January 1997

A Digital World Out of Balance

Sean R. Calvert
NOTES

A DIGITAL WORLD OUT OF BALANCE*

Sean R. Calvert†

TABLE OF CONTENTS

I. THE NEED FOR PROTECTION OF DIGITAL WORKS .......................... 548
II. THE TRANSMISSION RIGHT ........................................................ 551
III. FAIR USE .................................................................................. 556
IV. FIRST SALE DOCTRINE ............................................................ 561
V. ON-LINE SERVICE PROVIDER LIABILITY ..................................... 564
VI. CONCLUSION ............................................................................. 569

Copyright law, by virtue of its protection of intellectual capital and especially particular forms of expression, is in a constant state of flux.¹ Technological advances in two disparate areas continue to redefine copyright law while maintaining the crucial balance between the rights of copyright owners and those of users. One area of technological growth is that of reproduction and dissemination technology. Copyright law must acknowledge and conform to changes in the way we make and distribute copies of works and the ease with which this is accomplished.² Whether it be the printing press or the photocopier, videocassette recorders or digital audio tape recorders, copyright law must respond to technological advancements by protecting the copyright holders' interest in their creations while allow-

* Copyright © 1996 Sean R. Calvert.
† Sean R. Calvert, J.D. May, 1997 with high tech certificate. The author would like to thank Professor Howard Anawalt for his thoughtful comments and criticism of this article. This work is dedicated to the author's father for his support and emphasis on intellectual curiosity.

545
ing users to benefit from new technology.3

One other force shaping copyright law is the development of new media for the expression of authorship. When Congress enacted the 1909 version of the Copyright Act,4 enjoying dramatic works in the privacy of one’s home, without great effort or expense, was inconceivable. The advent of the VCR has made in-home enjoyment of dramatic performances common. The widespread availability of these new media has forced the law to adapt in order to maintain the balance between the rights of authors and the public. That adaptation is crucial to copyright law. The same is true of the music recording industry. Digital audio tapes and compact disks have made it possible to listen to an almost exact duplication of a full orchestra while sitting in our living rooms without the inconvenience of actually building an orchestra pit next to the couch.

We are presently poised for yet another monumental change in the structure of copyright law. The proliferation of digital technology, particularly the creation of linked data networks spanning the world, has created a fertile environment for the quick and easy reproduction and distribution of a work to millions all over the world.5 In response to this challenge, the Working Group on Intellectual Property of the Information Infrastructure Task Force (Working Group) has released a set of proposed changes to the Copyright Act in an attempt to adapt copyright law to this new technology. The report (White Paper) suggests several changes to the Copyright Act.

The minor changes to the Copyright Act proposed by the White Paper may be the most troubling. The shift that is presently underway is fundamental to the means of producing, duplicating, and transmitting copyrightable works.6 The White Paper’s reliance on minor alterations to the Act severely underestimates the scope of this shift. It further ignores the present tension in copyright law by single-mindedly citing to only the cases supporting its view of where copyright should be.7 The White Paper ignores contrary authority

5. WHITE PAPER, supra note 2, at 12.
6. Peters, supra note 3, at 341 (noting that the present stress on the Copyright Act is nothing new and that the emergence of new technologies over the past fifty years has “magically transform[ed] our lives”).
and often cites cases for only that portion of the holding it wishes to use. This approach has resulted in a report lacking serious analysis of the policy behind the Copyright Act.

The Constitution of the United States confers upon Congress the power 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." It is from this clause that copyright protection flows. Congress enacted the Copyright Act to promote useful arts and sciences by securing for the lifetime of the author plus fifty years several exclusive rights with regard to their writings. These rights exist as an incentive to create and further the arts. Thus, while the Constitution calls for exclusive rights to be granted to the author, those rights only exist to the extent they are necessary as an economic incentive for creation. There is no basis in the Constitution for authors to have complete control over the works they create.

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, ... but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.

It is clear from the language above that the interest in protecting the rights of authors is secondary to the interest in maintaining public access to creative works. This is the basis of the balancing test inherent in copyright. There must be rights sufficient to provide an incentive to create new works but not to an extent that hinders access to the works.

The Working Group's one-sided approach leads to an interpretation of precedent that supports the conclusion that copyright law protects a copyright owner's interests in digital works. For the most part, the cases that were the basis of the Working Group's report

(1994).

8. In particular note the Working Group's reading of Sony v. Universal City Studios, discussed later with regard to fair use. See infra Part III.


concerned nondigital media. The blanket application of the decisions in these cases to a wholly different medium is questionable at best. The expansive reading the Working Group applies to these cases ignores the balance that courts have consistently tried to maintain between the rights of copyright owners and users.15 Because the seemingly minor changes to copyright law that the Working Group suggests derive from the Working Group's reinterpretations of established law, the changes could shift the balance basic to the Copyright Act severely in favor of copyright owners.

This note discusses whether it is possible to adopt the minor changes suggested by the Working Group and broaden the scope of copyright protection to cover digital works while maintaining the balance necessary to permit public access and use.

This note will address four areas of the Working Group's analysis. Part I discusses the need for protection of intellectual property in digital environments both for copyright owners and for users. Part II addresses the Working Group's suggested creation of a new digital transmission right in light of its reading of existing case law. Part III discusses the implications for the fair use doctrine of the Working Group's reading of selected cases. Part IV is an analysis of the first sale doctrine for digital works in the wake of the White Paper. Part V suggests some technological solutions for the on-line service provider dilemma. Finally, Part VI considers the aftermath of the White Paper and the resultant congressional and international debate concerning application of its recommendations. Part VI concludes with how the suggestions of the Working Group will affect copyright law.

I. THE NEED FOR PROTECTION OF DIGITAL WORKS

The exponential growth of the Internet during the past decade16 provides copyright owners with an unprecedented opportunity to fundamentally alter the way they market their works. Foreseeing its potential, several companies have begun to conduct business over the Internet.17 Undoubtedly, the number of companies doing business over the Internet will continue to grow.

15. Id.
Some companies have developed Internet sites through which customers can order the company’s product via electronic mail.\textsuperscript{18} The company either bills the customer or takes the customer’s credit card number in encrypted form on-line.\textsuperscript{19} Once the payment is settled, the company ships the product.\textsuperscript{20} This is a mixed approach because it places the company on the Internet but does not treat the Internet as its major avenue of sales. Of course, for some companies, primarily those with a physical product, this is the only way to do business on the Internet.\textsuperscript{21} Other companies are realizing the amazing potential of the Internet for decreasing or eliminating the costs associated with maintaining resellers, warehouses and other, more traditional modes of distribution.\textsuperscript{22} This bolder strategy accepts the risks of uncertainty that come with doing business on the Internet, with the chance to multiply one’s returns.\textsuperscript{23}

For companies that sell digitized products, the Internet offers a distribution system without the typical costs.\textsuperscript{24} A minimal investment allows a company to set up a site on the Internet,\textsuperscript{25} usually a page on the World Wide Web,\textsuperscript{26} and sell their product directly from that site. This eliminates almost all the per unit costs associated with product distribution.\textsuperscript{27} There is no longer the need for warehouses or for networks of wholesalers and retailers.\textsuperscript{28} The per unit cost for this method is almost nil.

Because the reproduction of digital works can be quick and easy,\textsuperscript{29} companies can respond to customer demand instantaneously, without the costs of increasing and improving the production of a physical product.\textsuperscript{30} Coupled with a practically free distribution net-

\begin{itemize}
  \item \textsuperscript{18} Id. at 138.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Craig W. Harding, \textit{Trends in Electronic Commerce: Doing Business Over the Internet}, 452 PLI/PAT 509, 513 (1996).
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} Id.
  \item \textsuperscript{24} Stevenson, \textit{supra} note 17, at 128.
  \item \textsuperscript{27} Stevenson, \textit{supra} note 17, at 128.
  \item \textsuperscript{28} Id.
  \item \textsuperscript{29} \textit{White Paper}, \textit{supra} note 2, at 11.
  \item \textsuperscript{30} Id. at 9.
\end{itemize}
work, per unit cost drops considerably. In all probability, the cost savings in doing business over the National Information Infrastructure (NII) will eventually shift the way most companies do business away from a physical distribution model and toward some method of digital distribution. The ability to reach consumers at home or at work will also drive companies unable to take advantage of the digital economies, due to the physical nature of their product, to establish some presence on the Internet.

Obstacles exist, however, that may prevent this shift from occurring. One of the most important problems is how to protect the dealings between a company and its customers. A concern of almost as much importance is the protection afforded a company's product. Companies will likely delay turning to the Internet until they can be confident that works are equally protected when transmitted digitally as when they are distributed physically. While the benefits to a company which switches to the Internet are enormous, the risks the switch entails are potentially overwhelming. With no protection for the distribution of digital works, except in contract, there is a strong probability that illicit copies of its product will reduce the company's market share. This, combined with the present questions about the enforceability of electronic adhesion contracts, presents a company interested in doing business over the Internet with a severe problem. A further concern is that the digital nature of the work makes it almost impossible, under the present scheme, to ensure that copies distributed by a third party have the same quality as the original. Thus, a company's market share could be adversely affected by illicit copies.

Aware of these concerns, the Working Group attempts to alter the Copyright Act to protect digital works from the potential hazards.

31. Stevenson, supra note 17, at 127.
32. Id. at 123.
33. From Wire Reports, Net Security is a Real Issue with Companies, SAN DIEGO UNION-TRIB., May 14, 1996, at 17, 18.
34. WHITE PAPER, supra note 2, at 10.
35. Id.
36. Id.
37. ProCD, Inc. v. Zeidenberg, 89 F.3d 1257 (7th Cir. 1996). Many of these uncertainties should be resolved with the publication of the Uniform Commercial Code § 2B.
38. One of the benefits of digital works is that the copy is of the same quality as the original. Because of the malleability of digital works, however, there exists the potential for a third party to alter an original work and then post it to the Internet. The resulting altered work can have severe consequences for the author of the original work.
39. WHITE PAPER, supra note 2, at 10.
In that respect, the alterations proposed in the White Paper are laudatory. The proposed changes go well beyond correcting for the risks associated with digital works, however, and consequently convey a patent like monopoly over the works. This unfortunate outcome reflects an incorrect reading of the scope of copyright law. It results from the Working Group’s reliance on questionable precedent which allows substantial changes in copyright law without reforming the Copyright Act.

II. THE TRANSMISSION RIGHT

The Working Group relies heavily on a line of cases, starting with MAI Systems Corp. v. Peak Computer (MAI), which held that loading a work into the random access memory (RAM) of a computer creates a copy sufficiently fixed to violate the reproduction right. All the cases cited by the Working Group further rely on the Final Report of the National Commission on New Technological Uses of Copyrighted Works (CONTU Report) for their conclusions regarding the fixation of a work in RAM. Reliance on the CONTU Report may be misplaced as there is almost no legislative history with regards to Congress’s adoption of the report’s recommendations. On the other hand, two years prior to the release of the

40. See Pamela Samuelson, Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob, and Sega, 1 J. INTEL. PROP. L. 49, 56-57 (1993) (discussing how limiting the scope of copyright protection furthers the societal purposes of copyright law by preventing the recognition of broad rights in publishers or authors, and stating that “the ultimate purpose of copyright is not the maximization of financial rewards to copyright”).

41. MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993).

42. RAM refers to both dynamic and static RAM although there may be differences in how one should treat them under a MAI analysis.


45. The only legislative history with regard to Congress’s acceptance of the rule that loading of a work into the memory of a computer is contained in a short paragraph in a committee report, which merely states that the Act “embodies the recommendations of [the CONTU] with respect to clarifying the law of copyright of computer software.” H.R. REP. No. 96-1307, pt. 1, at 23, reprinted in 1980 U.S.C.C.A.N. 6460, 6482 [hereinafter H.R. REP. No. 1307].
CONTU Report, Congress made it clear that works are not sufficiently fixed if they are "purely evanescent or transient" in nature, "such as those projected briefly on a screen, shown electronically on a television or cathode ray tube, or captured momentarily in the 'memory' of a computer."\(^{46}\) The decisions cited by the Working Group relied on this blanket adoption of the CONTU Report despite specific Congressional language to the contrary.

The decisions cited by the Working Group also overemphasize the verbiage in the definition of "fixed" in § 101 of the Copyright Act.

[By] showing that Peak loads the software into the RAM and is then able to view the system error log and diagnose the problem with the computer, MAI has adequately shown that the representation created in the RAM is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."\(^{47}\)

Once a software program is loaded into a computer's RAM, useful representations of the program's information or intelligence can be displayed on a video screen or printed out on a printer. And this can be done virtually instantaneously once loading is completed. Given this, it is apparent that a software program residing in RAM is "stable enough to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."\(^{48}\)

While the courts in both instances were correct to look to the wording of the statute to determine whether loading a work into RAM constitutes creation of a copy, there are several strong arguments against such a simple application.\(^{49}\) Aside from Congress's statement that loading a digital work into RAM does not meet the


\(^{47}\) MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993).


\(^{49}\) This note does not address the possibility of using § 117 to solve this problem as it has been thoroughly discussed. See Carol Stovisky, MAI Systems Corp. v. Peak Computer, Inc.: Using Copyright Law to Prohibit Unauthorized Use of Computer Software, 56 OHIO ST. L.J. 593 (1995); Michael E. Johnson, The Uncertain Future of Computer Software User's Rights in the Aftermath of MAI Systems, 44 DUKE L.J. 327 (1994). Further, the language of that section does not apply to the present question, as it is limited to computer software. Note, however, that PTO Commissioner, Bruce Lehman, undercut the Working Group's reading of MAI when at the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions he referred to § 117 as limiting the scope of copyright protection for transitory copies. See News from WIPO (Dec. 9, 1996) <http://www.hrrc.org/wr_129.html>.
fixation requirement, other problems exist regarding the present understanding of fixation. The courts’ reliance on the “perceived, reproduced, or otherwise communicated” language could be interpreted to apply to the display of a work on a screen regardless of whether a copy is generated in RAM. A screen display is not the original work, but merely a display, and it is perceptible, thus meeting the first part of the definition of fixation. Such an interpretation, however, would contradict the specific intent of Congress, and would be against any reasonable interpretation of what constitutes a copy or phonorecord.50

Even more troublesome is the fact that strict reliance upon the language the courts relied upon could lead to the illogical conclusion that a copy of a work stored on a hard drive or other storage media is not fixed within the meaning of § 101. This is because, under the courts’ interpretation, only the copy of the work located in RAM can be “perceived, reproduced, or otherwise communicated.”51 A copy of a work stored in a computer storage media such as a hard disk or tape cannot really be perceived, reproduced, or altered. To do anything with the copy of a work located on a permanent storage medium, it is generally necessary to first make a RAM copy, and it is generally only the RAM copy which is capable of perception, reproduction, or communication. One may then manipulate the RAM copy and save it back onto the storage device thus altering the original work. From the perspective of the copyright owner and the user, however, it is the copy of a work on permanent storage media which is critical for infringement purposes.52 The copy of a work in RAM is simply a tool to utilize the permanent work.

The more accurate interpretation of the definition in § 10153 of what constitutes a “fixed” work is that “perceived, reproduced, or otherwise communicated” refers to the same matters as that language in § 102. Section 102 clarifies the meaning of this clause by appending the language “either directly or with the aid of a machine or

52. The RAM copy could be critical from the copyright owner’s perspective, since that is the copy which allows the user to infringe the copyright. As a practical matter, however, the limited life of works stored in RAM limits their functionality and thus the damage done to the copyright owner.
device." Thus, the definition of "fixed" in § 101 should be read to incorporate the restrictive language of § 102. This interpretation would lead to the more logical conclusion that works in a storage medium, such as a hard drive, are perceivable and reproducible with the aid of the computer, and are thus fixed for purposes of the Copyright Act. Copies of works which reside temporarily in RAM are simply the means by which the machine makes viewable the work fixed in another storage medium and are not themselves copies.

This understanding has already been applied at least partially. Under the present definition, digital works could not qualify as being "fixed," since they are not inherently perceivable or reproducible. The conclusion that a digital work meets the fixation requirement requires that the § 101 definition be modified by the language "either directly or with the aid of a machine or device." The decision in Religious Technology Center v. Netcom On-Line Communication Services, Inc. supports this interpretation:

Browsing technically causes an infringing copy of the digital information to be made in the screen memory. MAI holds that such a copy is fixed even when information is temporarily placed in RAM, such as the screen RAM. The temporary copying involved in browsing is only necessary because humans cannot otherwise perceive digital information. It is the functional equivalent of reading, which does not implicate the copyright laws and may be done by anyone without the permission of the copyright owner.

The court continued to state that even if digital browsing could somehow be distinguishable, digital browsing still falls within fair use.

The White Paper's recommendations, in conjunction with the precedent set by the MAI and Triad cases, could upset the traditional balance between users and copyright owners. If, as the courts have held and as the Working Group proposes, loading a digital work into RAM constitutes creation of a copy, then users will lose several of

---

56. Id.
57. Id. But see Sega Enters. Ltd v. MAPHIA, 1996 WL 734409 *7 (N.D. Cal. 1996)
59. Id.
60. See MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993); Vault Corp. v. Quaid Software Ltd., 847 F.2d 255 (5th Cir. 1988); Advanced Computer Serv. v. MAI
the basic privileges copyright law grants them. The Working Group aptly proposes to expand the distribution right to include digitally transmitted works.61 However, broadening such rights based on the assumptions of the Working Group would allow copyright owners the right to control individual uses or viewings of a work.62

The White Paper proposal blurs the line between browsing and copying a work. Because all works carried over the Internet must be downloaded to the searching computer’s RAM before viewing,63 it is possible, under the Working Group’s interpretation, to violate a copyright owner’s rights simply by browsing a work. Traditionally, viewing a work alone is not enough to violate the copyright owner’s distribution or reproduction rights.64 Under the Working Group’s understanding, if a user must load a copy into RAM prior to viewing, browsing a digital work is synonymous with copying the work.65 This would enable copyright owners to circumvent the statutory constraints that allow them to prevent only public displays or performances of a work. Since every performance or display of a work via the Internet would be a distribution and reproduction in contravention of the owner’s rights, the copyright owner would be able to control displays or performances of works whether they be public or private.

Another problem is that works must pass through and be stored in the RAM of various computers which act as servers in order to be transmitted over the NII.66 The Working Group’s proposed adoption of the MAI line of cases, in combination with its discussion of on-line service provider liability,67 leads to the conclusion that all such intermediary copies would be infringing. This serves no useful purpose, as the copies are actually only temporary. The courts following MAI, however, refuse to look at the actual conditions under which the copying occurs. Instead, courts look only at the hypothetical situation that involves loading a copy into RAM and then leaving it there.68 This approach was properly rejected by the court in Religious Sys. Corp., 845 F. Supp. 356 (E. D. Va. 1994); Triad Sys. Corp. v. Southeastern Express Co. 1994 WL 446049 (N.D. Cal. 1994).

62. This is very possible, considering the Working Group’s approach to RAM copies and its reading of the effect of a licensing system on the fair use defense.
64. Id.
65. White Paper, supra note 2, at 58.
66. Id. at 59 n. 205.
67. Id. at 117. See infra Part V.
Technology Center\textsuperscript{69} and should have been rejected by the Working Group.\textsuperscript{70}

Some researchers in this area have suggested that a digital transmission right is not necessary since, at least according to the Working Group, downloading a work from the Internet would violate at least one of the copyright owner's other rights.\textsuperscript{71} However, as the Working Group points out "[e]ach of the exclusive rights is distinct and separately alienable and different parties may be responsible for infringements or licensing of different rights — and different rights may be owned by different people."\textsuperscript{72}

There is definitely a need for a digital transmission right, but that right should not encompass loading a work into RAM. No liability should attach to that act if the work is available through a digital network like the Internet and is viewed by someone. If the user saves the work to a storage medium, then that would infringe the copyright owner's reproduction and distribution right. Displaying the work would also amount to a violation of a copyright owner's public performance and display rights. This reading of the statute would also resolve the issue of whether viewing a work privately would be a violation of the copyright owner's public display or public performance rights.

III. FAIR USE

The Working Group does not specifically discuss the role of the fair use defense\textsuperscript{73} in the digital environment, but its suggestions for controlling works through licensing schemes raise some problems because the Working Group approves American Geophysical Union v. Texaco Inc.\textsuperscript{74} This is particularly true when taken in conjunction with the Working Group's suggestions regarding the scope of the transmission right and the MAI line of cases. The district court in Texaco held that a finding of fair use is less likely if the user could have obtained a license for his particular use of the

\textsuperscript{1994).


\textsuperscript{70.} Judging from its proposals, the Working Group apparently does not see this implication.


\textsuperscript{72.} WHITE PAPER, supra note 2, at 215.

\textsuperscript{73.} Fair use is an affirmative defense to an action for copyright infringement. WHITE PAPER, supra note 2, at 73. 17 U.S.C. § 107 (1988).

\textsuperscript{74.} American Geophysical Union v. Texaco Inc., 37 F.3d 881 (2d Cir. 1994).
work.\textsuperscript{75} \textit{Texaco} is not the only case, however, which has reached this conclusion.\textsuperscript{76} In fact, the Working Group contradicts this holding in stating that when the use falls under fair use, “the user is not required to seek permission from the copyright owner or to pay a license fee for the use.”\textsuperscript{77} Thus, one reaches the peculiar conclusion from reading the White Paper that the copier need not pay a license fee where there is a fair use, but nonpayment of a license fee weighs against finding fair use.\textsuperscript{78}

The court in \textit{Texaco} misapplied § 107’s first factor, the purpose and character of the use, in analyzing Texaco’s copying of journals.\textsuperscript{79} Section 107 provides in part that “[n]otwithstanding the provisions of §§ 106 and 106A, the fair use of a copyrighted work, . . . for purposes such as . . . research, is not an infringement of copyright.”\textsuperscript{80} In analyzing Texaco’s fair use defense, the court failed to give sufficient weight to the research purposes behind copying the journal articles in question.\textsuperscript{81} The majority found that the copies were made for archival purposes even though the articles were of a scientific nature, published in a scientific journal, and related to the field of expertise of the researcher.\textsuperscript{82} While the majority was correct in pointing out that Texaco’s employee photocopied the articles and placed them in his files, the archival nature of this activity was not the ultimate purpose for the articles.\textsuperscript{83} Texaco’s employee photocopied the articles and kept them in his files for future reference and never really used the articles.\textsuperscript{84} The ultimate purpose of the copies, as the dissent found, was to facilitate the defendant’s research.\textsuperscript{85}

The approach taken by the dissent in emphasizing the ultimate purpose of the use is in closer accord with the language and purpose of the Copyright Act.\textsuperscript{86} One of the primary aims of copyright is to

\textsuperscript{75} \textit{Id.} (citing American Geophysical Union v. Texaco Inc, 802 F. Supp. 1 (S.D.N.Y. 1992)).


\textsuperscript{77} \textit{WHITE PAPER, supra note 2, at 73}.

\textsuperscript{78} This may result in the situation where a user must seek a declaratory judgement that copying a work is fair prior to reproduction rather than as an after the fact determination.

\textsuperscript{79} American Geophysical Union v. Texaco Inc., 37 F.3d at 900.


\textsuperscript{81} \textit{See generally} 37 F.3d at 881.

\textsuperscript{82} \textit{Id.}

\textsuperscript{83} American Geophysical Union v. Texaco Inc., 37 F.3d 881, 890 (2d Cir. 1994).

\textsuperscript{84} \textit{Id.}

\textsuperscript{85} \textit{Id.} at 900.

promote creativity by providing an incentive to publish new works of research and to extend upon the works of others. By only considering the specific instance of copying without examining the underlying purpose, the court inTexaco sets a precedent that stifles new research based on those works.

Where the purpose for copying the work is one of the purposes enumerated in § 107, as was the case inTexaco, there is a strong presumption that the first factor in a fair use analysis favors the defendant. The Second Circuit’s inaccurate analysis of the purpose and character of the use resulted in its finding the first factor in favor of the copyright holder.

The court also distinguishedWilliams & Wilkins Co. v. United Statesimproperly. In rejectingTexaco’s argument that the copying was “reasonable and customary,” the Second Circuit stated: “[W]hatever validity this argument might have had before the advent of the photocopying licensing arrangements (of the CCC), the argument today is insubstantial.” The court interpreted the holding inWilliams & Wilkins as depending on the lack of a licensing scheme. Commentators, however, have criticized this interpretation ofWilliams & Wilkins as creating a broad expansion of the copyright monopoly.

The advent of a program for photocopying licensing is not a valid distinction, however, because the lack of a way to collect payment for copies was not the reason that photocopying was “reasonable” inWilliams & Wilkins. The Court of Claims cited many factors...[It] did not consider the lack of availability of a licensing scheme to be relevant to the inquiry of fair use and only addressed the issue as a response to the plaintiff’s assertion that licensing should be relevant.

The Working Group further relies on a questionable reading of the relevant case law by failing to acknowledge the effect ofSony Corp. v. Universal City Studios, Inc. The White Paper references theSony decision for the proposition that all commercial uses are

89. Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), aff’d, 420 U.S. 376 (1976).
90. American Geophysical Union v. Texaco Inc., 37 F.3d 881, 892 (2d Cir. 1994).
91. Id. at 899.
presumably unfair.\textsuperscript{94} While this is a correct interpretation of the holding in \textit{Sony}, it fails to mention that the presumption is the opposite when the conduct is noncommercial or nonprofit.\textsuperscript{95}

The White Paper further misstates the effect of \textit{Sony} in footnote 229.\textsuperscript{96} It states, "[a]n affirmative defense, the burdens of persuasion and coming forward with evidence both must be carried by defendants to avoid liability."\textsuperscript{97} The Court in \textit{Sony}, however, stated that while this is generally true, it is not so in all cases. The Court specifically states that, if the intended use is for commercial gain, the likelihood of future harm "may be presumed," but that "if it is for a noncommercial purpose, the likelihood must be demonstrated."\textsuperscript{98} Thus, where analysis under § 107(1) results in a finding that the purpose or character of the use is noncommercial, the copyright owner must carry the burden of proof with regard to § 107(4).

The White Paper's misreading of \textit{Sony} could have the effect of greatly expanding the copyright owner's monopoly. By ignoring the presumption that noncommercial uses are fair, and failing to shift the burden of proof where the use is noncommercial in nature, the Working Group places a much heavier burden on defendants to prove fair use. This expansion of the copyright monopoly together with the Working Group's adoption of \textit{Texaco} decision could erode the fair use defense for digital works.

By undermining the fair use defense, the White Paper contradicts the basic purposes of the Copyright Act. The overriding goal of the Copyright Clause is the promotion of the useful arts and sciences.\textsuperscript{99} Furthering that goal requires both that authors and inventors

\textsuperscript{94} White Paper, \textit{supra} note 2.
\textsuperscript{95} Id. at 449 (explaining that "[i]f the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair... [t]he contrary presumption is appropriate here, however, because the District Court's findings plainly established that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity").
\textsuperscript{96} Id.
\textsuperscript{97} WHITE PAPER, \textit{supra} note 2, at 48.
\textsuperscript{98} \textit{Sony Corp. v. Universal City Studios, Inc.}, 464 U.S. at 451 (Stating that where the use of a work is commercial the copyright owner is entitled to a presumption of illegality and the infringer bears the burden of proving a lack of economic harm. Where, however, the use is noncommercial in nature the owner must prove "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.").
\textsuperscript{99} "The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings... but upon the ground that the welfare of the public will be served and progress of science and useful arts promoted." S. REP. No. 60-1108, at 7 (1909).
have an incentive to create and that users have access to any resulting works. Thus, while copyright protection provides an incentive for authors to create works, the fair use defense prevents the copyright monopoly from becoming a restriction on the use of knowledge by those who might add to it. Out of this tension between the need to provide authors with an incentive to create works and the need to preserve the users’ right to access those works, the courts have created a balance through the Copyright Act that protects the author only to the extent necessary to provide an incentive. Under this formula, the copyright owner has no rights beyond those strictly necessary as an incentive for creation.

The Working Group, however, gives copyright owners substantially more control over their works than is necessary to provide this incentive. By adopting the fair use analysis of Texaco and ignoring the presumptions set forth in Sony, the Working Group extends the copyright monopoly beyond the scope intended by the Copyright Clause. The creation of new technology or a new market which could result in larger profits for copyright owners, i.e., the Copyright Clearance Center, does not justify the expansion of the copyright monopoly and the concomitant restriction of access rights. This is because the incentive to create new works already exists within present technology and markets.

It is conceivable that a new technology would lend itself to a licensing scheme that permits no use of a work without a royalty payment to the copyright owner.100 This is particularly true of digital works which are easily manipulable.101 In that situation, eliminating the fair use defense would contradict the Copyright Clause, because it would fail to allow for use without payment to the copyright owner, now matter how small the amount of use.

In expanding the copyright monopoly, the Working Group failed to take into account the incentives for creation already exist. The po-

100. In fact, from a close reading of the White Paper, this author gets the feeling that the Working Group may have been imagining just this situation. See generally White Paper, supra note 2.

101. Because digital works exist only as a stream of undifferentiated bits, it is a simple matter to remove infinitely small sections of a single work. One could easily take a particular background from a digitized photograph, combine it with a sentence or two of text from a digital writing, and insert a short sequence of sound from a song, to create a new multimedia work. It is also fairly easy in a digital context to monitor which parts of the data stream have been sampled and then charge a license fee for only those parts. INFORMATIONAL INFRASTRUCTURE TASK FORCE, GREEN PAPER: INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: A PRELIMINARY DRAFT OF THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 106-107 (1995).
A DIGITAL WORLD OUT OF BALANCE

sition that licensing revenues are necessary when sufficient incentives for the creation of new works already exist is untenable. The White Paper nonetheless takes this position.

IV. FIRST SALE DOCTRINE

One of the most perplexing arguments made by the Working Group concerns the first sale doctrine. White Paper's understanding of the first sale doctrine eliminates the first sale right for works that are digitally transmitted.

[T]he first sale doctrine limits only the copyright owner's distribution right; it in no way affects the reproduction right. Thus, the first sale doctrine does not allow the transmission of a copy of a work (through a computer network, for instance), because, under current technology the transmitter retains the original copy of the work while the recipient of the transmission obtains a reproduction of the original copy (i.e., a new copy), rather than the copy owned by the transmitter.

This assumes, however, that the "current technology" is the only method available of reproducing a copy of the original. This is an unsafe assumption. It is no more difficult technologically to have the transmission protocol remove the original work in the process of transmitting it. The Working Group realized that such a technological fix would solve the problem and would not create an infringing copy. "If the technology utilized allows the transmission of a copy without making an unlawful reproduction — i.e., no copy remains with the original owner — the first sale doctrine would apply and the transmission would not be an infringement."

Granted that allowing first sale rights in transmissions may in some instances result in the copying of the work, that does not sufficiently justify doing away with the rights granted by the first sale doctrine. If the only protection for a copyright owner from the problem articulated above is the removal of the original copy by the transmission protocol, there exists a substantial probability of abuse of the system by the user. The user in some cases could simply prepare a copy of the copyrighted work prior to transmission, and achieve the very condition that the White Paper is trying to solve —


103. WHITE PAPER, supra note 2, at 92.

104. Id. at 93.
the existence of two copies of a work, one on the originating computer and one on the receiving. Nonetheless, since duplicating or copying the original violates the reproduction right, the copyright holder would not lose any rights while the user retains the first sale exception.

The technological solution of automatic deletion also creates several conundrums of its own. Where the underlying work that is to be transmitted is within the public domain, the fact that the transmission protocol automatically deletes the originating file would undermine the very purpose for transmission in the first place, i.e., unlimited transferability. Deleting the originating file would also be awkward where one is trying to send e-mail or another work of one's own creation. These problems may be relatively easy to solve.

If the Working Group succeeds in having all copyrighted works carry an embedded copyright management information block, then a user could simply have the transmission protocol read the copyright management information embedded in the work to determine whether the work was licensed for transmission without deletion. If the copyright management information states that the work is public domain or that there are no transmission restrictions, then the transmission protocol would send the work without deleting it. If the work was licensed only for use on an individual machine, then the transmission protocol will delete the originating work in the process of transmission. Another solution, of course, would be to follow the procedures outlined above for violating the copyright while transmitting a work. The end result would be the same, both the sending and receiving machine would have copies of the work.

The Working Group's analysis also leads to another unique conclusion that works that a user obtains digitally come with fewer rights than the identical work in a physical form. If the first sale rights do not cover transmission, then the digital work is much more restricted than the physical form of the same work. For example, compare two copies of a book. One is purchased on-line over the Internet, the other at a bookstore. Although they are exactly the same work, the person who purchased the digital version has substantially fewer rights. The owner of the physical book may sell, lease, or otherwise transfer the book to a third party. The owner of the digital book, however, cannot transfer it, unless she does so as part of the sale of the computer or storage medium in which it resides. Because the
work was purchased digitally there is no physical form to transfer, unlike situations involving the purchase of a program on disk. At least in the second case, one can transfer the original disks. The Working Group’s analysis thus creates a dubious distinction, giving more rights to one copy of a work than another based on the form of fixation of the work.

The Working Group recognizes one exception where digitally transmitted works are transferrable within the first sale right. If the work was fixed in a removable media when the user originally downloaded it, then the user could sell a copy of the work on disk. This, however, permits only a very restricted first sale exception. Thus, the Working Group has managed to significantly restrict the first sale doctrine while explicitly rejecting any restrictions.

The Working Group rejects what may be a viable solution to the first sale dilemma. The Working Group cites § 109 for the limited first sale exception with regards to computer programs and phonorecords of sound recordings. The Working Group, however, refuses to extend the limited first sale rights that apply to those works to works which are digitally transmitted. The Working Group refuses to do so in spite of the fact that the reasoning behind the limited first sale exception for computer software and sound recordings applies equally to digitally transmitted works.

The Copyright Act specifically limits the first sale doctrine with regard to those works because of the ease with which one can make copies or phonorecords of the work. This same analysis would apply to digital works. If the reasoning is the same for the different mediums, then the law should treat them all equally and recognize first sale rights for digital works, except where they are rented, leased, or lent for direct or indirect commercial advantage. This, of course, assumes that the user follows one of the technological solutions suggested above so that it does not infringe the copyright owner’s reproduction right.

106. Id. at 93 (“It has been suggested that the scope of the first sale doctrine be narrowed to exclude copies obtained via transmission. This would mean, for instance, that if a copy of a literary work is legally purchased on-line and the copy so purchased is downloaded onto the purchaser’s disk, the disk could not be resold. Clearly, the first sale doctrine should apply if the particular copy involved is in fact the copy that is further distributed.”).

107. Id. at 81.


The White Paper proposal also runs afoul of the public policy against restrictions on the alienation of property rights. The White Paper's dismissal of the first sale exception creates almost a complete ban on the alienation of digitally transmitted works. It further gives the copyright owner a right which she has never had before — the right to every sale of a work. Because an owner of a digital copy of a work is practically barred from transferring that copy, any new users must purchase their copy of the work directly from the author. This results in a tidy profit for the copyright owner, but it does not comport with copyright principles.

V. ON-LINE SERVICE PROVIDER LIABILITY

The Working Group briefly considers the liability of service providers for copyright infringements by users of the service and comes down in favor of the service provider being directly liable for actions by users on the service so long as the service provider has any level of control over access to the content of its servers. This takes one view of the law in this area and ignores all others.

Given the increased criminal and civil penalties the White Paper articulates, to hold on-line service providers (OSPs) directly liable for infringements of which they had no knowledge and over which they had little or no control is unnecessary.

The White Paper argues for direct liability by analogy to the liability the law imposes on other service providers and retailers.

[B]ook sellers, record stores, newsstands and computer software retailers cannot possibly read all the books, listen to all the records, review all the newspapers and magazines or analyze all the com-

110. Peters, supra note 3, at 355 (arguing that "[t]he first sale doctrine was developed to avoid restraints on the alienation of physical property, and to prevent publishers from controlling not only initial sales of books, but the after-market for resales," and that, "[t]hese concerns do not apply to transmissions of works on the NII."). There is, however, no basis for arguing that the policy against restraints on alienation apply only to physical works. The economic justifications for the first sale right exist in any valuable work whether digital or physical.

111. The term "service providers" includes both on-line service providers (OSPs) and Internet service providers (ISPs).

112. White Paper, supra note 2, at 117.

113. Id. at 123.


115. White Paper, supra note 2, at 117.
computer programs that pass through their establishments for possible infringements. Yet, they may be held strictly liable as distributors if the works or copies they deal in are infringing.\textsuperscript{116}

The Working Group also makes the analogy to publishers. "On-line service providers currently provide a number of services. With respect to the allowance of uploading of material by their subscribers, they are, in essence, acting as an electronic publisher."\textsuperscript{117} Both of these analogies are fundamentally flawed. The Working Group ignores the fact that, in all of its analogies, the service provider, retailer, or publisher receives the works for which they are liable from known, primarily commercial, sources.\textsuperscript{118} Furthermore, as they are in the business of selling products in a particular market, one can expect publishers to know if they are selling infringing goods. An example of this is the commercial bookseller. A commercial bookseller will purchase its stock directly from specific publishers. In addition, the bookseller only deals in the sale of books, and for the most part does not sell other copyrightable works. The bookseller thus has the advantage of being able to rely on the reputation of the publishers with which they deal, and need only be aware of the copyrights on a limited number of products. The same is not true for on-line service providers.

On-line service providers generally do not get their works from commercial sources that can be expected to comply with copyright law as a means of preserving their business. OSPs do not obtain their works in the sense that retailers or publishers do. An OSP merely provides the system, and a majority of the content is placed there \textit{in gratis} by individuals. Individuals will upload works without any notice to the service provider and the works will run the gamut in terms of the Section 102(a) categories of works. A subscriber to a particular service provider could be uploading a book, a computer program, a sound file, or almost anything else. The situation is very different from that of the commercial retailer, who generally deals in one area of goods. It would be impossible for an OSP to be aware of all of the copyrights in the different types of works which are uploaded on a daily basis. The analogies offered by the Working Group simply do not hold. Service providers have no way of ensuring that they are not indirectly contributing to the infringement of a copyrighted work.

A better analogy would be to the owner of a lot or building that

\begin{footnotesize}
\begin{enumerate}
\item[116.] \textit{Id.} at 75.
\item[117.] \textit{Id.} at 79.
\item[118.] \textit{WHITE PAPER}, supra note 2.
\end{enumerate}
\end{footnotesize}
holds a swap meet. The owner may have some control over who is able to sell on their lot but has very little control over what goods the participants sell. In fact, the owner probably will not even know what individual vendors sell. The participants are in charge of promoting or selling their goods, not the owner. It is simply not feasible for our theoretical owner to monitor all of the goods that participants bring to his property for compliance with copyright laws.

The Working Group also looks to prior case law to support its recommendation that on-line service providers be directly liable for copyright infringement by its subscribers. The Working Group specifically cites Playboy Enterprises, Inc. v. Frena (Playboy) and Sega Enterprises Ltd. v. MAPHLA (Sega I). Once again, the White Paper excludes case law supporting the opposite conclusion. The court in Religious Technology Center v. Netcom On-Line Communication Services, Inc. (Netcom) considered Playboy and Sega I, and the White Paper in rejecting direct liability for an OSP. The Netcom decision is supported by cases involving service provider liability for defamation. The court in Netcom thought that, “[a]lthough copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant’s system is merely used to create a copy by a third party.” The court explained that “Netcom’s act of designing and implementing a system that automatically and uniformly creates temporary copies of all data sent through it is not unlike that of the owner of a copying machine who lets the public make copies with it.” According to the court, “Though some people using the machine may directly infringe copyrights, courts analyze the machine owner’s liability under the

119. Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996) (holding owner of a swap meet liable for contributory infringement). However, Fonovisa is distinguishable as Cherry Auction had prior notice on several occasions of the infringing activity.

120. Cf. Sega Enter., Ltd. v. MAPHLA, 948 F. Supp. 923, 927-29 (N.D. Cal. 1996) (finding the defendants, Maphia, guilty of infringement, based on the analysis, but only because of extraordinary evidence that the defendants knew of the infringement, including printouts from the system operator’s computer showing the system operator know that users were uploading and downloading unauthorized copies of Sega's copyrighted video games).

121. White Paper, supra note 2, at 120-21.


127. Id. at 1369.
rubric of contributory infringement, not direct infringement." The court in Sega, which the Working Group relies upon, has reconsidered the question and has adopted the analysis put forth by the court in Netcom.

Where there is no causal relationship between a service provider’s conduct and the infringement by a third party, the analysis regarding the service provider should be limited to contributory and not direct infringement. This approach is more consistent with the actual control exercised by OSPs. It has the additional benefit of providing some level of certainty for OSPs as to when they are infringing. Under the direct liability scheme, the OSP would have no knowledge that they were infringing until someone takes them to court, at which point the OSP has little chance at defending itself, given the broad range of conduct courts have held to be sufficient control for purposes of direct liability.

Throughout the White Paper, the Working Group argues that where new technology has made it easier to infringe a copyrighted work, the copyright monopoly should be enlarged to compensate. The corollary to that argument should be true as well, that where new technology has made it easier to police copyright infringement, the copyright monopoly should be limited. The White Paper contains no such provision, despite the fact that, while digital technology may benefit the infringer by making copying easier, it also benefits the copyright owner by increasing its ability to monitor copyright violations. With the expansion of digital technology and, in particular, search engines on the Internet, copyright owners have a new tool to enforce their rights.

In the past, direct liability was necessary, because there was no economical way for copyright owners to monitor their works and be sure that no one was infringing. This is no longer true with digital technology. A combination of the White Paper’s suggested copyright


131. The only restriction on a copyright owner’s rights is the grant of a license for reproducing or adapting works for the visually impaired. White Paper, supra note 2, at 227-28.
management information or steganography and digital search engines enables the copyright owner to police their own works. The copyright owner can easily create digital watermarks or other identifying marks in its digital works which they could then use as the search criteria. This is in fact what is happening presently, despite the Working Group's reluctance to realize it. In a digital environment like the Internet, where works can be located by simply searching, it is incumbent on the copyright owner to search for infringing copies of its works, and to inform the system on which they reside that they are in violation of the Copyright Act. This process has the additional benefit of being automatable, minimizing the response time from a copyright owner and preventing the spread of illicit copies of the work.

An approach combining stenography and digital search engines has several benefits which contributory liability cannot claim and which a direct liability system cannot replicate. By placing at least some of the burden of preventing copyright infringement on the party which benefits from strict copyright enforcement, it creates an incentive for the copyright owner to actively employ self-help rather than judicial remedies. Placing a portion of the burden on the copyright owner also makes the task of ensuring copyright compliance easier. The copyright owner has only a limited number of works which it must monitor, as opposed to the OSP who would have to monitor every work on its system. The copyright owner is also in a position to place signifying characteristics into its digital works through steganography, which would ease the task of locating infringing works. Of course, once the copyright owner has found an infringing copy of one of their works and informed the service provider of its existence, the burden shifts to the service provider to remedy the infringement. The service provider's refusal to remove infringing copies of a work from their system may subject them to willful infringement remedies.\footnote{132} Regardless of whether the copyright owner can recover willful infringement damages, notifying the service provider of the infringement will allow the owner to recover for contributory infringement. This results in a much more certain placement of liability than does direct liability.\footnote{133}


\footnote{133} This is in fact the approach recently taken by the PTO in suggesting a resolution to this question to Senator Moorehead. Memorandum from Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, to Congressman Carlos Moorhead, Member, U.S. House of Representatives (10/10/96)(on file with the Santa Clara Computer and High Technology Law Journal).
The prior suggested approach can be enhanced even more by adding a provision requiring that service providers adopt and implement a procedure for searching their own system for copyright infringements. A service provider's failure to implement any such procedure could be a factor weighing heavily in favor of holding the service provider contributorily liable if the service provider had no notice or willful infringement damages if it had notice. This is untenable to OSPs under the present approach to liability because affirmatively seeking out and removing infringements on their own could render them liable for infringement on any works they missed. However, by providing a system of notice prior to the attachment of liability, the OSPs are then in a position to work together with copyright owners to prevent copyright infringement. This dual approach provides an incentive for both the copyright owner and the service provider to make an effort to combat copyright violations.

VI. Conclusion

While the Working Group's proposals have created significant controversy, they have so far failed to result in any substantive legislation. The two bills introduced into Congress last session as a result of the Working Group's proposal, H.R. 2441 and S. 1284, failed to pass, as they never left the respective subcommittees prior to the end of the 104th Congress. 134 Two provisions of the White Paper were enacted, however, during the last congressional session. Congress included in the Library of Congress appropriations bill a provision allowing the publication of materials for the visually impaired, provided the copyright owner was given one year from the original publication date to create a visually impaired edition of the work. 135 Congress also passed the Performing Rights in Sound Recordings Act. 136 This Act provides a new right for producers and performers for certain digital transmissions, in addition to the public performance right already enjoyed by the composer in the underlying composition. 137

That H.R. 2441 and S. 1284 (the NII bills) did not pass does not sound the death knell for the present push for protection of transmissions. The NII bills were held up in large part due to the opposition
of OSPs and Internet access providers (ISPs).\textsuperscript{138} They objected to the bills' failure to clarify that OSPs and ISPs were not directly liable for infringing activity on their systems.\textsuperscript{139} This was only one of several battles that went on over the passage of the NII bills, but it was the primary battle during the 104th Congress.\textsuperscript{140} The bills also drew opposition from library groups objecting to the fair use provisions for libraries and a coalition of groups objecting to the proposed ban on devices intended to defeat anti-copying measures.\textsuperscript{141}

When Congress reconvenes for its 105th session, the on-line service providers may have fewer objections to the NII bills. The NII bills, as introduced in the 105th Congress, will in all probability contain language providing a safe harbor provision for service and access providers as well as a specific mere conduit exception to liability. These provisions are the result of a new proposal made by the PTO in a letter dated October 4, 1996.\textsuperscript{142}

The new proposal, which should form the basis of any further discussion, provides for the amendment of the Copyright Act to include a new section, 17 U.S.C. § 512.\textsuperscript{143} Section 512 has a specific safe harbor provision that disallows holding service providers contributorily or vicariously liable for infringement occurring on their system unless the copyright owner provides notice meeting the requirements of subsection 3 of that section.\textsuperscript{144} Paragraph 3 requires notifications to: (a) be signed, physically or electronically, (b) iden-
tify the particular copyrighted work or works and the right infringed, (c) describe the material claimed to be infringing, (d) include information sufficient to permit the service provider to contact the complaining party, (e) state that the complaining party has a good faith belief that use of the material is not authorized, and (f) state that the information in the notification is accurate. The proposal also protects service providers from liability for any acts they do in compliance with a notification that there is a work on their system which infringes a copyright. Finally, § 512(b) provides for an explicit exception to liability for service providers that are mere conduits for copyright violations or for infringement which arises solely out of supplying electronic mail or real-time communication services.

The NII bills in the 105th Congress, if they reflect the October 4th PTO proposal, should see substantially less opposition than did their predecessors. Clearly, the inclusion of the proposed § 512 only solves one of the many problems with the White Paper. It does not address the Working Group’s one-sided reading of the state of copyright law. Congress will do well to learn from the MAI decisions, and not simply adopt the Working Group’s proposals without comment, as it did with the CONTU report. Any such adoption of the Working Group’s White Paper would result in a substantial shift in the law, lending congressional support to one side of a split in the circuits. It would also behoove Congress to take into consideration the recent holdings in Netcom and Sega II.

The fate of copyright law on the Internet does not depend solely upon congressional action. The World Intellectual Property Organization (WIPO) has recently broached the issue of what copyright protection should be available to digital works on the Internet. Despite the support of the United States’ delegation, the conference did not adopt proposed Article 7, which would have specifically clarified that temporary copies were within the reproduction right of Article 9

---

145. Id.
146. (6) LIMITATION ON OTHER LIABILITY. - A service provider shall not be liable to any person for any claim based on the service provider's good faith disabling or blocking of access to or removal of material claimed to be infringing to the procedures established in this subsection, regardless of whether the material is ultimately determined to be infringing. Memorandum from Bruce A. Lehman, supra note 133, at *3.
147. Memorandum from Bruce A. Lehman, supra note 133.
of the Berne Convention.\textsuperscript{149} The U.S. delegation, however, was able to include an agreed statement concerning the protection of transitory copies under the WIPO Copyright Treaty.\textsuperscript{150} Because the WIPO Copyright Treaty does not alter our international agreements,\textsuperscript{151} it is uncertain whether it will have any influence on similar provisions in our own legislation. The significant resistance which the WIPO proposal received may very well carry over to congressional discussion of the scope of copyright protection. If the last session is any indication, it is doubtful that there will be that much resistance to the extension of the MAI approach to digital networks. There is, however, a collateral attack underway against the precedent established by MAI. There is a bill presently before Congress which would reverse the MAI court’s finding that loading software into a computer’s RAM while servicing the machine constitutes a violation of copyright.\textsuperscript{152}

It is always possible that Congress will decide to take the Working Group at its word that copyright law presently covers most of the issues raised by digital networks without any alterations, but it is doubtful. When Congress gets around to reintroducing the copyright NII legislation, it will probably look at least fairly similar to the bills that were before the 104th Congress. Last year’s battles have proven that the Working Group may not have the consensus it

\textsuperscript{149} Article 7 as originally proposed provided:

\begin{enumerate}
\item The exclusive right accorded to authors of literary and artistic works in Article 9(1) of the Berne Convention of authorizing the reproduction of their works shall include direct and indirect reproduction of their works, whether permanent or temporary, in any manner or form.
\item Subject to the provisions of Article 9(2) of the Berne Convention, it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the work that is authorized by the author or permitted by law.
\end{enumerate}

WIPO Diplomatic Conference, \textit{supra} note 148.

\textsuperscript{150} WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Agreed Statements Concerning the WIPO Copyright Treaty (Dec. 23, 1996) <http://www.wipo.org/eng/diplconf/distrib/96dcl.htm> ("The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form."). It is agreed that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne. \textit{Id}.

\textsuperscript{151} Since the language added to the WIPO Copyright Treaty only states the applicability of Article 9 of Berne to digital works it should not require any changes to our law. WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, WIPO Copyright Treaty (Dec. 23, 1996) <http://wipo.org/eng/diplconf/94dc.htm>.

\textsuperscript{152} H.R. 72, 105th Cong. (1997).
The rebirth of the bills for the 105th Congress can be expected to contain language at least very similar to that contained in the amended ISP provisions. The new bills may also manifest a retreat from the position taken by the courts in *MAI* and its progeny. Unfortunately, it looks like the libraries will be in for yet another battle on the question of fair use and, if the last session is any example, the Working Group's approach to first sale rights will be accepted without comment. The touchy issue for the 105th Congress may be the White Paper proposals regarding copyright management information and importation of anti-copying devices.\(^{153}\) There has been substantial resistance to these provisions, but they gained international acceptance with the passing of Articles 11 and 12 of the WIPO Copyright Treaty.\(^{154}\)

Regardless of the form of the bills as they are introduced in the 105th Congress, it will be incumbent on practitioners to advocate keeping the amendments consistent with the original balance set by the Constitution and to prevent the creation of a digital world out of balance.

\(^{153}\) *White Paper*, *supra* note 2, at 207.

\(^{154}\) *WIPO Copyright Treaty*, *supra* note 150.