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Fair Use on the Internet

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Fair Use on the Internet

Summary

The originating objective of copyright, as stated in the Constitution, was to promote the progress of science and the useful arts. Rewarding the labor of authors is viewed as furthering that objective. The Copyright Act serves this two-tier purpose by vesting in authors of protected works certain exclusive rights. The unauthorized use of copyrighted material constitutes an infringement of these rights, unless the use is excused by a statutory exception. By limiting these rights, the Copyright Act attempts to strike a fair balance between an author's exclusive rights and the public's interest in using copyrighted material. The fair use defense, a statutory exception to a copyright holder's exclusive rights, is integral to obtaining this balance, as it permits courts to avoid rigid application of a copyright holder's exclusive rights, when, on occasion, it would undermine the primary purpose of the Copyright Act.

The advent and spread of Internet technologies pose new challenges to Congress and the courts in maintaining a balance between the free flow of information over the Internet while still protecting intellectual property rights. The application of the fair use doctrine is one way courts endeavor to strike a proper balance.

In assessing whether a use of a copyrighted work is a "fair use," courts weigh four statutory factors – (1) the purpose and character of the use, (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 the copyrighted work.

A bright line approach to fair use is difficult, if not impossible to formulate, as courts examine fair use on a case by case basis. However, it appears that the new digital environment has not caused the courts to abandon or significantly deviate from traditional fair use analysis. Courts appear to be applying the fair use factors in a technologically neutral manner.

Specifically, courts have held web sites and other internet service providers liable for copyright infringements conducted through various internet-related functions, such as posting, linking, file sharing and storage, the maintenance of electronic bulletin boards, and video streaming. Fair use was successfully invoked in a case involving the creation and display of thumbnail images. This report reviews the development of fair use on the Internet, and will be updated as circumstances warrant.

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Fair Use on the Internet

I. Introduction.

Copyright owners enjoy exclusive rights over the use of their protected work, but not without certain exceptions.[1] These rights include the right to reproduce and distribute copies, prepare derivative works, and publicly perform and display the work.[2] The unauthorized use of copyrighted material constitutes an infringement of these rights, unless the use is excused by a statutory exception. "Fair use," one of these exceptions, is designed to permit the use of copyrighted works by the public "for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research, is not an infringement of copyright."[3]

In assessing whether a use of a copyrighted work is a "fair use," courts weigh four statutory factors – (1) the purpose and character of the use, (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 the copyrighted work.[4] A bright line approach to fair use is difficult, if not impossible, to formulate, as courts examine the fair use defense on a case by case basis.

Courts have ruled against fair use and have found copyright liability for infringements conducted through various Internet-related functions, such as posting, linking, file sharing and storage, the maintenance of electronic bulletin boards, and video streaming. Fair use, however, was successfully invoked in a case involving the creation and display of thumbnail images.

This report provides an overview of each fair use factor and analyzes them in the context of particular Internet technologies.

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[1]The Copyright Act protects original works of authorship fixed in a tangible medium of expression. 17 U.S.C. § 102(a).

[2] 17 U.S.C. §§ 106, 106A.

[3] 17 U.S.C. § 107 (these examples are illustrative rather than exclusive).

[4] Id. These factors were first articulated judicially in Folsom v. Marsh, 9 F. Cas. 342, 348 (D. Mass. 1841) (Story, J.).

II. Fair Use in a Nutshell

Fair use is an affirmative defense to a claim of copyright infringement.[5] It is a privilege, not a right. More specifically, it is "an equitable rule of reason, which permits courts to avoid rigid application of the copyright statute when, on occasion, it would" undermine the purpose of copyright.[6] "The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.' . . . To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."[7] Courts apply the four fair use factors with this over arching purpose in mind.

A. The Purpose and Character of the Work – 17 U.S.C. § 107(1).

The first factor in the fair-use analysis, the purpose and character of the infringing work, has two primary facets, whether the use serves a commercial purpose, and whether the new use is transformative.

Commercial Use. Commercial use of copyrighted material cuts against a finding of fair use. According to the Supreme Court "the crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain, but whether the user stands to profit from the exploitation of the copyrighted material without paying the customary price."[8] This standard does not require courts to make a clear-cut choice between two absolute choices – i.e., making a dispositive decision of whether a use is a "commercial" or "non-profit" per se. Rather, "the commercial nature of a use is a matter of degree, not absolute."[9] This places the question of commercial use on a continuum between two extremes: (1) a use that serves a non-commercial purpose by a non-commercial entity charging no fee whatsoever, and (2) a use that serves a commercial purpose by a commercial entity deriving its revenue directly from a fee charged for the copyrighted material.

Transformative Use. "The goal of copyright, to promote science and the useful arts, is generally furthered by the creation of transformative works."[10] For this reason, "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[11] What constitutes a "transformative work" is not subject to exacting definition.

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[5]To make out a prima facie case for copyright infringement, a plaintiff must show ownership of a valid copyright and unauthorized copying by the defendant. The copying must be substantially similar to the "expressive" aspects of the copyrighted material. Ideas, processes, and facts are not copyrightable.

[6] Stewart v. Abend, 495 U.S. 207, 236 (1990).

[7] Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50, *quoting* U.S. CONST. ART. I, sec. 8, cl. 8.

[8] Harper & Row Publishers, Inc. v. Nation Enterprises, Inc., 471 U.S. 539, 562 (1985).

[9]Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1262 (2d Cir. 1986).

[10] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

[11]Id.

However, as a general rule, if the new work "merely supersedes the objects of the original creation,"[12] it is not transformative, but if it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message," it is transformative.[13] Transformative uses add new information, new aesthetics, new insights and new understandings. Such uses may include criticizing the copyrighted work, "exposing the character of the original author, proving a fact," or representing the original work in order to defend or rebut it.[14]

B. The Nature of the Copyrighted Work – 17 U.S.C. § 107(2).

The second factor, the nature of the copyrighted work, recognizes that there is a hierarchy of copyright protection in which original, creative works are afforded greater protection than derivative works or factual compilations.[15] Also, the fact that a work is published or unpublished is a critical element of this factor.[16] The use of published works is more likely to qualify as fair use because the first appearance of the artist's expression has already occurred.

Thus, a finding of fair use will be couched between two extremes. Use of an unpublished, creative work weighs against fair use, while use of a published work relating factual material weighs in favor of fair use.

C. The Amount and Substantiality of the Portion Used – 17 U.S.C. § 107(3).

The third fair-use factor considers the amount and substantiality of the portion used in relation to the copyrighted work as a whole. "There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use."[17] Rather, this factor has both quantitative and qualitative components, under which courts have found a use to be unfair where the material used formed a "substantial percentage" of the copyrighted work or where the material was "essentially the heart of" the copyrighted work.[18] In applying this standard, the Supreme Court has held that this factor "must be examined in context," focusing on whether the extent of copying is "consistent with or more than necessary to further the purpose and character of the use."[19]

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[12] *Marsh,* 9 F. Cas. at 348.

[13] *Campbell,* 510 U.S. at 579.

[14] Pierre Leval, *Toward A Fair Use Standard,* 103 HARV. L. REV. 1105, 1111 (1990).

[15] *See Campbell,* 510 U.S. at 586.

[16] *See Harper & Row,* 471 U.S. at 564 (noting that the scope of fair use is narrower with respect to unpublished works because the author's right to control the first public appearance of his work weighs against the use of his work before its release).

[17] *Maxtone-Graham,* 803 F.2d at 1263

[18] *See* New Era Publications v. Carol Publishing Group, 904 F.2d 152, 158 (2nd Cir. 1990).

[19] *Campbell,* 510 U.S. at 590.

D. Effect on the Market Value for the Original – 17 U.S.C. § 107(4).

While courts frequently identify this as the most important element of a fair use analysis,[20] the legislative history cautions that it "must almost always be judged in conjunction with the other three criteria."[21] In addressing this factor, courts "consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market."[22] The Supreme Court has stated, "the only harm to derivatives that need concern us . . . is the harm of market substitution."[23] While a "work that merely supplants or supersedes another is likely to cause a substantially adverse impact on the potential market of the original," courts have held that "a transformative work is less likely to do so."[24]

III. Fair Use on the Internet

The advent and spread of Internet technologies challenges Congress and the courts to maintain a balance between the free flow of information and the protection of intellectual property rights. Application of the fair use doctrine is one way courts endeavor to strike the proper balance.

Merely browsing a web site containing copyrighted material may, theoretically, constitute copyright infringement. As one court has stated, "when a person browses a web site, a copy of the website is made in the computer's random access memory (RAM), to permit the viewing of the website's material. And in making a copy, even a temporary one," copyright's reproduction, distribution, and public display rights are

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[20] *See Harper & Row,* 471 U.S. at 566 (finding, in a case involving copyright infringement of unpublished material, that the fourth factor "is undoubtedly the single most important element of fair use"); Wright v. Warner Books, 953 F.2d 731, 739 (2d Cir 1991)(involving infringement of unpublished material), *citing* 471 U.S. at 566; Association of Medical Colleges v. Cuomo, 928 F.2d 519, 525 (2d Cir 1990)(involving infringement of published material), *citing* 471 U.S. at 566; Sundeman v. Seajay Soc'y, 142 F.3d 194, 206 (4th Cir 1998)(involving infringement of unpublished material), *citing* 471 U.S. at 566; Princeton University Press v. Michigan Document Servs., 99 F.3d 1381, 1385 (6th Cir 1996)(involving infringement of published material), *citing* 471 U.S. at 566; United Tel. Co. v. Johnson Pub. Co., 855 F.2d 604 (8th Cir 1988)(involving infringement of published material), *citing* 471 U.S. at 566; Hustler Magazine v. Moral Majority, 796 F.2d 1148, 1155 (9th Cir 1986)(involving infringement of published material), *citing* 471 U.S. at 566. *See also,* Consumers Union of United States, Inc. v. General Signal Corp., 724 F.2d 1044, 1050 (2d Cir 1983)("the fourth factor . . . is widely accepted to be the most important").

[21] H.R. Rep. No. 83, 90th Cong.,1st Sess. 33, 35 (1967).

[22] *Harper & Row,* 471 U.S. at 567.

[23] Id.

[24] Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F.3d 596, 607 (9th Cir. 2000), *citing Campbell,* 510 U.S. at 591, and *Harper & Row,* 471 U.S. at 567-69.

potentially violated.[25] However, courts have acknowledged that while browsing may, on its face, infringe on copyright, it will, in most foreseeable cases, be a fair use.[26]

Courts have held web sites and other Internet service providers liable for infringements conducted through various Internet-related functions such as linking, media streaming, file sharing and storage, the maintenance of electronic bulletin boards, and posting. Fair use, however, was successfully invoked in a case involving the use of low resolution, "thumbnail" copies of photographic images. Notwithstanding the low number of successful fair use claims, courts appear to be applying the fair use factors in a technologically neutral manner. That is, the new digital environment has not caused the courts to abandon or significantly deviate from traditional fair use analysis.

A. Linking and Framing

"Linking," a ubiquitous Internet function, comes in two varieties: outline links and inline links. When a user clicks on an outline link, the browser displays a new web site. When a user clicks on an inline link, the browser pulls content – e.g., an image file, textual material, or audio stream – from another web site into the linking site for performance or display. "Framing" is substantially similar to inline linking and occurs when material from a link is displayed within a "frame" or window border of a page on the linking web site. The use of these technologies to appropriate copyrighted material raises a number of issues.

Outline Links. An outline link that connects a user to a site containing infringing material may further infringing reproductions, performances, distributions, and displays by others.[27] If a linked site contains infringing material, the link may give rise to secondary liability for contributory or vicarious infringement on the part of the linking site, particularly if the linking site is promoting the copying, transmission, public display or public performance of material at the linked site. To the extent that the linked material is not infringing in itself, the reproduction, distribution, performance, or display that results from the link may not be authorized, and therefore may constitute an infringement in its own right.[28]

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[25] Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290 (D. Utah 1999).

[26] *See* Religious Technology Center v. Netcom On-Line Communication Services, 907 F. Supp. 1361, 1378 (N.D. Cal. 1995) (acknowledging in dicta that much of digital browsing constitutes infringement, but would, in most cases, qualify as a fair use or an innocent infringement).

[27] 17 U.S.C. § 512 provides a safe harbor to online service providers who set up out links to infringing material without knowledge of the infringement.

[28] *See, e.g., Intellectual Reserve*, 75 F. Supp. 2d at 1290 (granting preliminary injunction under a theory of contributory copyright infringement against a web site that provided outline links to infringing material at another web site), and *compare with*, Bernstein v. JC Penney, Inc., 50 U.S.P.Q.2d (BNA)1063 (C.D. Cal. 1998)(denying a preliminary injunction against a non-infringing outline link to infringing material).

It is unclear whether an outline link might also be considered the creation of an unauthorized

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The fair use doctrine may apply to many outline links, because it is likely the case that many site owners will want their material disseminated as widely as possible. However, where a link causes harm, fair use may not be appropriate. For example, unauthorized links may burden the linked site's server by increasing traffic to the web site. To the extent that the links pull in users that the linked site is not targeting, the owner of the linked site could argue that such traffic is unwanted and prevents the distribution of copyrighted material to its desired audience. Specific kinds of outline links, such as deep linking, may raise other issues.

Deep Linking. Most web sites have a "home" page to which all subsidiary pages are linked. A home page is akin to a front door that users open to gain access to the web site's contents. Often, a web site's commercial applications, such as advertising and other commercial solicitations, are displayed as the user enters the site's front door and proceeds through the first few subsidiary pages. A deep link can bypass a web site's introductory pages, and therefore its commercial applications, sending a user directly to the site's content or particular service

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In *Kelly v. Arriba Soft Corporation,*[29] the lower court, in dicta, commented on the use of deep links by a "visual search engine." The court noted that deep links provided by a search engine specializing in finding, indexing, and referring users to images on the Internet would not violate the reproduction or public display rights of a photographer, whose photographs were made available by the search engine. The court acknowledged that the search engine's links allowed users to bypass the plaintiff's "front page" and thereby made it less likely that users would see all of the plaintiff's advertisements and promotional messages. However, this, the court noted, was insufficient evidence of harm or adverse market impact for an otherwise fair use of the plaintiff's copyright material.

On appeal, the Ninth Circuit Court of Appeals addressed the material issues of this case, which involved the search engine's practice of inline linking to and framing of the photographs, as well as its use of low resolution, thumbnail images to depict the photographer's images. These aspects of the case are discussed immediately below.

Inline Links and Frames. Inline links and frames appear more problematic than outline links, in general, and deep links, in particular. As this technology allows a web site to appropriate copyrighted material by pulling content from another site into its own, an unauthorized inline link or frame may infringe on the right of reproduction, display, or performance, or may constitute the creation of an unauthorized derivative work.

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[28](...continued)
derivative work. Viewed in one way, an outline link merely "references" another work, and does not constitute a derivative work. On the other hand, the linking site could be viewed as a virtual collective work, where links incorporate the material from the linked site into its own. Insofar as the linked content enhances the linking site content, it is arguably the case that the linking site is "based upon" the linked site and therefore constitutes a derivative work.

[29] 77 F. Supp. 2d 1116 (C.D. Cal. 1999).

Kelly v. Arriba Soft Corp,[30] discussed above, involved inline linking and framing by a visual search engine of copyrighted photographs. In response to a user's query, Arriba, the search engine, displayed the results of its search as a series of "thumbnail" images. As discussed above, Arriba would then deep link its users to the full sized images. However, before Arriba had initiated this practice, a user could click on the thumbnail and view the full version within the context of the Arriba's web site.

The Ninth Circuit parsed the case into two distinct issues. The first, which is discussed in subsection B, concerned the reproduction of the photographs as thumbnail images. The second involved the use of inline links and frames to display those images within the context of the search engine's web site.

The search engine's display of the full-sized images was held not to be a fair use.[31] Under the first analytical factor, the court stated that pulling the images into the search engine's web site did not serve a different purpose or add new expressive elements to the photographs. The practice harmed the photographer's existing market by discouraging traffic to his web site, where he sold advertising space as well as books and travel packages. In addition, the use harmed the photographer's derivative markets. For instance, he could sell or license his photographs to other web sites or to a stock photo database, which then could offer the images to its customers. Accordingly, the court held that the unauthorized inline linking to or framing of copyrighted photographic images was not a fair use, but constituted an infringement of a copyright holder's public display right.

B. Thumbnails.

"Thumbnails," imprecise copies of low resolution, scaled down images, are widely exploited by web sites. Generally, a website will use a thumbnail as a reference device, and embed a link in the image, which will, in turn, send a user to a high resolution, full scale version of the image. When used for this purpose, a thumbnail of an image may potentially infringe on a number of exclusive rights, including the reproduction, distribution, public display rights, and, arguably, the right to make derivative works. As of the date of this report, only one reported case, *Kelly v. Arriba*, has addressed copyright issues related to the creation and use of thumbnail versions of copyrighted images.

In *Kelly*, the court found that the use of thumbnail images implicated the photographer's reproduction right, but was, nonetheless, a fair use.[32] While the use of the images served a commercial purpose, the search engine neither used the images to directly promote its web site nor tried to profit by selling them. As the search engine did not directly benefit from the images and did not use them in a "highly exploitative way, the commercial nature of the use only slightly weighed

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[30] 280 F.3d 934 (9th Cir. 2002).

[31] *See* id. at 940 - 947.

[32] *See* id. at 941 - 944.

against a finding of fair use."[33] The thumbnails also served a transformative use, since they "were much smaller, lower-resolution images that served an entirely different purpose than [the] original images, [functioning] as a tool to help index and improve access to images on the Internet ... ."[34] For similar reasons, the court found that the thumbnails did not have an adverse impact on the photographer's market, but would enhance his market by creating a demand for the larger images.

C. Streaming Media

Streaming provides access to a wide variety of visual and musical works, allowing users to listen to retransmissions of radio programs, concerts and other musical events and services, as well as view music videos, television shows, movies, cartoons, and other transmissions of visual content. A single transmission of music or video can simultaneously infringe on a copyright holder's reproduction, distribution, public display and performance rights, in addition to the right to make derivative works.

In *Video Pipeline v. Buena Vista Home Entertainment,*[35] the defendant, Video Pipeline, created and streamed movie trailers to its clients, video retailers, for exhibition to their customers. The court held that this practice infringed on the plaintiff's reproduction, public performance, and distribution rights, as well as its right to make derivative works. The streams were not defensible under the fair use doctrine. The court found that the use furthered a commercial purpose, since the service derived a direct financial benefit from the streams – its sole purpose was to advertise and promote video rentals. Moreover, the use was not transformative, since no new "creative ingenuity" was involved in preparing the previews, aside from "snipping and clipping."[36] Even though the length of the previews were usually less than two minutes, whereas the length of the motion pictures was over one and a half hours, the small amount used did not sway the court to find in favor of fair use. From a qualitative perspective, the court found the previews relied too heavily upon the "expressive value" of copyrighted works – e.g., their themes, plots, character, and overall premise. In doing so, the clips went to the heart of the copyrighted works, coopting their essence. Accordingly, despite an indeterminate finding on the question of market impact,[37] the court rejected Video Pipeline's fair use argument.

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[33] Id. at 941.

[34] Id.

[35] 192 F. Supp. 2d 321(D.N.J. 2002).

[36] Id. at 324 (finding that creating motion picture previews "involved no new creative ingenuity, apart from snipping and slicing that undoubtedly occurred in selecting the excerpts to be viewed").

[37]On the one hand, the previews had a negative market impact since the presence of the previews on the Internet undermined the copyright holder's right to determine how, when, where and to whom to market its motion pictures. On the other hand, the streams helped promote video rentals and sales of the copyright holder's motion pictures.

D. Peer-to-Peer File Sharing

File sharing refers to a process in which devices controlled by end users, known as peers, interact directly with each other to transfer files between them, rather than using an intermediary, such as a central server, to transfer files. Music, literature, motion pictures, photographs, and other examples of copyrightable content can be traded over a file sharing, or "peer-to-peer" network. These networks are architecturally diverse. The design of some file-sharing networks employs a central server to house a publicly accessible and searchable index of files available over the network. Other designs eliminate centralized servers altogether. In these systems, a user joins an immediate community of peers and searches within that community. The user's query goes through the immediate community first, and if it is not satisfied, the query then goes to another community of peers.

When peers engage in the unauthorized trade of copyrighted material, the copyright holder's reproduction and distribution rights are implicated. The Internet service that provides for the functionality of these networks may be held secondarily liable for the infringing acts of its users, even though it does not reproduce, store, or directly distribute copies of the infringing files on its servers.

In *A&M Records v. Napster,*[38] various record companies brought an infringement action against Napster, an Internet service that facilitated the sharing of digital music files among its users. The files themselves–the infringing material–always remained on user systems and never passed through Napster's system. However, Napster maintained a central server that indexed the contents of the network. This feature allowed users to search for particular files of interest and to initiate a peer-to-peer transfer of those files. This functionality was the basis for holding Napster secondarily liable for the infringing acts of its users.

Rejecting Napster's argument that the users were making fair use of the record companies' copyrighted material, the court emphasized that the use was commercial because the users of the network received for free what they normally would have to buy, namely, compact discs. It was not transformative, since the service added no new creative or expressive elements to the copyrighted material. Moreover, the court held that the service not only harmed the copyright owner's existing market for the sale of musical compact discs, but also raised barriers to the copyright owner's entry into the same market.[39]

E. Posting and Storage

Making copyrighted works publicly available over the Internet raises obvious copyright issues. The most common means of doing this is by storing copyrighted works on publicly accessible servers or by posting copyrighted material on Internet-related services, such as bulletin board services or web sites. These uses can violate

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[38] 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd* 239 F.3d 1004, 1020 (9th Cir. 2001).

[39] *See* id. at 912 - 913, *aff'd* 239 F.3d at 1017 (noting further that "lack of harm to an established market cannot deprive the copyright holder of the right to develop alternative markets for the works").

a host of exclusive rights, but may, in some circumstances, constitute a non-infringing fair use.

Storage of Digital Files. In *UMG Recordings v. MP3.com,* various record companies sued an Internet company, MP3.com, for storing personal MP3 music files created from personal copies of compact discs sold by the plaintiffs.[40] By opening an account with MP3.com, an individual could store his or her MP3 music files on MP3.com's central servers for play at a later time and place. MP3.com argued that the copying necessary to provide this service was a "fair use." Rejecting this argument, the court found that copying the recordings to facilitate their retransmission through another medium was not a "transformative" use, nor was it a time-shifting transformative use (e.g., video taping a television program for viewing at a later time). The court also held that the recordings at issue were at the core of intended copyright protection and the amount copied was excessive. Most importantly, the court concluded that MP3.com's business model had an adverse impact on the recording companies' market for selling compact music discs as well as on other derivative markets.

Web Site Postings. In *Veeck v. Southern Building Code Congress International,*[41] the Fifth Circuit Court of Appeals held that an unauthorized posting of copyrighted "model codes" for municipalities and localities infringed on the owner's reproduction and publication rights. Without the defendant's permission, plaintiff posted defendant's copyrighted model building codes on plaintiff's nonprofit web site.[42] Regarding the plaintiff's fair use argument, the court noted that when "use of a copyrighted work is noncommercial, defeating a fair use defense requires 'proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.'"[43] The potential harm to the defendant precluded plaintiff's asserted noncommercial fair use of the copyrighted codes, since the "posting of the codes on the Internet could prove harmful by reducing the defendant's market and depriving it of income used in its socially valuable effort of promulgating and revising model codes."[44]

Bulletin Board Services (BBS). A number of early infringement cases on the Internet involved the unauthorized posting of copyrighted material on electronic bulletin board services.[45] A bulletin board service (BBS) is a computerized version

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[40] 92 F. Supp. 2d 349 (S.D.N.Y. 2000)

[41] 241 F.3d 398 (5th Cir. 2001)

[42] Plaintiff asserted that copyright protection was not warranted after some of the towns enacted the model codes into law. The court held that defendant's codes did not enter the public domain merely by being enacted into law, and no due process or policy concern excused plaintiff's infringement.

[43] Id. at 410, *quoting* Sony Corp. v. Universal City Studios, 464 U.S. 417, 451 (1984).

[44] *Veeck,* 241 F.3d at 410.

[45] *See, e.g.,* Playboy Enterprises, Inc. v. Webbworld, Inc., 991 F. Supp. 543 (N.D. Texas 1997); Playboy Enterprises v. Russ Hardenburgh, 982 F. Supp. 503 (N.D. Ohio 1997); Marobie-Fl, Inc. v. Nat'l Ass'n of Fire & Equip. Distribs., 983 F. Supp. 1167, 1176-79 (N.D.

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of bulletin boards found in stores and other public places where people can leave messages. Generally, BBSs are run by local computer user groups. Essentially, a BBS is a host computer that is accessible by direct dial and can operate independent of the Internet. However, many BBSs also have web sites which connect the BBS to other similar services and interested users.

Los Angeles Times v. Free Republic,[46] a recent case, involved a bulletin board that posted the entire text of many news articles originally published on two newspapers' web sites. The purpose of the posting was to encourage BBS members to add commentary and criticism. The newspapers sued for copyright infringement. The BBS operator sought summary judgment on its fair use defense, which the court rejected. The court found that the market for viewing articles online, for selling copies of archived articles, and for licensing others to display or sell the articles would be adversely affected by the availability of verbatim copies on the defendant's web site. Although the web site was non-commercial and promoted critical comment, the defendant failed to show that verbatim copying of the articles was necessary to achieve its purposes.

In a related issue, the court in *Religious Technology Center v. Netcom On-Line Communication Services* determined, on summary judgment, whether an Internet service provider (ISP) that allowed a BBS to reach the Internet was liable for the infringing activity of the BBS's users.[47] While the court rejected a theory of direct copyright infringement, it held that the ISP may be held secondarily liable for the infringing BBS postings it stores and disseminates over its servers. On the question of whether the ISP had a valid fair use defense, the court determined that while the provision of Internet access is commercial, it "also benefits the public in allowing for the functioning of the Internet and the dissemination of other creative works, a goal of the Copyright Act."[48] The court went on to conclude that because the Internet service provider's "use of copyrighted materials served a completely different function than that of the [copyright holder], [the first] factor weighs in [the Internet service provider's] favor."[49] Turning to the third prong, the court found that the service provider "copied no more of the plaintiffs' works than was necessary to function as an Internet service provider."[50] It "had no practical alternative to carry out its socially useful purpose, since the prescreening of [Internet traffic through its routing servers] for potential copyright infringement" was not feasible.[51] However, there remained a material issue of fact as to the extent to which the ISP's use

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[45](...continued)
Ill.1997); Sega Enterprises Ltd. v. MAPHIA, 948 F. Supp. 923 (N.D. Cal. 1996); and Playboy Enterprises v. Frena, 839 F. Supp. 1552, 1558 (M.D. Fla. 1993).

[46] 2000 U.S. Dist. LEXIS 5669 (C.D. Cal. 2000).

[47] Religious Technology Center v. Netcom On-Line Communication Services, 907 F. Supp. 1361, 1378 (N.D. Cal. 1995).

[48] Id. at 1379.

[49] Id. at 1380.

[50] Id. at 1381.

[51] Id.

displaced the copyright holder's market. Therefore, the court refused to grant summary judgment on the fair use issue to the ISP.

IV. Conclusion

Although the Internet has not caused the courts to abandon or significantly deviate from traditional fair use analysis, the law is still developing. As the courts develop this law, this report will be updated.