the challenge again. As I tell my students, the history of U.S. copyright law is largely the history of the law's coping with the problem of protection for expression communicated via new media.[4] The Internet poses no greater problem in the application of copyright laws to new technology than the printing press, photography or motion pictures posed during their early days.

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[3] *See, e.g.*, Jonathan Wallace and Mark Mangano, Sex, Laws and Cyberspace 101-124 (Henry Holt & Co. 1996) (challenging application of copyright law to cyberspace in *Religious Technology Center v. Netcom On-Line Communications Services, Inc.*, 907 F.Supp. 1361 (N.D. Cal. 1995); Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 Cardozo Arts & Ent. L.J. 345 (1995) (outlining shortcomings of copyright in a digitized world). *Accord* Pamela Samuelson, et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 Colum. L. Rev. 2308 (1994) (urging development of new hybrid protection for computer software); Jessica Litman, *The Exclusive Right to Read*, 13 Cardozo Arts & Ent. L.J. 29 (1994) (questioning application of current copyright laws to Internet uses); J.H. Reichman, *Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a Restructured International Intellectual Property System*, 13 Cardozo Arts & Ent. L.J. 475 (1995) (challenging the application of copyright).

[4] The first recorded copyright laws were enacted in England in, part, in reaction to the growing availability of printed works due to the printing press, the new technological advance of the Fifteenth Century, and the desire of printers to continue their monopoly over works communicated through this new medium. Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 Tul. L. Rev. 991 (1990). In the United States, the copyright law has been routinely amended to clarify that works communicated through new communications media are subject to protection. Thus, the Copyright Act of 1865 extended protection to photographic works, the 1909 Act extended protection to motion pictures and sound recordings, and the 1976 Act was amended in 1980 to expressly include computer programs among the categories of protected works. *See* 17 U.S.C. §101. Case law has reflected (and often anticipated) similar expansions in protection. *See, e.g., Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) (photograph of Oscar Wilde subject to copyright protection); *White-Smith Music Publishing Co. v. Apollo Corp.*, 209 U.S. 1 (1908) (piano rolls subject to copyright protection); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984) (source and object codes are subject to copyright protection). For a general history of the development of U.S. copyright law, *see* William F. Patry, Copyright Law and Practice (1994).

Despite the problems posed by the Internet (and they are legion),[5] there is no disputing that the Internet serves as a tremendous resource for copyright clearance information. Virtually every publisher and entertainment company has a web cite on the Internet.[6] Many even offer copyright permission services over the Internet.[7] Even the U.S. Copyright Office has a web cite and readily accessible copyright registration information.[8] Thus, the Internet has the potential for easing the copyright permission process. The problem, however, is convincing people that they need to obtain such permission for material transmitted via the Internet.

Perhaps the greatest problem for the future lies in overcoming the widespread public perception that no copyright clearance is required for Internet communications because the Internet is "a copyright free zone." The threat posed by the unauthorized communication of copyrighted material on the Internet is growing.[9] The time to expect bulletin board service

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[5] The Internet is growing at an astronomical rate. Its size cannot be ascertained with certainty because new systems go on line daily. It has been estimated that the Internet has between 10 to 15 million users, using 1,313,000 host systems. Edward Cavazos and Gavina Morin, Cyberspace and the Law: Your Rights and Duties in the On-Line World 10 (MIT Press 1994). The use of potentially illegal materials by Internet users has similarly grown. Among the issues which courts are currently struggling to decide are the application of copyright laws to Internet-transmitted materials, the scope of the right of privacy to electronic mail communications, the reach of the First Amendment to Internet "speech," the regulation of obscene speech or speech that is harmful to minors, and the application of trademark laws to domain names. *See, e.g.,* Cyberspace and the Law, *supra*; Sex, Laws and Cyberspace, *supra* note 31. *See also* cases cited in notes 9, 13 and 33 *infra*.

[6] *See, e.g.*, http://www.randomhouse.com (Random House Publishing); http://www.pathfinder.com (Time-Warner); http://www.disney.com (Disney); http://www.NYtimes.com (New York Times); http://www.viacom.com (MacMillan Publishing, Simon & Schuster Publishing; Paramount); http://www.westpub.com (Westlaw); http://www.bna.com (BNA Publishers); and http://www.aetn.com (Arts & Entertainment Network).

[7] The Copyright Clearance Center (CCC), for example, has a web cite which allows users to obtain reproduction permission for various copyrighted works electronically. *See* http://www.copyright.com. *See also* note 37 *infra*.

[8] http://lcweb.loc.gov/copyright. Among the materials currently available at the Copyright Office's web cite are Copyright Basics, Copyright Registration, Copyright Application Forms, Copyright Information Circulars, Mandatory Deposit Requirements, Copyright Office Records, Copyright Office Announcements, CORDS (Copyright Office Electronic Registration, Recordation and Deposit System), and Internet Resources Related to Copyright.

[9] *See, e.g., SPA Sues Internet Service Providers*, Newsbytes, Oct. 11, 1996, *available in* 1996 WL 12025767; *Big Bucks Online in Internet Battle: Court Fight Looms Over Who Owns Sports Information,* Toronto Star, Sept. 18, 1996, at D3; *Record Set in Music Piracy Arrests,*

providers, web page creators, and Internet link server operators to police themselves is long past. Monitor discussions on the Internet regarding the need for regulation of Internet communications and certain Internet truisms or widely-held beliefs become readily apparent. The first truism is simply -- "The Internet is a global INFORMATION superhighway. Its purpose is ready-access to information. Any regulation necessarily impedes the free-flow of this information, and is directly contrary to the purposes for which the Internet was created."[10] The second truism is closely related to this first one and no less strongly felt. It is: "Any attempt to control the content of the Internet in any form is nothing less than censorship."[11] The final and, I believe potentially the most devastating, truism is "Everything on the Internet is placed there with the full understanding that all such materials are thereafter freely usable without compensation to the copyright owner."[12] In other words, material placed on the Internet is provided with the grant of an implied license that it may be used and disseminated without compensation to the copyright owner.

These "truisms" ignore some fundamental realities. The first reality is that the goal of encouraging the dissemination of ideas does *not* preclude copyright protection. To the contrary,

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Com Appeal, Mar. 16, 1996 at 2C; *Internet Guitar Archive Shut Down over Copyright Fear,* Telecomworldwire, Mar. 7, 1996; *Court Tackles Copyright Infringement on the Net: Ruling Helps Define Duties of Service Providers in infringement Cases,* Internet Wk., December 4, 1995, *available in* WL 11867985.

Among reported cases which have dealt with Internet copyright issues are *Playboy Enterprises, Inc. v. Frena*, 839 F.Supp. 1552 (M.D.Fla. 1993); *Frank Music Corp. v. CompuServe Inc.*, 93-CV-8153 (J.F.K.) (S.D.N.Y. 1996) (use of sound recordings on Internet; case settled); *Tasini v. New York Times Co.*, 98-8678 9 (S.D.N.Y. 1996) (suit by diverse freelance authors for additional compensation for Internet uses of textual materials); *Religious Technology Center v. Netcom On-Line Comm. Services, Inc.*, 907 F.Supp. 1361 (N.D. Cal. 1995) (use of textual materials on the Internet); *Sega Enterprises Ltd. v. Maphia*, 857 F.Supp. 679 (N.D.Cal. 1994) (use of copyrighted video games).

[10] *See, e.g.*, Sex, Laws and Cyberspace, supra note 3 at xiv-xv (describing the Internet as a "forum without gatekeepers" and "a wild medium in which everyone can be publisher, reader,and distributor of information without requiring the permission of anyone in authority").

[11] *Id.* (referring to obscenity, copyright, and sexual harassment regulations as "censorship").

[12] *See, e.g.*, Brad Templeton, 10 Big Myths about Copyright Explained, http://www.Clari.net/brad/copymths.intl (citing as a major myth "If it's posted to Usnet, it's in the public domain"). This truism may have developed from the warnings placed by service providers such as America On Line that require users to agree that all of their communications are fully usable. While such an implied-license mechanism may be desirable in reducing potential liability for service providers, it cannot be used to turn the entire Internet into a "copyright free zone" or to eliminate the copyright interests of owners who have *not* consented to the implied license.

one of the fundamental principles of U.S. copyright law is that original expression deserves protection in order to encourage the development of new works.[13] Ideas are free.[14] But the dissemination of ideas as embodied in a particular expression is not free.[15] This basic difference has been lost in the present rhetoric about the Internet.

Some people analogize the Internet to a public library or a bookstore.[16] You are free to

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[13] Article 1, section 8, clause 8 of the U.S. Constitution specifically grants Congress the power to enact copyright laws in order "to promote the progress of … useful arts." U.S. Const., Art. I, § 8, cl. 8 As the Register of Copyrights emphasized in his report on the general revision of the copyright laws that led to the enactment of the 1976 Copyright Act: "The primary purpose of copyright is to stimulate the creation and dissemination of intellectual works." Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 6 (1961).

U.S. copyright law "represents an economic trade-off between encouraging the optimal creation of works of authorship through monopoly incentives, and providing for their optimal access, use and distribution through limiting doctrines." Marshall Leaffer, Understanding Copyright Law 17 (Matthew Bender & Co. 1995). *See also Twentieth Century Music Corp v. Atkin*, 422 U.S. 151, 156 (1975) ("[T]he ultimate aim [of U.S. copyright law] is … to stimulate artistic creativity for the public good.").

[14] U.S. copyright law expressly precludes the protection of ideas. 17 U.S.C. § 102 ("In no case does copyright protection for an original work of authorship extend to any idea … regardless of the form in which it is … embodied.") Thus, for example, the white pages of a telephone directory was found to be outside the scope of copyright protection because it lacked sufficient expressive elements. *Feist Publications, Inc. v. Rural Telephone Service, Co.*, 499 U.S. 340 (1991). Similarly, ideas which may only be expressed in a limited form are beyond the scope of copyright protection. Using the idea/expression merger doctrine, courts have declined to extend protection to such diverse "limited expressions" as non-literal elements in a computer program, *Synercom Technology, Inc. v. University Computing Co.*, 462 F.Supp. 1003 (W.D. Tex. 1978); contest rules, *Morrissey v. The Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967); and scenes a faire, *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S.902 (1931).

[15] As the Supreme Court recognized: "Unlike a patent, copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea -- not the idea itself." *Mazer v. Stein*, 347 U.S. 201, 217 (1954). This protection of expression is at the heart of the copyright law's goal to "provide the incentive to create information and a shelter to develop and protect it." Marshall Leaffer, Understanding Copyright Law, *supra* note 13 at 17. *See also* note 13 *supra* (discussing creation goal of U.S. copyright laws).

[16] Sex, Law and Cyberspace *supra* note 3 at 83-99. *See also Cubby, Inc. v. Compu-Serve, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) (analogizing to First Amendment precedents that protect libraries and bookstores in dismissing defamation claims against an on-line server). Despite the attraction of the analogy (and its adoption in supporting the free and uncompensated access and use of materials by Internet users, *see, e.g.*, Sex, Laws and Cyberspace *supra* note 3 at 83-99),

browse in a bookstore and should be free to browse the Internet without having to worry about copyright clearance. The analogy only works to a certain point. It assumes that works on the Internet have been placed there by their copyright owners. As the increasing number of Internet lawsuits indicate, this assumption is false. Furthermore, to my knowledge, bookstores do not obtain compensation for the act of browsing. By contrast, one method for fixing compensation for Internet use is through the number of "hits" or browsers that stop at an operator's website or homepage. Thus, "browsing" has the potential for being a qualitatively different act in the Internet "bookstore."

The fact that so much material on the Internet is unauthorized also eliminates the third truism cited above -- that material is placed on the Internet with an implied license of free dissemination. How can there be an implied license if the copyright owner has not agreed to the terms?

I do not pretend to have a crystal ball or to be able to predict the future any better than anyone else. But since the subject of this paper is "present problems and future solutions," I would like to explore what I view as some of the most significant future developments regarding copyright clearance issues on the Internet.

The introduction to Internet truisms underscores my first prediction about the future of copyright clearance and the Internet. If the goal is to reduce copyright infringement on the Internet, while continuing to encourage widespread use of the Internet, copyright owners and associations such as the AIPLA need to educate users and service providers about the need for copyright permission. This education effort requires outreach programs to all groups of users in order to reduce the hostile rhetoric that currently surrounds discussions about copyright enforcement on the Internet. Such outreach programs could be as simple as encouraging BBS providers to post notices about the need for copyright permission, similar to those required to be posted by libraries near photocopy machines,[17] to sponsoring on-line symposiums about copyright

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comparing the Internet to a bookstore or library ignores a fundamental distinction. Most bookstores and libraries contain works whose distribution has been approved by the copyright owner. Moreover, bookstores do not charge for the privilege of browsing and could not easily do so. By contrast, economic value on the Internet is determined by the number of "hits" (the number of users) of a particular web cite. Thus, as noted in the text above "browsing" on the Internet bears a substantially different economic relationship to "browsing" in a bookstore or library. Such differences have a direct bearing on the application of fair use theories to Internet communications.

[17] *See* 17 U.S.C. §108(d)(2) (library not responsible for user's photocopying so long as it prominently displays "a warning of copyright"). The Register of Copyrights has prescribed the

clearance.

Like the problems of enforcement of copyright in Third World and newly industrialized countries,[18] copyright enforcement programs for the Internet should aim, not merely to inform users that copyright protection extends to the Internet, but to educate users about the value of such protection. Until users view copyright enforcement as something which can enrich the content of the Internet, copyright enforcement will remain problematic. I have already seen flickerings that some advance is being made on this front. As more businesses are creating web cites, and creating value-laden materials for which they expect compensation, more Internet *users* are beginning to support copyright enforcement efforts. Continuing efforts must be made, however, to get the word out that copyright enforcement plays a positive role in enriching the content of the Internet.[19]

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following notice:

> NOTICE WARNING CONCERNING COPYRIGHT RESTRICTIONS
>
> The copyright laws of the United States (Title 17, United States Code) governs the making of photocopies or other reproduction of copyrighted material.
> Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.
>
> This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

37 C.F R. §201.14. Most libraries and archives post a modified version of this notice over photocopying machines provided by the library.

[18] *See, e.g.*, "29 Countries on IPAA Hit List," 29 IP World 1 (March 1996); Doris Estelle Long, *The Protection of Information Technology in a Culturally Diverse Marketplace*, 15 JMLS Comp. & Info. L.J. 129 (1996).

[19] Such enforcement arguably would encourage owners of value-laden materials to place these materials on the Internet since they would have the right to control their use, including providing such materials subject to subscription or some other form of compensation for the copyright owner. Without such assurances, the Internet could degenerate into a wasteland of public domain and infringing materials. Moreover, without such protection, the development of Internet magazines and other subscription-type services would no doubt come to an abrupt end,

My second prediction for the future is the development of better methods for securing rights to utilize materials on the Internet. If copyright owners are going to insist on the application of the copyright laws to Internet communications, the law must be clarified regarding the uses for which permission is required and the parties who will be liable if such permission is not secured.

The NII Task Force report suggested that the Copyright Act be modified to clarify that transmitting copyrighted works on the Internet qualifies as a distribution for which permission must be obtained by the copyright owner.[20] Others have suggested, properly I believe, that reviewing Internet communications on your monitor (browsing) may also qualify as a public display.[21] On a theoretical level, it may matter to academics and scholars what rights are required. On a practical level you may ask "Who cares? As long as I get the rights I need, who cares what their label is?" I agree. But if your contract only gives you the right to reproduce and distribute the copyrighted work digitally,[22] you are going to care if you should have asked for public display rights as well.[23]

Clarification of the rights required for distribution of copyrighted works on the Internet will require clarification of whether typing a copyrighted work onto the Internet (without storage in any medium) is an act of reproduction for which permission is required. I have heard arguments that a work typed onto a screen display but not stored in any physical medium does *not*

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stunting the Internet's early potential as a news and entertainment distribution medium.

[20] Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights (Sept. 1995). The Task Force recommended amending the 1976 Copyright Act to enumerate an exclusive right to "distribute copies … to the public … by transmission." *Id.* at 213-20. The Task Force stressed, however, that "the proposed amendment does not create a new right. It is an express recognition that, as a result of technological developments, the distribution right can be exercised by means of transmission -- just as the reproduction, public performance and public display rights may be." *Id.* at 213-14.

[21] *See, e.g.*, Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 Colum. L. Rev. 1466 (1995) (forwarding to a mailing list is a public display).

[22] For a brief discussion of the impact that contractual obligations have on Internet rights, *see* note 42 *infra*.

[23] You are also going to care if uploading, downloading, accessing, caching, posting to a mailbox, and/or transmission qualify as separate, potentially infringing acts for which compensation is required. Theoretically, copyright owners could seek larger fees on the basis of the greater scope of rights being sought or divide such rights to exercise greater control over the use of her work on line.

qualify as unlawful copying for purposes of the Copyright Act because it is not sufficiently fixed.[24] My personal view is -- if you are uploading, downloading or even accessing a work, under current law you are making a copy. As the court recognized in *Advanced Computer Services of Michigan v. MAI Systems Corp.*,[25] and *MAI Systems Corp. v. Peak Computer Inc.*,[26] copying onto a relatively ephemeral RAM without permission is an unauthorized reproduction. There is no requirement of permanence. There is only a requirement that the "copy" be "stable enough to be perceived, reproduced or otherwise communicated for a period of more than transitory duration."[27] If copying onto a RAM requires permission, Internet users will be hard pressed to avoid the application of copyright to their activities without a change in the applicable laws.[28]

Clarification of the scope of copyright protection for Internet communications will also require clarification of the fair use doctrine as it applies to the Internet.[29] One of the criticisms

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[24] *See, e.g.*, Cyberspace and the Law, *supra* note 3 at 62 (absent transcription or capture, communications on the Internet are not sufficiently fixed to qualify for copyright protection). David Post, New Wine, Old Bottles: The Case of the Evanescent Copy, Am. Lawyer, May 1995, at 103-04 (questioning whether RAM copies are a "copy"); Jessica Litman, *The Exclusive Right to Read*, 13 Cardozo Arts & Ent. L.J. 29, 40-43 (1994) (criticizing the view that RAM copies qualify as "copies"). Although uploading and downloading copyrighted materials clearly qualifies as unauthorized reproduction under U.S. copyright law, *Playboy Enterprises, Inc. v. Frena*, *supra* note 9, caching and access (without downloading) raise potential issues of permanence. Caching also raises potential problems in connection with the creation of unauthorized derivative works.

[25] 845 F.Supp. 356 (E.D. Va. 1994).

[26] 991 F.2d 511 (9th Cir. 1993).

[27] 17 U.S.C. § 101.

[28] *See also Telerate Systems, Inc. v. Caro*, 689 F.Supp. 221 (S.D.N.Y. 1988) (receipt of data in an unauthorized user's computer is a "copy").

[29] The fair use doctrine is codified in Section 107 of the 1976 Copyright Act. 17 U.S.C. § 107. It is an equitable doctrine that permits the uncompensated use of copyrighted materials in certain limited situations. Among those uses which may qualify as a fair use are news reporting, education, commentary and criticism, and home recording. The determination of whether any use qualifies as a fair use is based largely upon an analysis of four non-exclusive statutory factors. They are:

1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
2) The nature of the copyrighted work;
3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4) The effect of the use upon the potential market for, or value of, the copyrighted

leveled at the NII report[30] was the failure to examine the doctrine of fair use.[31] Just as some have contended that certain technologically-required uses, such as reverse engineering for platform compatibility, should be considered "fair,"[32] others have insisted that a liberal application of fair use is required to maintain the viability of the Internet.[33] Regardless of the outcome of the debate, at least efforts should be made to develop a coherent policy, and that policy should be widely disseminated and, thereafter, strongly enforced.

Finally, clarification is needed regarding the liability of bulletin board service providers for the infringing acts of their users. Although *Playboy Enterprises v. Frena*[34] held the fee-paid BBS provider directly liable for subscribers' unauthorized uploading and downloading of copyrighted photographs, other courts have struggled with liability issues. Some have suggested that, absent a direct financial interest or knowledge of the infringing activities, BBS providers should not be liable for their subscribers' acts.[35] Others suggest that BBS providers should be

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work.

17 U.S.C. § 107. The purpose of the fair use defense is to "protect secondary creativity as a legitimate concern of the copyright." Pierre Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1109 (1990).

[30] *Supra* note 20.

[31] *See, e.g.*, Jessica Litman, *The Exclusive Right to Read*, 13 Cardozo Arts & Ent. L.J. 29 (1994) (criticizing the report as one-sided); James Mahon, *a Commentary on the Proposals for Copyright protection on the National Information Infrastructure: an Analysis of Proposed Copyright Changes and Their Impact on Copyright's Public Benefits,* 22 Rutgers Computer & Tech L.J. 233 (1996)(critically examining the Report's fair use analysis).

[32] *See Sega Enterprises v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992) (court holds that reverse engineering of computer software to ascertain functional elements qualifies as a fair use).

[33] For example, in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F.Supp. 1361 (N.D. Cal. 1995), the court in dicta indicated that "digital browsing" might be considered a fair use. Scholars have also argued that transitory reproduction, including copies made at a router as part of the transmission network or while a user is browsing the Internet should qualify as a fair use. *See* articles cited note 23 *supra*. Article 7 of the Draft Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works (earlier referred to as a "Protocol" to the Berne Convention) provides that ephemeral copies are covered under the right of reproduction but allows Contracting Parties to "limit the right of reproduction in cases where temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature."

[34] 839 F.Supp. 1552 (M.D. Fla. 1993).

[35] *See, e.g.,* David J. Loundy, *Revising the Copyright Law for Electronic Publishing,* 14 J. Marshall J. Computer & Info. L.1 (1995)(examining standards for direct and contributory infringment).

able to avoid liability through copyright warning notices and subscriber agreements that indemnify the provider for its subscribers' acts.[36] Until the issue is clearly decided, BBS providers may decide to "play it close to the vest" and put the burden of copyright clearance on users. We can all guess how many users will bother to obtain permission.

I further predict that mechanisms will continue to be established to facilitate the licensing of copyrighted materials for use on the Internet. Licensing organizations similar to the Copyright Clearance Center (CCC) for the print media[37] and The Harry Fox Agency for mechanical rights[38] will continue to grow. As indicated previously, many publishers already have web sites on the Internet and provide electronic access for permissions for educational and other print purposes. These mechanisms can be easily adapted to include electronic rights.

In addition, I believe that organizations such as The Authors Registry, which serves as a licensing resource for electronic rights,[39] will grow and flourish. This organization, similar to The Harry Fox Agency, ASCAP and BMI,[40] has been organized to facilitate the payment of additional royalties for electronic use of text materials. Other organizations may well be established in the future to administer electronic rights for musical and graphic works.

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[36] *See, e.g.,* Rex S. Heinker & Heather D. Raffer, *Rough Justice in Cyberspace: Liaibility on the Electronic Frontier*, 7 Computer L. 1 (1994).

[37] The Copyright Clearance Center operates numerous licensing programs for print media. It grants users the right to reproduce portions of copyrighted works previously registered with CCC upon the payment of specified fees. CCC currently licenses the reproduction of represented works to a broad variety of business, corporate and academic institutions.

[38] The Harry Fox Agency is a private organization which grants synchronization rights for various musical works and sound recordings upon the payment of specified fees.

[39] The Authors Registry is a private organization composed of freelance authors which licenses the use of their textual material in digital media for specified royalties. It currently includes more than 15 writers' groups and 80 literary agencies, and serves a role similar to that of the American Society of Composers, Authors and Publishers (ASCAP) and the Broadcast Music Industry (BMI) for musical works. *See generally* John B. Kennedy and Shoshana R. Diveck, "Publishers, Authors Battle Over Electronic Rights," The National Law Journal C17 (Oct. 18, 1996).

[40] For an interesting examination of entertainment law cases and their application to electronic publishing, see Sidney Rosenzweig, *Don't Put My Article On Line!: Extending Copyright's New-Use Doctrine to the Electronic Publishing Media and Beyond*, 143 U. Pa. L. Rev. 899 (1995)

This brings me to my final point about the future of copyright clearance. We are currently entering a phase where clearance is not an easy task, and will remain a difficult one for the near future. As the bitter dispute over the need for additional royalties for electronic print rights demonstrates,[41] it may not be clear who has the ability to grant the necessary rights in a situation where the author is not the copyright owner. Many publishing and entertainment contracts may not have provided for electronic rights. Just as the advent of video tape led to disputes over the right to transfer motion pictures to videotapes without additional compensation,[42] so too the Internet and electronic media may lead to bitter disputes over royalty rights for this new medium. Once these disputes are resolved, however, predictability of rights should lead to greater facilitation of the clearance process.

In conclusion, although the Internet has the potential in the long run to facilitate copyright clearance, in the short term, it poses strong challenges to owners and users. The test will be in the law's ability to meet these challenges.

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[41] *See, e.g., Tasini v. New York Times*, *supra*, note 4 (pending lawsuit for royalties for electronic rights brought by diverse freelance authors.

[42] *See, e.g.*, *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851 (9th Cir. 1988) (license conferring right to exhibit film "by means of television" did not include right to distribute videocassettes for home viewing because VCRs for home viewing were not known or invented when the license was executed); *Barts v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 1150 (license of "exhibition rights … analogous to cinematography" included television rights since parties "had reason to know of the new medium's potential"); *Rey v. Lafferty*, 990 F.2d 1379 (1st Cir. 1993) (television rights do not include videocassette distribution rights); *ABKCO Music, Inc. v. Westminster Music, Ltd.*, 838 F.Supp. 153 (S.D.N.Y. 1993) (license included videocassette rights despite fact that videocassettes were not invented until after license because the parties were sophisticated); *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (1956) (moving rights do not include television).