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Nine Guidelines and a Reflection on Internet Copyright Practice

Howard C. Anawalt

Santa Clara University School of Law, hanawalt@scu.edu

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NINE GUIDELINES AND A REFLECTION ON INTERNET COPYRIGHT PRACTICE

Professor Howard C. Anawalt

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NINE GUIDELINES AND A REFLECTION ON INTERNET COPYRIGHT PRACTICE

*Professor Howard C. Anawalt**

I. INTRODUCTION

Application of copyright law often presents questions which require balancing claims of ownership of an expression against claims of access to fair use of the expression or its underlying concepts.¹ The development over recent decades of electronic forms of communication, such as the Internet, has created an especially fertile arena for competing copyright claims. The Internet functions as a powerful new distribution and communications medium. In itself, it does not provide a tool for infringement so much as it provides a place where copyright questions will arise. New claims of infringement have arisen because it has become so easy to distribute and duplicate expressions. In some quarters of the public you hear cries of infringement and piracy. While in others, you hear complaints of excessive control and monopoly.

The world of electronic communication presents authors and their attorneys with an unfamiliar setting where poems, music, plays, novels, and software circulate by ethereal streams of data, rather than as physical copies. While the technology for doing this has existed for several decades, the widespread use of mediums like the Internet has exploded only recently.² The use of the Internet or its successors will sweep the world much as the use of the telephone, radio, and television. The Internet creates a worldwide space where people communicate and where their interests may jostle with each other.

Copyright attorneys and judges have historically been required to resolve puzzling new problems in the development of protection for ideas. For example, in 1963, the Second Circuit decided a case involving the sale of bootleg copies of records. The case imposed a form of vicarious copyright liability on a store owner whose licensee or concessionaire actually did the copying.³ In introducing the opinion, Judge Kaufman stated:

This action for copyright infringement presents us with a picture all too familiar

* Professor Anawalt teaches Protection of Intellectual Property, Copyright and Constitutional Law at Santa Clara University School of Law. He is co-author with Elizabeth F. Enayati of IP STRATEGY—COMPLETE INTELLECTUAL PROPERTY PLANNING, ACCESS, AND PROTECTION, published by Clark Boardman Callaghan. He was instrumental in creating Santa Clara's High Technology Program and served as its director until 1997.

1. Copyright law denies protection to the concepts themselves. 17 U.S.C. 102(b) (1994).

2. See, e.g., Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 346, 384; 43 UCLA 587, 593 (1995); Andrea Sloan Pink, *Copyright Infringement Post Isoquantic Shift: Should Bulletin Board Services Be Liable?*, 43 UCLA L. REV. 587, 593 (1995); see also *Religious Tech. Ctr. v. Netcom On-Line Servs., Inc.* 923 F. Supp. 1231 (N.D. Cal. 1995) (discussing the Internet).

3. *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963).

in copyright litigation: A legal problem vexing in its difficulty, the dearth of squarely applicable precedents, a business so common that a dearth of precedents seems inexplicable, and an almost complete absence of guidance from the terms of the [1909] Copyright Act, 17 U.S.C. §1 et seq.⁴

Internet issues will often not be resolved by precedents that are directly on point. However, attorneys and courts will find a wealth of case and statutory law to apply either by analogy or extension to cases at hand. In some respects one can complain that there is too much, rather than too little, law to apply. This article will sketch out a series of guidelines for coping with practical copyright problems that arise on the Internet.

Part II of this article summarizes the copyright background for Internet problems. Part III contains the heart of the article. It sets forth nine Internet user guidelines and the underlying strategy for them. To be effective, guidelines must speak to the user, rather than fellow attorneys. The article concludes in Part IV with a brief reflection on the relation of the guidelines to the general nature of copyright law.

II. COPYRIGHT BACKGROUND

The Internet's power resides in its speed of transmission coupled with the organizing capacity of computers. The speed of transmission has given rise to practical problems that beg for resolution in the courts or in Congress. Congress has plenary authority to rewrite the copyright laws under the copyright and patent clause of Article I, section 8 of the Constitution.⁵ Congress recently considered amending the Copyright Act ("Act") to provide for broad claims of ownership to transmission as opposed to just production of copies.⁶ While limited rights to control transmission exist in the Act, no

4. *Id.* at 305.

5. The Constitution authorizes Congress to "secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings." U.S. CONST. art. I, § 8, cl. 8. In *Feist Publications v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 346 (1991), the Supreme Court emphasized: "Originality is a constitutional requirement." The Supreme Court rarely finds that grants of power imply strong substantive limits on congressional exercise of the power granted. *See, e.g.*, *United States v. Lopez*, 115 S. Ct. 1624 (1995) (commerce clause context). *Feist* indicates that the Supreme Court may find that the copyright and patent clause provides a stronger definitional limitation on congressional powers. The constitutional limitations on the scope of copyright both from Article I, section 8 and the First Amendment may play an increased practical role in future litigation. Ultimately, however, it will be congressional judgment that will govern:

As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly. *Sony v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

6. *See* Bruce A. Lehman, INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995) [hereinafter WHITE PAPER]. The IITF consists of high-level representatives of the federal agencies that play a major role in the development and operation of information and

general right to control transmission of copyrighted material now exists.⁷ A shift to ownership of transmission rights would present a major shift in the concept of the substance of rights that our law intends to grant to authors.⁸ The core of the exclusive rights granted by copyright law is the right to copy (reproduce) the fixed work or derive new works from it.⁹ The enumeration of the other rights of distribution, performance, and display serves to ensure that the essence of the right to control the equivalent of "copies" resides with the author.¹⁰ Even if Congress decides to make a major change in the substance or basis of copyrights, it is unlikely that it will radically change the countervailing rights of public access contained in doctrines such as fair use.¹¹ The guidelines presented in this Article stem largely from such doctrines as fair use. Thus, they will likely retain basic validity even if we see the Act amended.

The level of interest in and use of computers and such media as the Internet varies widely, and we will find large differences in usage and attitudes toward these technologies. Some understand the technologies very well, while others know very little. Some spend a lot of time "surfing the net" or resolving software difficulties, while others pay little attention to either. Differences in use, experience, and attitude will have an impact on the copyright controversies that will take place on the Internet. For example, in three recent Internet cases, the principal defendants appear to represent different attitudes and motivations. For example, *Sega Enterprises v. Maphia* appears to have been generated by a breed of free spirit prankster who wanted to have the Internet function as an electronic Robin Hood that would make commercial electronic games available

telecommunications technologies. The late Ronald H. Brown, Secretary of Commerce, served as chair for the IITF at the time of the White Paper's publication. John Carmichael, *In Support of the White Paper: Why Online Service Providers Should Not Receive Immunity from Traditional Notions of Vicarious and Contributory Liability for Copyright Infringement*, 16 LOY. L.A. ENT. L.J. 759 (1996); see also Sean Calvert, *A Digital World Out of Balance: A Response to the NII White Paper and Subsequent Legislation*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 2 (forthcoming 1997); Hon. Marybeth Peters, *The Spring 1996 Horace S. Manges Lecture—The National Information Infrastructure: A Copyright Office Perspective*, 20 COLUM.-VLA J.L. & ARTS 341 (1996); James V. Mahon, Comment, *A Commentary on Proposals for Copyright Protection on the National Information Infrastructure*, 22 RUTGERS COMPUTER & TECH. L.J. 233 (1996).

7. 17 U.S.C. § 411 (1994) provides special ability for live event broadcasters to achieve remedies. It does not alter the basic norm that copyright subsists essentially in the "fixed work" that must be copied, distributed, etc. to be infringed.

8. Note, however, that the WHITE PAPER takes an expansive reading of precedent indicating that copyright law already grants broad transmission rights. See *supra* note 6.

9. 17 U.S.C. § 106.

10. 17 U.S.C. § 106. "[T]he Copyright Act grants the copyright holder 'exclusive' rights to use and to authorize the use of his work in five qualified ways, including reproduction of the copyrighted work in copies." *Sony v. Universal City Studios, Inc.*, 464 U.S. 417, 432-33 (1984). "These exclusive rights, which comprise the so-called 'bundle of rights' that is a copyright, are cumulative and may overlap in some cases." H.R. REP. NO. 1476, 94th Cong., 2d Sess., 61 (1976). See also Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547 (1997).

11. See 17 U.S.C. § 107; see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576-78 (1994) (describing the elusive nature of the fair use doctrine).

without charge.¹² By contrast, *Religious Technology Center v. Netcom On-Line Communications Services, Inc.* presents a pitched political and religious battle between an individual and a religious organization that the individual sharply criticizes.¹³ Finally, *Playboy Enterprises v. Frena* presents the more traditional contest over commercial rights in a situation where the defendant was deriving a profit from making copyrighted items available on his bulletin board service.¹⁴

The dynamics of electronic media combined with the logic of copyright law make each Internet communication a potential copyright infringement. Electronic mail, called e-mail, is a good example. E-mail is essentially a voiceless telephone call. However, unlike a voice communication, a copy of the message must be made in order to read or comprehend it. Once one makes the interim copy of the message, the conditions of a copyright infringement have been established. The logic of copyright law in these circumstances is as follows:

1. *Messages obtain copyright automatically.* Once a message is fixed in a medium for anything more than a transitory period, copyright is established.¹⁵ No formal act is required to perfect the copyright, though one must register it prior to seeking remedies.¹⁶
2. *Copying occurs immediately.* When one reads an electronic message, the computer immediately places the message in some sort of memory.¹⁷

12. *Sega Enters. Ltd. v. Maphia*, 857 F. Supp. 679 (N.D. Cal. 1994).

13. *Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc.*, 907 F. Supp. 1361, 1365 (N.D. Cal. 1995).

14. *Playboy Enters. v. Frena*, 839 F. Supp. 1552, 1554 (M.D. Fla. 1993).

15. See 17 U.S.C. § 101 (defining "fixed"); see also 17 U.S.C. § 102 (requiring fixation items to come within copyright subject matter).

16. 17 U.S.C. §§ 410-11.

17. See *MAI Sys. Corp. v. Peak Computer, Inc.* 991 F.2d 511 (9th Cir. 1993), cert. dismissed, 510 U.S. 1033 (1994). In *MAI*, the defendant, Peak, had loaded the plaintiff's software into the RAM (random access memory) of a computer for the purposes of diagnosing a computer problem at its customer's site. The Court stated the following:

Peak argues that this loading of copyrighted software does not constitute a copyright violation because the "copy" created in RAM is not "fixed." However, 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."

Id. at 518. The holding is controversial. For example, Niva Elkin-Koren states the following:

[L]oading a program into the RAM, in which the program is read from a fixed copy (diskette, CD-ROM, hard-disk), creates only a temporary copy of the program. One therefore can argue that loading a program into a computer's memory does not involve the preparation of a 'fixed' copy, and thus does not constitute copyright infringement. Neither previous opinions nor the legislative history distinguished between the different types of computer memories.

Elkin-Koren, *supra* note 2, at 354-55 (citations omitted). Ms. Elkin-Koren observes that "RAM is a temporary working memory. It is dynamic and transient, and whatever is stored in it disappears when power goes off." *Id.* at 353, n. 40. RAM is not permanent but will continue to hold memory usually until power is lost. Floppies and hard drives seem more permanent, but they get destroyed, lost, and erased. In *Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc.*, 907 F. Supp. 1361, 1368-69 (N.D. Cal. 1995), the court held that a bulletin board service should not be held directly liable for copies automatically made as part of

3. *Copying creates an infringement.* Copying a protected work constitutes infringement absent consent or fair use. By definition, all communications sent over the Internet become copyrighted works of their authors upon being fixed in a medium of expression.¹⁸ One should also note the basic proposition that even innocent infringement is actionable under copyright law.¹⁹

Thus, if an Internet user downloads a popular piece of software owned by Microsoft or Claris and uses it without permission, the downloading and use constitute a prima facie case of infringement. Another user might become disgruntled with the same program and send an e-mail complaint to the company. If an employee copies that same message, adding a snide comment, and forwards it to a friend, the employee's actions also amount to a prima facie infringement.²⁰

If everyone were to take legal actions based on the strict logic of copyright law, we can imagine a universe of chaotic copyright suits. Practicalities intervene, however, and limit the number of claims. If a software producer perceives real economic harm it may pursue legal remedies against individual down loaders. One would tend to consider that action routine and normal. On the other hand, the individual e-mail writer may be unable or unwilling to commit resources to a legal action. If he or she did sue, the action would likely be viewed as unusual and silly.

As a practical matter, copyright law in the United States primarily vindicates commercial value, which is present in a company's claim of software copying but absent from an e-mailer's complaint about a forwarded message. In the future, however, the dynamics of the Internet may extend copyright claims into areas other than commercial interest. Also, copyright claims may begin to combine with general tort claims and concepts, such as fairness, reasonableness, consent, and fraud.

the necessary process of forwarding messages.

When one receives Internet messages, they are placed in a buffer or elsewhere in RAM. The message might remain as long as power is supplied, thus satisfying the fixation requirement that it be communicated for more than a "transitory duration." 17 U.S.C. § 100. I recall having exchanged a few messages with a business colleague on some form of nearly real time communications protocol. His message would appear, then disappear, when I sent mine back. Even in that instance, the messages were fixed for some period of time. It seems doubtful that the human eye could be trained to read words that disappear as fast as the spoken word does. The specific result in *MAI* will be changed by the Copyright Clarification Act of 1996, which contains a "narrowly crafted" amendment to 17 U.S.C. § 117 to allow copying of an already authorized copy of software for "purposes only of maintenance or repair" of the machine that contains the authorized copy of the software. H.R. REP. NO. 554, 104th Cong., 2d Sess. 15 (1996) (enacted in 17 U.S.C. 117(c)).

18. See 17 U.S.C. § 102(a) (1994 & Supp. 1996). There will be some exceptions. For example, transmission of a method of operation will not constitute a copyrighted item under 17 U.S.C. § 102(b). Most transmissions probably are fixed by some method of recording by the sender at the time of transmission.

19. See 17 U.S.C. § 504(2) (providing that a Court may reduce damages to not less than \$200 in cases where the infringer "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright").

20. In any legal action, the plaintiff will have to establish ownership of the copyright. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

Copyright law cushions its straightforward application with the doctrine of fair use, which permits copying when it is reasonable in purpose and scope.²¹ The doctrine does not function to provide a general permission for wholesale copying, but it does require courts to consider seriously a wide range of justifications for copying.²² The doctrine both permits and requires courts to “avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity that the law is designed to foster.”²³

Much of the corpus of copyright infringement law concerns the boundaries of copyright protection, proof of infringement, and the scope of fair use as applied to those who consciously use others' works. The Internet focuses attention on some new issues: the liability of distributors; the responsibilities of authors or producers to give notice of their claims when distribution occurs without the circulation of actual copies; and the effect of public expectations on the application of fair use to mass electronic distribution.

It will take time for the courts, Congress, and international cooperation to iron out the questions raised by the Internet.²⁴ The relative strengths of ownership claims and fair use claims tend to ebb and flow. For example, computer software litigation tended initially to favor ownership claims and grant little scope to limiting doctrines such as the exclusion of subject matter²⁵ and the fair use doctrine. Furthermore, the Federal Circuits are not obliged to follow each other, so one must always be aware of the “problem of the circuits.”

The variations in interpretation create uncertainty for practitioners and their clients. However, copyright law is, for most developers, a matter of immediacy, not leisure. Clients cannot wait in a relaxed state while courts work out the nuances of fair use. Clients need to know what they can expect and be able to act on those expectations. Often they need to make critical decisions fast.²⁶ Attorneys need to provide clients with solid and workable

21. See 17 U.S.C. § 107 (providing that reproduction for purposes “such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright”); see also *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994). But see *American Geophysical Union v. Texaco, Inc.*, 37 F.3d 881 (2d Cir. 1994) (limiting research fair use in the context of a corporation's development projects).

22. *Princeton Univ. Press v. Michigan Doc. Servs.*, 99 F.3d 1381 (6th Cir. 1996) (en banc).

23. *Campbell*, 114 S. Ct. at 1170.

24. The fact that electronic communications, such as the Internet, flow easily across state and international boundaries exerts pressure on communication participants and nations to seek common ground to avoid debilitating chaos. Detailed consideration of international matters lies beyond the scope of this inquiry into practical guidelines. However, the guidelines themselves offer sufficient international market place appeal that they will very likely function well in international transactions.

25. Copyright protection does not “extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form [that] it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b).

26. It appears, for example, that the defendant in *Sega Enters., Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992), wagered its entire future on a decision that it would be permitted to copy parts of the plaintiff's work to reverse engineer a critical enabling component.

guidelines. These rules of thumb will not be perfect, but like the guidance given by a coach to an athlete or musician, the guidelines must provide clear indications of a path to follow. Clients will take risks, but with good advice they will be able to minimize those risks or the damage that mistakes cost them.²⁷ To provide the needed advice, lawyers will need to start with some guidelines that help explain abstractions, such as "fair use," in terms that relate to the immediate problems that their clients face.

III. SUGGESTED GUIDELINES

A. *The Guideline Strategy*

The guidelines derive largely from the proposition that if parties give notice of their copyright claims and use intentions, they will be able to achieve the balance of rights and access intended by the copyright law. The parties using these guidelines will also achieve the balance while minimizing the expense and delay of litigation. To achieve this balance, the actors need to cooperate within the rules.

Sports and automobile driving provide a rough analogy since there are rules for both. When the rules are violated and the violation is detected, a sanction is imposed. However, if the rules are not known by the players, violation is much more likely. On the road, successful drivers avoid accidents, rather than litigate them after the fact. They do this by observing the rules of the road and by driving defensively, looking out for and accommodating the mistakes or discourtesies of other drivers. The Internet needs customs in much the same sense that roads and games need rules. As in driving and sports, copyright law, as it relates to the Internet, needs sideline and goal definitions to provide structure to the game. Fair use functions best when the participants cooperate in some degree with the customs.

Copyright law identifies its common goals quite clearly. The basic norms or assumptions of the law are simple and fairly well known to lawyers and nonlawyers alike. These norms include the following:

- One should pay authors for copies of their works.²⁸
- The right to payment is limited by a concept of fairness that allows copying

27. See, e.g., Howard C. Anawalt & E. Enayati, IP STRATEGY—COMPLETE INTELLECTUAL PROPERTY PLANNING, ACCESS, AND PROTECTION, §1.03[12][e] at 107:

Ultimately the client needs to take a great deal of responsibility for deciding whether a proposed use is either fair or transformative, as opposed to an invasion of another's right. The client usually has knowledge of industry customs and the degree of originality which he has supplied. Ask the client: "Is there an essential element of change in what you have done that does not rely primarily on the other's work."

28. Harper & Row Publishers, Inc. v. Nat'l Enters., 471 U.S. 539, 558 (1985).

for certain socially useful purposes.²⁹

- The fairness sought should try to accommodate the interests of authors and the interests of the public in the free exchange of ideas.³⁰
- Copyright also respects a degree of privacy in that it recognizes that authors may restrict work from circulation, as by keeping it unpublished.³¹

The assumptions of copyright involve reciprocity. An author knows that he deserves compensation, but the author also knows that in exchange for his right to compensation, the public is accorded access by fair use. Law always encounters difficulty in trying to enforce reciprocity.³² Enforcement of compensation rights and fair use norms must occur, but true reciprocity will be achieved when the authors and users play by the same rules.³³ One critical means for achieving the reciprocity of claims between authors and users is for each group to provide adequate communication of their claims and intentions. The guidelines take the position that much of the responsibility for the communication rests on the copyright owners. Copyright owners need to give notice of their claims, keep their demands for compensation for copies reasonable, and make fair accommodations for access.

Copyright law imposes liability even on innocent infringers. However, the law immediately softens that liability by making many uses fair and by reducing the damages caused by an innocent infringer.³⁴ The fair use statute lists four non-exclusive factors for judging fairness of use of copyrighted materials: purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of what is used; and the effect of the use on the market for or value of the work.³⁵

An Internet user can judge a great deal about the fairness of his or her use directly from the work as it appears on the computer screen. The user knows the purposes of his or her use. Also, the individual can judge the nature of the work, as well as how much he or she is using from the work. However, the individual will need some guidance as to the market and value of the work, the fourth factor in the statute. The Internet presents such a huge body of communications that a user will have difficulty separating those items that are offered for access without charge from those that charge a fee if the author or producer does not provide some guidance.

In the Internet environment, the potential infringer appears to have limited

29. 17 U.S.C. §§ 102(b) & 107.

30. *Harper & Row Publishers, Inc.* 471 U.S. at 558.

31. See 17 U.S.C. §§ 104(b), 109, & 204.

32. Enforcing reciprocal relations carries a bit of the contradiction that is involved when a law school tries to instill a spirit of volunteerism by requiring pro bono legal work.

33. Most soccer and tennis games are played in the United States without the presence of a referee. The games function because of cooperation and reciprocity by the players.

34. 17 U.S.C. §§ 107 & 504(c).

35. 17 U.S.C. § 107. Fair use is adjudicated after the fact. It is viewed as an affirmative defense, with the alleged infringer bearing the burden of proof that his or her use was fair. See *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1177 (1994).

ability to observe the value of a work without some notice from its originator that value is claimed. The claim of value can be made very simply by the copyright holder declaring that he or she retains or insists on the rights as a holder. This can be done simply by a copyright notice, a statement that a matter is an unpublished work, that rights are reserved, or some other such warning to the lay person that the author regards its claim as important. The nonlawyer tends to recognize such indications as "no trespassing signs."³⁶ Some works, such as correspondence, tend in themselves to provide warning that they are not free for the copying.³⁷

Internet Copyright Guidelines

- 1. Give notice.** Include notice of claims of ownership and restrictions of delivery in electronic versions posted on the Net.
- 2. Reasonable compensation.** Authors of highly marketable works should keep compensation demands to reasonable levels.
- 3. Respect claims.** Respect known claims of ownership of electronic postings. Generally, do not retain copies of works which contain no indication of permission by the copyright owner.
- 4. Pay for use.** Obtain permission or pay for a work which you upload or download and use.
- 5. Transform, critique, or analyze.** Fair use likely exists when you transform, critique, or analyze a relevant, but limited section of a work.
- 6. Respond.** Respond to communications that copyright owners direct to you.
- 7. Computer programs and games.** When downloading an interactive work, such as a computer program or game, restrict your activity to reading or perusal of its contents, unless you have paid for its use.
- 8. Do not reformat.** Do not convert material into an Internet postable format without permission or clear fair use privilege.
- 9. Distributors watch for restrictions.** Determine whether likely claims of restricted distribution exist when making matters available for downloading from the Internet.

Until the United States acceded to the Berne Convention, notice was required to preserve one's copyright in published works. Our law does not maintain that general requirement for current works, yet the purposes that

36. The emphasis is on the nonlawyer or "layperson." For example, unpublished works are copyrighted. 17 U.S.C. § 104(a). Thus, there is no basic distinction between the copyrightability of published and unpublished works. The layperson, however, may affix the label "Unpublished—all rights reserved" and expect that others will be obliged to treat the matter as "private" without ever knowing about or being concerned with the exact legal theory that protects his or her work. Notice of seriousness has been given.

37. There is probably a widespread misconception, however, that the recipient of a letter is free to copy or broadcast it. The recipient owns the physical item, but the writer owns the copyright.

notice originally served are present in the fair use context discussed above. The adequacy of the notice was judged by determining whether it was placed "in such manner and location as to give reasonable notice of the claim of copyright."³⁸

Summarized, the strategy underlying these guidelines relies on reasonable notice and communication among the interested parties. Fair notice of one's claims of ownership and access will allow the practical balance of ownership and access of copyright to flourish on the Internet.³⁹

B. The Guidelines and Their Context

1. Notice

The first guideline focuses on the practical value to authors of giving notice that they take their work and its copyright seriously. The law does not require notice by authors.⁴⁰ While there is no direct legal sanction for not giving notice, the lack of equity on the part of the author may be perceived by the judge or jury when enforcement is sought.⁴¹ The discretion that copyright allows for fair use or reduction of damages can blunt the legal remedies available to authors.

Guideline 1. Give notice.
Include notice of claims of ownership and restrictions of delivery in electronic versions posted on the Net.

Giving notice provides advantages. It insists that the creator has rights and claims them. In days when public domain software ("freeware") is distributed by electronic means, the notice states that "this is not free stuff." A courteous notice also creates a good rapport with the using public. A good deal of thought can be given to the substance and form of the notice. I believe

38. Former 17 U.S.C. § 410(c). The section is explained in H.R. REP. NO. 94-1476, 94th Cong., 2nd Sess. 144, reprinted in 5 U.S.C.C.A.N. 5659-60 (1976). Under present law, 17 U.S.C. § 405(b), an innocent infringer of a pre-Berne work incurs no liability if he or she relied on an authorized copy of a publicly distributed work which omitted notice. *Id.* at 143.

39. In the analogy of sports, the various players will be able to participate in the "game" of copyright with minimum supervision by the referee. Enforcement plays an important role in the copyright context, but adherence to common expectations should reduce reliance on legal proceedings. At the Dayton Symposium, one colleague urged that Internet behavior was much more the "law of the jungle" and that the expectations expressed in this paper may be naive. Dayton School of Law: A Scholarly Symposium—Copyright Owners' Rights & Users' Privileges on the Internet. The expectation expressed throughout the discussion that follows is that behavior will likely *improve* in response to known and reasonable rules and mores.

40. *Norma Ribbon & Trimming, Inc. v. Little*, 51 F.3d 45, 48 (5th Cir. 1995). Pre-Berne works, of course, require notice. *Id.* As to certain types of works, such as phonorecords, licensing rates are regulated through the copyright arbitration royalty tribunals. See 17 U.S.C. § 801 *et seq.*

41. A practical caveat is in order here: Judges and juries *may* grant the alleged infringer some leeway on fair use and damages reduction. However, counsel for a defendant must reckon with carrying a burden of proof or fair use against a predictable judicial and public sentiment favoring copyright ownership claims. See also *supra* note 34 and accompanying text (noting that fair use is an affirmative defense).

that it is generally advisable to make a notice clear and friendly.⁴² The goal is to encourage recognition of one's legitimate legal claims. In the analogy to sports, one seeks to play soccer without seeking a referee. In making the notice clear, one benefits by using understandable nonlegalistic language and by keeping matters short.

A notice might read:

This work is copyrighted by ABC, 1994. We reserve our rights under the copyright laws. We have authorized this electronic distribution of this program for the convenience of users who may purchase it and those who wish to review it. We do not consent to one retaining a copy of the program in any storage medium for any period longer than necessary to become initially acquainted with the program without our permission.

This notice warns both consumers and those who distribute over the Internet (e.g., bulletin board operators) not to engage in long term copying, and implicitly not to transfer copies to others. If desired, one might add specific language that no consent is given to transferring the work to others.⁴³ The author or producer of software may also wish to include a kind of "electronic shrinkwrap" in its distributions.⁴⁴ Rather than distribute the entire software, only certain major features are distributed for direct downloading and user testing. Other features would be electronically locked or omitted so that one will be obliged to transact with the seller before proceeding further. The potential user should be warned in a friendly and understandable way that the matter is copyrighted and that the program is merely a sample. A simple sign-on procedure can then provide for delivery of the full program from the producer.⁴⁵ A further practical means to consider with clients is encryption. The program itself might be distributed in encrypted form, with the key for decryption provided as part of the licensing transaction whereby the producer authorizes (and enables) use.⁴⁶

42. In instances where matters are more adversarial, as when a demand letter is sent, it is useful to alter the tone to being firm and friendly. It is not often necessary to be either "in your face" or overly legalistic in creating copyright notices.

43. For example: "We do not consent to one retaining a copy of the program in a storage medium for any period longer than necessary to become initially acquainted with the program or to any transmission without our permission."

44. The analogy to shrinkwrap is to the ubiquitous physical shrinkwrap that all of us maddeningly contend with whether trying to open a package of screws, a CD, or a light bulb, rather than the legal boilerplate that we call "shrinkwrap licenses." See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640 (W.D. Wis. 1996); *Architectonics, Inc. v. Control Sys., Inc.*, 935 F. Supp. 425 (S.D.N.Y.). Software distributions often use the techniques mentioned in the text.

45. Proposed Article 2-B of the Uniform Commercial Code is seeking to provide simplified commercial customs and legal practices to accommodate such electronic commerce. The drafts that the author has seen also include electronic "self help" which would include such means as after the fact disabling of programs that have been installed. In effect, this amounts to installing bugs or "undocumented features" in the software. For many reasons, both the Commissioners and potential marketers need to approach such means gingerly. The electronic shrinkwrap discussed in the text does not include post facto disabling, and the author does not, at this time, recommend it.

46. William Hodkowski, *The Future of Internet Security: How New Technologies Will Shape the*

While a producer may fully enforce copyrights on Internet-distributed matter, many factors militate against copyright providing *effective* protection. Producers will expend time and effort going after individual alleged infringers. They will fare better by providing clear and reasonable notice that can gain compliance with legitimate claims in ways that threats or enforcement cannot. The text of notices will be important. The law does not require the notice, thus there is very little point in making it legalistic. Inform and engage the reader of the message, so that people will be generally pleased to comply. One can test the geniality of a notice by reading it from the point of view of the intended recipient, then follow that up with asking someone outside the legal profession to read it and comment on it.

2. Reasonable Compensation

The second guideline closely relates to the first and advises authors to ask for reasonable compensation for duplication.⁴⁷ Copyright law does not limit the amount of compensation authors may request.⁴⁸ This second guideline advises authors, especially of popular works, to keep their compensation demands for duplications to reasonable levels, rather than follow the formula "what the market will bear." If a price is reasonable, people will generally pay it. In classes I have taught to law students, some students remark, "All of us have bootleg copies of software. With all the expenses we have, we cannot afford the absurd prices for word processors and other programs."⁴⁹ These comments came from thoughtful students who display high levels of integrity in their actions. Most were also intellectual property students. In general, they want to comply with copyright demands. Yet they do not see themselves as being morally corrupted by making copies because the prices are too high.

Guideline 2. Reasonable compensation. Authors of highly marketable works should keep compensation demands to reasonable levels.

Internet and Affect the Law, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. (forthcoming 1997). Various enterprises are currently designing electronic means of bringing the old fashioned flexibility of traditional contract law into electronic transactions. One such effort is being pursued by a Silicon Valley company, Intertrust, Inc., which calls its system the "Intertrust Commerce Architecture."

47. While the author receives initial ownership of the copyright under United States law, in fact the work for hire doctrine and realities of corporate control give non-author *producers* the effective rights of authors in most instances. See 17 U.S.C. § 201(a)-(b). Corporate producers obtain the commercial benefit of their individual and collective author workers. Often such producers have decidedly different interests than the actual authors, the users, and the public at large. This presents a matter that is too often overlooked in current policy making in copyright.

48. 17 U.S.C. § 201(d).

49. Some have stated: "I'll bet that there is not a single person, faculty or student, in this law school who does not have some piece of bootleg software in his or her computer." I have a hunch that the level of copying of software may have changed in recent years, as the prices of popular or necessary programs have dropped.

The notion of reasonable pricing has a long history in copyright. The original copyright statute, the Statute of Anne (8 Anne c. 19, 1710), provided that judges could act on and remedy a complaint that a book was sold "at such a Price or Rate as shall be Conceived by any Person or Persons to be High and Unreasonable."⁵⁰ United States law has established a series of compulsory licenses to accommodate the distribution of certain kinds of copyrighted work.⁵¹ Our newer electronic distribution means, and others in the future, may require a similar response. A common thread of facilitating reasonable access at reasonable rates runs from the Statute of Anne through the 1976 Act's licensing provisions.

These first and second guidelines are primarily practical in that they emphasize the authors' relations to their markets. If authors do not give notice or if they charge extravagant prices, they may lose income and respect for their works because of unauthorized copying. When the copying occurs, these authors will be faced with the unpalatable choice of seeking belated enforcement or licking their wounds.⁵²

While the notice and compensation guidelines present marketing considerations, they also bear a direct relationship to the law. People seek to avail themselves of copyright protections because they desire to have *effective* rather than theoretical protection of their work. The best protection comes when the law is observed without recourse to enforcement. The fairness of the producer will most likely be taken into account "in the equities" of a matter when enforcement is sought.

3. Respect Claims

The third and fourth guidelines call on users and distributors to respect claims and pay for what they use. They are reciprocals of guidelines one and two. If, on the one hand, we advise producer-clients to provide fair notice and reasonable compensation demands,

Guideline 3. Respect claims.

Respect known claims of ownership of electronic postings. Generally, do not retain copies of works which contain no indication of permission by the copyright owner.

50. ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT FOR THE NINETIES, 2 (1989) (providing a discussion of the Statute of Anne).

51. These include compulsory licenses for cable transmission, phono records, public broadcasting, and satellite transmissions. See MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW, 206 (1989).

52. Esther Dyson has written some powerful critiques along these lines. Her views of what happens to intellectual property on the Net may be summed up like this: Value shifts from the transformation of bits rather than bits themselves, to services, to the selection of content, to the presence of other people and to the assurance of authenticity—reliable information about sources of bits and their future flows. In short, intellectual assets and property depreciate, while intellectual processes and services appreciate. The final result for creators in this new world is that intellectual value markets will bifurcate into content assets of premium prices and high value, and services and processes built around free or cheap content. Esther Dyson, *Intellectual Value*, WIRED, July 1995. The Netscape approach appears to be based on this strategy.

then let us urge our consumer-clients to respect claims of ownership. Fair use will protect a great deal of consumer downloading but not wholesale copying. The general notion is that users should look for copyright notices on works that are either rather obviously commercially available or which appear to embody an extensive work product. To a certain extent the guideline warns users away from some legitimate uses or downloading.⁵³ If I could state a pithy guideline that captured the legitimate exceptions without losing the main point, I would do so. The main point, however, seems to be too important to cloud with verbiage. Some types of "documents" available on the Net signal trouble. These are usually fairly long or complete. They also are usually commercial. While one may readily download the latest lawyer jokes or e-mail forwarded to us, one needs to resist doing the same with works that carry obvious commercial (or personal) value.⁵⁴

4. Pay for Use

The fourth guideline simply expresses the basic norm that one pay for what he or she uses.⁵⁵ The Internet creates situations that may be new to some users, in the sense that they may not as readily perceive that they are taking something from a copyright holder. For example, the average person has experience with

Guideline 4. Pay for use.
Obtain permission or pay for a work which you upload or download and use.

53. The guideline also fails to include certain copying that literally may offend the copyright of the author. Specifically, any downloading may constitute infringement. However, the principal problems raised usually do not concern the relatively short duration of downloading into RAM, unless one ventures from strict copyright claims into privacy.

54. The reciprocal relations among authors, distributors, and readers or viewers raise a matter of copyright theory that I would like to discuss briefly. These categories—authors, distributors, and readers or viewers—represent functionally important roles. However, in increasing instances the distinctions among these groups will be blurred or obliterated completely in electronic media. An interactive medium, such as the Net, tends to turn everyone into users who change their roles during the course of communication. At one point in time the original author may become the reader or student of a work. The reader or recipient of a work may comment on it or write an adaptation, in which case, he becomes an author.

The Internet resembles a large ballroom filled with people talking. Unlike a physical ballroom, in an electronic network people can all talk at once and still understand each other. A few years ago, very few people enjoyed the ability to initiate both point to point communication and broadcast style communications. Large entities could broadcast programs, while individual users could merely listen or watch. Now, computer connected communications allow users to watch, listen, reply, and alter what they have received. Works can be created and widely disseminated without the intervention of publishers. Traditional users will naturally want to "get in on the act" through criticism, parody, and forwarding of others the items that they view to be important, interesting, or even silly. Furthermore, dominant economic forces now urge consumers to become engaged in the phenomenon interactivity. "Multimedia" has become a predominant commercial push today, and its touchstone is ability to alter access, progression, and even content of messages, i.e. "works of authorship." Common acceptance of copyright mores or "rules of the road" becomes very important in an interactive environment. Reliance on courts to impose the rules in enforcement proceedings offers less practical value in electronic environments than it does in the traditional world of physical copies of works.

55. See *supra* notes 28-31 and accompanying text for a discussion of the four basic norms. The first norm is that one should pay authors for copies of their works. See *supra* note 28.

the notion that physically copying a picture may violate some rights of the photographer or artist. That same person may not realize that the same potential exists when he or she downloads or stores the same picture in a computer memory.⁵⁶

In *Playboy Enterprises v. Frena*,⁵⁷ the defendant, Frena did not pay for downloading pictures into his computer memory. Frena operated a bulletin board service (BBS). An electronic BBS, is very much like its traditional counterpart where one pins up messages. In essence it is a computer and an associated database where people can log in and leave and retrieve messages.⁵⁸ For a fee or as an incident to purchasing products, individuals could log onto Frena's BBS, the Techs Warehouse, and browse through his databases and download pictures from that base.⁵⁹ The pictures available in Frena's data files included 170 images from Playboy Magazine.⁶⁰ Frena had not obtained any authorization from *Playboy* to copy or display these images.⁶¹ Frena offered as his defense the fair use doctrine. The court roundly rejected that claim; "Defendant Frena's use was clearly commercial."⁶² The court then applied a presumption that commercial use is unfair use.⁶³

In 1994, four months after the decision in *Frena*, the Supreme Court clarified its views in *Cambell v. Acuff-Rose Music, Inc.*⁶⁴ In *Cambell v. Acuff-Rose Music, Inc.*, the Supreme Court held that commercialization is an extremely important factor in assessing whether a use is fair; however, the

56. The observation in the text does not condone ignorance but recognizes it. The anecdotal experience of the author and others he has spoken to indicate that a level of practical confusion does exist. On the other hand, there will be those who understand perfectly well that they are appropriating someone else's work when they download, upload, or store a picture.

57. 839 F. Supp. 1552 (M.D. Fla. 1993).

58. Some BBS's, like Frena's, are operated for profit. CompuServe and America On-Line, are in essence large, for-profit bulletin boards. Such electronic services usually are connected to the Internet and can be accessed from it, though they need not be.

59. *Frena*, 839 F. Supp. at 1554.

60. *Id.* "Frena has admitted that every one of the accused images is substantially similar to the PEI copyrighted photograph from which the image was made." *Id.* at 1552.

61. The case analyzes the allegations of infringement from the point of view of public distribution and display rights, as well as from the vantage of the original copying. *See id.* at 1559-61. Commenting on this aspect of the case, another District Court stated, "The court did not conclude, as plaintiffs suggest in this case, that the BBS is itself liable for the unauthorized reproduction of plaintiffs' work; instead, the court concluded that the BBS operator was liable for violating the plaintiff's right to publicly distribute and display copies of its work." *Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995).

62. *Frena*, 839 F. Supp. at 1556.

63. *Id.* at 1558. The decision hints at the Defendant's apparent capitulation. The Plaintiff's won their essential motions, and the Court dismissed the case, having been advised by counsel that the case was settled. The presumption of unfairness based solely on commercial nature of the subsequent use was firmly established when the decision was rendered. The Supreme Court had on two occasions indicated that "every commercial use of copyrighted material is presumptively . . . unfair." *Sony Corp. v. Universal City Studios, Inc.* 464 U.S. 417, 451 (1983). A presumption was probably never intended by the Supreme Court when first stated in the *Sony* opinion. The use of a presumption to deal with the question would now be improper as discussed in the text below.

64. 114 S. Ct. 1164 (1994).

commercialization does not create a presumption of unfair use.⁶⁵ Nonetheless, drawing a profit for oneself provides probably the most powerful single argument against fair use. Courts and counsel must be attentive to consider all of the factors, but when one factor stands out in persuasive force, a court may strike the balance in the direction of that factor.⁶⁶ Thus, even if the alleged infringer does not profit himself, courts will likely reject a fair use defense where the Internet has been used to facilitate widespread copying.⁶⁷

While the law of fair use contains nuances, the practitioner needs to present a clear picture to the client. Taking another's work and simply converting it to one's own profit resembles unallowed poaching. When the client understands the basic idea, he or she should avoid what is likely to be viewed as unfair and either pay for a work uploaded or downloaded or obtain permission for the use.

5. Transforming Works

The Internet makes it very easy to gain access to various copyrighted works. Guideline Five stresses that fair use, and, therefore, permissible use will more often exist when one uses a downloaded work as an integral and necessary part of one's own work. This aspect of fair use has received attention from the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*⁶⁸ The Court

Guideline 5. Transform, critique, or analyze. Fair use likely exists when you transform, critique, or analyze a relevant, but limited section of a work.

ruled that a rap group should be able to prove that its parody of a popular song amounted to fair use.⁶⁹ In addition, "the broader implications of the *Campbell v. Acuff-Rose Music, Inc.* opinion indicate that a subsequent work which 'transforms' the prior work ought to be accorded adequate 'breathing space within the confines of copyright.'"⁷⁰

65. *Id.* at 1174.

The language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character. Section 107(1) uses the term "including" to begin the dependent clause referring to commercial use, and the main clause speaks of a broader investigation into "purpose and character."

Id.

66. The Supreme Court emphasized the effect of profit in *Harper*: "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 exploitation of the copyrighted material without paying the customary price." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985).

67. Thus, in *Sega Enters. v. Maphia*, 857 F. Supp. 679, 688 (N.D. Cal. 1994), the District Court ruled that the operator of a nonprofit bulletin board would be unlikely to prove fair use at trial where the evidence indicated that his service allowed widespread copying of copyrighted games.

68. 114 S. Ct. at 1170.

69. *Id.* at 1170.

70. See *supra* note 27, at 106. A definitional difficulty attaches to the notion that use of a work may be fair when it sufficiently transforms a prior work. Analytically, a transformed work is a derivative of the

Critiquing and analyzing another's work also involves an active use of the copied work. Most often one quotes from the copyrighted work in order to provide the reader with evidence that one is closely following the matter criticized. The quotation makes the commentary more authentic. While critique and transformation provide a firm basis for a fair use claim, fair use will usually be found only in circumstances where the user has copied matter directly related to the substance of his or her original work.

*Religious Technology Center v. Netcom On-Line Services, Inc.*⁷¹ provides an interesting example. One of the defendants, Dennis Erlich, had been a member of the Church of Scientology.⁷² He left the church and became an ardent critic of it.⁷³ He posted a large amount of published and unpublished copyrighted church material on the Internet for the purposes of advancing criticism of the church.⁷⁴ In proceedings on issuance of a preliminary injunction, Erlich lost a very close contest on fair use.⁷⁵ The fact that he posted large portions of unpublished works weighed very heavily against him, as did the fact that he had taken so much of the work.⁷⁶ The court concluded that "the percentage of [the church's] works copied combined with the minimal added criticism or commentary negates a finding of fair use."⁷⁷

The *Netcom* case indicates that the requirements for fair or transformative use will not change much, if at all, because of the nature of the Internet. However, the circumstances that gave rise to the case demonstrate that the very volatility of the medium can lead users into treacherous situations. Erlich appears to have been very fervent in his desire to get his message "out there." It is likely that the ease of access and the potential size of the audience influenced Erlich. Under these circumstances, a user like Erlich needs a fairly clear piece of advice that he must truly transform the work before he can expect fair use to apply.

Internet users who download computer programs to study them may also benefit from the fact that the scope of copyright protection does not extend to aspects of the program that are dictated by considerations of efficiency and external needs.⁷⁸ However, the developer who wishes to accomplish legitimate

prior work, and the original author has the right to claim ownership of those. 17 U.S.C. §§ 101, 103, 106. Thus, the transformation referred to must be such that the character of the original work has been obliterated, distorted, commented upon, etc. so that it can be said to depart from the thrust of the original.

71. 923 F. Supp. 1231 (N.D. Cal. 1995).

72. *Id.* at 1238-39.

73. *Id.* at 1239.

74. *Id.* at 1242-50.

75. *Id.* at 1247.

76. *Id.* at 1249.

77. *See id.* at 1248 (noting that the Internet can be accessed by "more than 25 million subscribers"). Erlich might well have chosen to post the materials in any case. A clear guideline, however, gives a critic a better set of choices. For one thing, he might have designed a critique that was effective, but did not land him in legal trouble.

78. Circuits approach the matter differently. *Compare* Whelan Assoc. v. Jaslow Dev. Lab., 797 F.2d

transformation of a piece of software must first obtain authorized access to the software. Thus, the developer of software needs to follow Guideline Seven,⁷⁹ as well, which stresses that he or she should be careful to obtain permission for the download.

6. Respond

Guideline Six recommends a simple expedient of responding to communications by copyright owners. If one responds to a communication that represents a potential legal claim, one will usually be in a more favorable posture if the matter goes to court. Even more helpful is the fact that a response may help resolve the matter and keep one out of court altogether.

Guideline 6. Respond. Respond to communications that copyright owners direct to you.

The guideline is not unique to Internet matters, but certain attributes of the Net make it particularly appropriate. The speed and ease of Internet communication give rise to potential copyright claims over matters, such as correspondence, that have not been litigated in the past. Tort claims, such as invasion of privacy and interference with advantageous relations, may be combined with copyright claims.⁸⁰ The Internet resembles a shopping mall, a college campus or any other physical space where people communicate and act. It provides an arena for political, religious, or other confrontations, such as the one presented by the *Netcom* case. Responding to the owner's direct communications provides a basis for clarifying demands, and perhaps, minimizing conflict.

7. Computer Programs and Games

Traditionally, copyright was designed to protect softer edged cultural works that enrich or amuse; items such as songs, artwork, and poems. The author is granted exclusive rights of exploitation primarily with regard to making copies. If one must make some sort of a "copy" to read an elec-

Guideline 7. Computer programs and games. When downloading an interactive work, such as a computer program or game, restrict you activity to reading or perusal of its contents, unless you have paid for its use.

1222 (3d Cir. 1986) with *Computer Assoc. Int'l Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992); see also *Sega Enters., Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992) (reverse engineering of software).

79. See *infra* notes 81-88 and accompanying text.

80. One related legal theory, trademark, is frequently joined with copyright claims. Several of the cases referred to in this article presented Lanham Act claims joined with copyright claims. A quick look at cases reported on Lexis indicates that about 180 recent opinions in the federal system concerned copyright law together with Lanham Act claims.

tronic communication at all, however, then there appears to be a continuum of ways in which interim copying may erode the value of the copyright owner's work.⁸¹ For example, watching the performance of a dramatic work appropriates more work value than simply reading the text of the drama. Further, interacting with a work, such as a computer program, or a game, takes more of the author's value than simply reading a manual or watching a demonstration of the game or program.⁸² Therefore, an income tax return program can be effectively pirated by merely one use, as such a program is designed to be used once and generally must be updated annually.

In general, users need to be careful to restrict their use of downloaded interactive work. When downloading an interactive work, such as a computer program or game, restrict your activity to reading or perusal of its content, unless you have paid for its use. Guideline Seven strikes a balance that favors the liberty of the Internet user to examine, as opposed to use the program. In fact, the guideline may be too permissive, in that a user might erroneously understand it to encourage active reverse engineering. One needs to remember the major premise—pay for what you use (Guideline 4)—in conjunction with this guideline.

Some reverse engineering is permitted under copyright law. In *Sega Enters., Ltd. v. Accolade, Inc.*,⁸³ the court sustained a fair use defense of the defendant game manufacturer, Accolade, who made a copy of Sega's commercially available game. The defendant purchased several game cartridges and a Sega game playing console. Thus, the defendant had legitimate access to the entire work, as would any other purchasing member of the public. It then transformed the machine readable object code contained in these works into human readable source code so its engineers could study the games and produce completely independent competing works.⁸⁴

Several aspects of the *Sega* case bear emphasis. First, the defendant had authorized access to the works because he had purchased them.⁸⁵ Thus, in an equivalent Internet setting, it would have arranged for legitimate access before the reverse engineering. Second, the use of the *Sega* games was restricted to study of the work so it could produce completely different works.⁸⁶ Courts will probably understand this aspect of the *Sega* case to extend to production of a

81. See *supra* note 15-19 and accompanying text.

82. The display rights of the 1976 Act provide an analog. Because of the nature of works such as movies, Congress broadly defined the sweep of display rights under 17 U.S.C. § 106(5) combined with the relevant definitions of 17 U.S.C. § 101 to be broad enough "to include all media, including but by no means limited to radio and television broadcasting as we know them." H.R. REP. NO. 1476, 94th Cong., 2d Sess. 64 (1976).

83. 977 F.2d 1510 (9th Cir. 1992).

84. *Id.* at 1514-15.

85. *Id.* at 1522.

86. The court stated that its ruling "does not, of course, insulate Accolade from a claim of copyright infringement with respect to its finished products." *Id.* at 1528. As to those, Accolade would have to refrain from copying or again prove fair use. A small portion of verbatim copying of a functional work, such as a game, would likely be viewed as fair use under the analysis used by the *Sega* court. See *id.* at 524 n.7.

sufficiently transformed work.⁸⁷ Third, the code was copied under circumstances in which the copying was necessary in order for the defendant to produce its own works. The court concluded that fair use was well founded, because Accolade had “copied Sega’s code for a legitimate, essentially non-exploitative purpose, and that the commercial aspect of its use can best be described as of minimal significance.”⁸⁸

8. Reformatting

Guideline Eight deals with uploading or posting matter on the Internet. Uploading may subject one to liability as a contributory infringer. Also, conversion for the purposes of uploading will involve

Guideline 8. Do not reformat. Do not convert material into an Internet postable format without permission or clear fair use privilege.

a copying for more than a transitory period of time.⁸⁹ Thus, the person who wishes to post on the Internet needs to exercise care. One measure of care is to refrain from transforming material into a different form or format for the purposes of an Internet posting, unless the party posting the information has permission or has determined that such a posting likely falls within fair use. For example, a teacher might scan a piece of contemporary artwork into his or her computer memory so it can be used in class. The teacher might later reproduce it in a student handout. Each of these uses will be a very good candidate for fair use for instructional purposes.⁹⁰ However, if the teacher posts the transposed image on the Net or on a home page, the teacher expands the use beyond classroom use.⁹¹

The main value provided by this guideline is its warning effect. Before taking action to post certain items, users should consider whether broadcasting a work constitutes fair use according to one’s judgment. The need to reformat is a bit like approaching a railroad crossing, where it is wise to “stop, look, and listen” in most instances before proceeding.

87. See *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1170 (1994).

88. 977 F.2d at 1522-23.

89. See *supra* note 17.

90. They are within the teacher’s control and can be oriented toward the educational purpose at hand.

91. The ubiquitous practice of people posting artwork on their WWW home pages presents a conundrum. The guideline says: “Don’t do it.” At least it cautions against it, especially in light of the teacher example given. I believe that personal home pages may evolve to include postings such as art as fair personal use, much like a scrap book. Someone puts them on the home page, if she is oriented toward the electronic world and wishes to have her taste reflected there. Thus, one might advise that such a user may go ahead and post on a home page. The burden imposed by the guideline is to avoid posting another’s work when one’s use will likely go beyond the personal, for example, in connection with one’s own business or professional activities. In light of this, the guideline might be more accurate to read: “Do not convert material into an Internet portable format for professional use without permission or clear fair use privilege.” However, I believe that qualifying the guidelines too much undermines their force as practical guides to action.

9. Distributors

The last of the nine guidelines suggests a rule of reason for distributors. Distributors include bulletin board operators, on-line services, and others who provide services to enable people to connect on the Internet. To the extent that distributors exercise little control over content, one can offer forceful arguments against their being held liable for copyright infringement.⁹² This guideline, however, suggests that distributors determine whether likely claims of restricted distribution exist when making matters available from the Internet.

Guideline 9. Distributors watch for restrictions. Determine whether likely claims of restricted distribution exist when making matters available for downloading from the Internet.

It seems unlikely that a rule will develop that completely insulates distributors from liability. The level of liability will most likely be in proportion to the control or responsibility that the distributor bears for making harmful copying possible. The Supreme Court has had only one occasion to review a modern copying technology; the Betamax format of a video recorder. In that case, *Sony Corp. v. Universal City Studios, Inc.*, the Court overturned contributory liability for the recorder manufacturer because the recorder could be put to commercially significant noninfringing uses.⁹³ Protection of this copyright would require courts to look beyond actual duplication of a device or publication to the products or activities that make such duplication possible.

In *Religious Technology Center v. Netcom On-Line Services, Inc.*,⁹⁴ a bulletin board service (Netcom) continued to allow the posting of allegedly infringing copies of the plaintiff's Scientology works after it had received notice of the church's copyright claims.⁹⁵ Netcom was held subject to liability as a contributory infringer.⁹⁶ The court noted that Netcom had not completely relinquished control over its system and was perhaps able to prevent further damage to the church's protected works.⁹⁷ The court also held that Netcom could also be held liable for vicarious infringement of the copyrights.⁹⁸

92. See Elkin-Koren, *supra* note 2, at 346:

Users may play an active role in the transmission of information. In many cases users retrieve information as opposed to the system transmitting it. This may have tremendous implications under the transmission clause. Liability under 106(5) requires actively transmitting the copyrighted work. Consequently, liability would differ depending on the distribution method, whether the BBS operator sends the information or the subscribers retrieve it.

Id. at 306.

93. 464 U.S. 417, 442 (1984).

94. 907 F. Supp. 1361 (N.D. Cal. 1995).

95. *Id.*

96. *Id.*

97. *Id.* at 1375.

98. *Id.* at 1375. The Court relied on the leading case, *Shapiro, Bernstein and Co. v. H.L. Green Co.*,

An operating premise of these guidelines is that people comply with law only in terms that they understand. Probably most writers, employers, and users understand the underlying concepts of fairness that inspire the principles and specific rules of our copyright law. The writer or user knows what it is that he or she intends to do or express in relation to these general concepts of fairness. What is often missing is a more definite understanding of certain core concepts that carry out the basic premises of the law. Attorneys seek to bridge the gap between their more detailed knowledge and the client's need to act in relation to his or her project.

Guidelines work when they translate key concepts into terms that relate to experience of users. Guidelines tend to assist users more when they link general statements of rule to general references to the factual environment that the user will act. For example, the first two guidelines state: "Include notice of claims of ownership and restrictions of delivery in electronic versions posted on the Net. . . . Authors of highly marketable works should keep compensation demands to reasonable levels." These guidelines state strong general rules and relate these concepts to the environment of the Internet user by referring to "electronic versions," "posted," "Net," and "highly marketable." The result encourages the user to ask and answer such questions as: Is my work important enough that I should claim ownership? Am I seeking to restrict the downloading? What are my concerns about compensation? Should I download this? Should I pay for this item?⁹⁹

C. Counseling and Use of Guidelines

Guidelines such as these do not supplant attorney-client counseling on what may amount to fair use in given circumstances. Instead, attorneys should promote discussion with the client concerning usage that may barely fall within the fair use doctrine. Let us consider some examples.

1. Writing a Novel

Assume an author uses the Internet or some other on-line database to gather information, including copyrighted material, for a historical novel. The author has tried to follow the guidelines, particularly Guideline Three that cautions against retention of copies. However, the author is uncertain and

316 F.2d 304 (2d Cir. 1963). In *Shapiro*, the Court stated: "When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials—even in the absence of actual knowledge that the copyright monopoly is being impaired . . . the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation." *Id.* at 307.

99. Most users do not want to wander in a field of abstraction. A user wants to be able to relate to the immediate Internet environment and finish his task. The factual references herein reassure the user that the guidelines speak to an Internet setting, the kind of situation he faces right now. For a related discussion, see Cass R. Sunstein, *General Propositions and Concrete Cases (With Special Reference to Affirmative Action and Free Speech)*, 31 WAKE FOREST L. REV. 369, 369-72 (1996).

wants to know whether retention of the material amounts to fair use. At that point, the author should probably seek some advice. How should an attorney respond?

The gathering and reading may constitute fair use. Whether it is fair in gathering off the Internet depends on the author's respect for known claims of ownership. The author says that she primarily "browses"—like she would in a library. However, rather than take notes and make physical copies of what she may summarize or rely on, the author has created an interim file on her disk that contains relevant references. She tells you that she has relied on the guideline that she transform material into new work.

The creation of the working data base that she describes sounds like fair use.¹⁰⁰ The author is examining copyrighted work in much the same fashion that she would in a library. The difference lies in method. She probably downloads more than she would copy at the library. She appears not to deprive the other copyright holders of any readership, beyond her research use. Analysis of this situation based on the step-by-step application of the statutory factors confirms this conclusion:¹⁰¹

(a) Character of use. The character of her use is transformation. She created something completely new and different, a fictional account based on what she learned from various sources.

(b) Nature of copied works. The nature of the works that she electronically retains may vary, but let us assume that the copied work includes highly creative work which would receive the highest level of protection against asserted fair use.¹⁰² Even so, this factor ought not weigh heavily against the author, because she appears to refrain from copying the expressive aspects into her resulting work product.

(c) Amount used. The amount copied may be large. However, much the same thing can be said about the amount and substantiality of what she uses as has been said of the character of the copied works. She is not copying into her own work. She may store a fairly large amount, but does not divert the stored material away from other potential consumers.¹⁰³

(d) Effect on market. Finally, the fourth factor appears to weigh in her favor, as a novel drawing on many sources will not likely undercut any of the particular references.

These four factors suggest fair use of the material gotten off the Internet. Whether she may retain the electronic library built for the initial novel project and use it in future work depends on the practical utility of keeping the work accessible for the next project. It would appear to be a sheer waste of her time

100. "Sounds like" is an imprecise phrase. The application of fair use is, however, very much geared to overall impressions.

101. Courts, especially at the trial level, tend to recite the various nonexclusive criteria of 17 U.S.C. § 107 and apply them to the facts. This, however, may conceal the fact that the decision maker necessarily looks for the gravamen of the issue of fairness. In some cases this will be the extent taken; in other cases, the market sensitivity of what is taken, etc. Most often, two features of fair use leap to the fore: the gainful (or commercial) nature of the defendant's use, and the degree of defendant's transformation.

102. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

103. *Princeton Univ. Press v. Michigan Doc. Servs.*, 99 F.3d 1381, 1389 (6th Cir. 1996) (en banc).

and effort to start over on her research. The copyright owners would appear to be no more deprived of their work by the second use than the first, which appeared to have been fair. Thus, the practitioner and the author-client have begun to shape a guideline for the author's future work: so long as the author channels his or her use of retained material toward production of a new, transformative, work, the use will likely remain fair.

2. Supreme Court Arguments

As another example, a professor who teaches constitutional law downloads, pays for, and listens to an edited version of the arguments in *Planned Parenthood v. Casey*.¹⁰⁴ He decides that these recordings would be a valuable thing to play for his classes.¹⁰⁵ The professor decides that the portions of the actual arguments are excellent, but that commentary interspersed throughout the recording is too opinionated. Thus, he decides that the best thing to do will be to edit the recordings to eliminate the editorial comments, then play the edited version to the class. May he proceed with confidence that the use appears fair?

The answer appears to be "yes." The critical first step is that he obtained an authorized copy.¹⁰⁶ To the extent there will be transformation, it appears minimal. The professor will not add work of his own but will take out matter in a way that resembles an abridgment.¹⁰⁷ He will take large portions of the work; however, the portions to be used appear to come from the public domain.¹⁰⁸ All he is taking is the research effort to obtain the tapes from the Supreme Court in the first place. Finally, he will not detract from the market of purchasers, because, they, like himself, will need to buy or otherwise obtain the original by downloading or other means.

3. A Netguide

The third, and most difficult, example has been supplied by David L. Hayes, a commentator at *A Scholarly Symposium: Copyrights Owners' Rights*

104. 112 S. Ct. 2791 (1992).

105. He has legitimately acquired his copy. *Compare Sega Enters., Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

106. The alterations, however, will produce a copy (being on a tape, disk or other medium).

107. An abridgement constitutes a derivative work. *See* 17 U.S.C. § 101.

108. Copyright questions have the potential of expanding in all directions: There are substantial questions concerning who owns the copyright to the recorded arguments. The United States government appears to have no claim. *See* 17 U.S.C. § 105. Leaving aside the comments and questions of the Justices, the attorneys arguing the case are the authors of the arguments that have been recorded. These arguments are richly original by any application of the *Feist* standard. It would seem that full access to using and copying these arguments ought to exist without substantial deterrence by copyright claims. Various rationales will support the access: fair use, public argument in court dedicates to the public, and the First Amendment, which while accommodating copyright, nonetheless protects public debate from being inhibited by claims of private right. *Compare New York Times v. Sullivan*, 376 U.S. 254, 277 (1964).

& Users' Privileges on the Internet. He described the following: Assume a client wishes to create a net guide similar to the magazine *TV Guide*. The client intends to sell access to her guide for a profit. Rather than write up descriptions of matters on given Internet sites, the client wishes to rely nearly entirely on copied portions of the content of the material from each site.¹⁰⁹ These would then be displayed on line on the client's own site or World Wide Web page. The purpose would be to allow the net user to browse and select which sites to visit.

There is much that favors a general argument of fair use in this instance. First, the attorney should caution the client to take neither too much material nor critical material from the site.¹¹⁰ If the client restricts her direct copying in this respect, then the Netguide may be said to enhance the original site's market by teasing people to take a look at it. That will likely enhance rather than detract from commercial gain to be derived from paid-for downloads or other transactions. Thus, while the client admittedly aims at commercial gain herself by appropriation of the copied material, the copying is counterbalanced by a positive, rather than negative, effect on the market.¹¹¹

That argument, however, runs into strong resistance. The original source of the sample may have strong desires to control the general tone or flavor of its advertising or previews. An originator may not wish to be listed in the Netguide because of its name or the other material with which its material may be associated. A producer of an animated children's story may be reluctant to have its sample appear in conjunction with clips of hot sexy videos or aggressive macho-man video games. The original author or producer may argue that the Netguide takes content for a commercial purpose and uses it to undermine the commercial value of the work.

The originator's counter argument evolves from the basic notion that the client seeks to make a profit from substantial copyrighted work with little transformative effort beyond selection and organization.¹¹² The client can accomplish her task of creating a Netguide in an alternative way. She can summarize what is available, supplementing the summaries by minor sampling. At a minimum, it would appear that the client needs to include more of her own original work in the Netguide so that a clear transformation occurs. In addition, the client should exercise judgment as to the grouping of material to

109. Apparently this is known by the inelegant term of "sucking" from the sites.

110. Under this analysis, the client will stay within the spirit of criteria 2 (nature) and 3 (substantiality) of 17 U.S.C. § 107.

111. Thus, factor 1 of 17 U.S.C. § 107, commercial purpose, runs against the client, but factor 4, effect on market appears to run in her favor.

112. See *Princeton Univ. Press v. Michigan Doc. Servs.*, 99 F.3d 1381, 1389 (6th Cir. 1996):

If you make verbatim copies of 95 pages of a 316-page book, you have not transformed the 95 pages very much—even if you juxtapose them to excerpts from other works and package everything conveniently. This kind of mechanical "transformation" bears little resemblance to the creative metamorphosis accomplished by the parodist in the *Campbell* case.

avoid such matters as confusing adult and children's offerings by placing them together. Finally, the client should be advised to provide an easy way for the original author to request removal of its listing or the clipped material.

The latter approach will oblige the Netguide creator to undertake time consuming effort: write text, group carefully, and provide an opt-out method for the original owners. If she does not act with such precautions, her alternatives, however, are onerous. She may face and potentially lose a severe law suit, or she may need to obtain advance approval for including each listing or clip in her new site. Thus, the attorney should strongly encourage the client to transform the copyrighted work into an integral and necessary part of the client's own work.

IV. THE SOFT EDGES OF COPYRIGHT

Finally, this Article concludes with a brief reflection on the relation of the guidelines to the general nature of copyright law. The guidelines proceed from the basic theme that copyright depends on day-to-day practices that adhere to common expectations. The theory of copyright balances ownership claims with access interests. As a result, our law posits relatively weak claims of ownership of copyrighted works.¹¹³ The guidelines reflect the notion that while rights will be enforced, the actual substance of the rights involves give and take based on readily understandable expectations.

Copyrights constitute property.¹¹⁴ However, copyright functions more as a tort claim than vindication of a property right.¹¹⁵ Copyrights have fluid boundaries rather than hard and fast metes and bounds. Copyrights are enforced through an action in tort.¹¹⁶ Other property rights are also enforced by tort actions, but the infringement action determines the scope of the copyright and its value. The infringement action defines the rights in ways that do not occur, for example, in an action for trespass to land.¹¹⁷ A claim of infringement triggers an inquiry into the scope of permissible copyright subject matter and into the relative fairness of the defendant's conduct.¹¹⁸ Copyright

113. The underlying premise that ownership rights will encourage works that benefit the public. See Const. art 1, § 8.

114. 17 U.S.C. § 201 provides: "Title vests initially in the author or authors of the work" and that ownership can be transferred "in whole or in part."

115. Defamation, personal injury, privacy, misrepresentation, publicity and the like.

116. It "has always been that infringement of copyright, whether common law, *Twentieth Century Film Corp. v. Dieckhaus*, 153 F.2d 893 (CA 8, 1948), or statutory, *Turton v. United States*, 212 F.2d 354 (CA 6, 1954), constitutes a tort." *Porter v. United States*, 473 F.2d 1329, 1337 (5th Cir. 1973).

117. The property rights in a land trespass case are fixed rather definitely before the action begins, whereas, the infringement action in copyright for all practical purposes defines the extent of the "bundle of rights" which one "owns." *W. PAGE PROSSER ET AL., PROSSER & KEETON ON THE LAW OF TORTS*, § 13 (5th ed. 1984).

118. 17 U.S.C. §§ 106-120 confer "exclusive" rights riddled with exceptions and qualifications, most notably, fair use, which has been the primary concept of discussion throughout these guidelines. Ultimately the judgment in United States infringement cases is determined by a kind of "reasonable person of ordinary

practice also draws heavily on contractual arrangements for definition of rights and enforcement.¹¹⁹ Thus, copyright law comprises a blend of property, tort, and contract.

Enforcement of commercially important copyrights invites the adversary to search his portfolio of claims for countervailing theories: interference with contract, fraud in obtaining an agreement, invasion of privacy, rights to publicize matters, etc. When competing theories or equities reach a trier of fact, there is room for practical compromise, whether in a jury verdict or a judge's findings of fact. When lawyers recognize the fact of practical compromise, they will be likely to accept the need for being pragmatic in enforcement demands.¹²⁰

In addition to the soft nature of copyright, the guidelines rest on the fact that enforcement is often impractical.¹²¹ Minimizing recourse to legal proceedings is a good thing.¹²² Encouraging voluntary reciprocity is wise legal policy. These observations represent a general proposition that law depends more on realities than on logic. Law is proved in practice, not in formality, theory, or perfected logic of enforcement.¹²³ Enforcement seeks only to influence behavior, rather than justify abstract theory.¹²⁴

The flexibility of copyrights represents a good choice of public policy. Flexibility encourages one to experiment with expressions because it reduces anxiety that one's actions will conflict with another's rights. At the same time, it gives ample ability for one to achieve reasonable compensation for the completed work. This balance is a basic policy choice that is likely to endure. Society evidences a continuing preference for the basic goals that motivate soft edged copyright rights—reasonable compensation to authors combined with fair access to the public.¹²⁵

prudence" who makes a broad gauged judgment of what is reasonable under the circumstances. *See, e.g.,* *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532 (11th Cir. 1996). The Court unwinds a typically complex technological copyright problem with generalized concepts to be instructed to a jury. The Court added a wry comment: "Sometimes parties become so engrossed in disputing what 'test' should apply that they lose sight of what the tests were designed to accomplish in the first place. To paraphrase a sage observer, 'If you don't know where you're going, when you get there you'll be lost.'" 79 F.3d at 1545 n. 27.

119. 17 U.S.C. § 201(d), transfer of ownership, and 17 U.S.C. § 204.

120. *See supra* note 51 and accompanying text.

121. *See supra* notes 23-27 and accompanying text.

122. *See supra* notes 20-21 and accompanying text.

123. OLIVER W. HOLMES, *THE COMMON LAW* I (1881):

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

Id.

124. There are times when enforcement is particularly important to achieve practical ends. One of these is when society needs to bring a general pattern of conduct into accord with an important norm. For example, the international rules of law clearly prohibit war crimes, but we need much more attention to the norm by instituting legitimate enforcement proceedings more often.

125. These expectations reflect the values adopted in the Constitution. That protection extends to original works of authors that promote the public good; in the constitutional language, those writings that

Copyright practice has accommodated technological change. Protection of computer programs provides a helpful example of such evolution. From their inception, computer programs have challenged the copyright balance of fair compensation and access. These "literary works" function as machines. The initial extension of copyright protection to cover these very functional works created a kind of "super patent," because one need not demonstrate novelty and non-obviousness before obtaining the capacity to exclude others from effective use. There has been great debate on whether extension of copyrights to such thoroughly functional works has been a good idea. However, once that choice was made, existing copyright norms began to bring the effective scope of such technological copyrights back to a reasonable balance between public access rights and author compensation.¹²⁶ Such readjustments of copyright law occur when legal decisions focus on the underlying policies that limit scope of claims in order to assure access to and use of creativity and information.

At the creative stage of her work, an author benefits from the flexibility of copyright because it allows her to draw on existing work with a good margin of error in judgment. The creative person will worry less about infringement when access or use rights are relatively generous. When faced with a claim of infringement, the author may have ample justification for his or her conduct. Under these circumstances, a reasonably careful author has less reason to fear losing a legal action, although she will need to be concerned about potential legal expenses.

Once the author has become successful, her interest tends to shift from access to protection. She becomes an owner. She wants return for her effort and views encroachments with a jealous eye. If one acquires ownership of a copyright to a work someone else has produced, one benefits enormously from the copyright law's protection of ownership. Yet ownership protection is granted in order to encourage the original creative process rather than to maximize the value of the resulting property.

Most owners of commercially successful works are not authors, but corporations. Most often, the large producers, such as Sony, Random House, or Microsoft, acquire their copyright properties by contract, assignment, or operation of the "work for hire" doctrine.¹²⁷ The companies that manufacture and market works contribute much that is of value, but they do not actually write the works they market. They collect groups of talented people to work on large projects.¹²⁸ They provide capital and they market the products.

"promote the Progress of Science and useful Arts. . . ." U.S. CONST. art. 1, § 8.

126. United States Copyright law currently restricts the protection of functional aspects of software. Prominent among these is 17 U.S.C. § 102(b) which "excludes strictly utilitarian or functioning applications of ideas that are properly the subject of patent law." Howard C. Anawalt & Carol A. Kunze, *Borland Amicus Brief*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J., 501, 504 (1996).

127. 17 U.S.C. §§ 201(b), 204.

128. These companies bring together individual authors who work on a project that may be larger than

Will Internet use encourage authorship of new valuable works?¹²⁹ The Internet offers high speed communication. Coupled with the writing power of computers, it provides an ideal environment for authors to write, exchange work, and communicate directly with a public. There is an expanding Internet culture of exchange of ideas by bulletin boards, on-line chats, and group forms of e-mail. The Net represents different prospects for different authors. Some see it as a grand new world of interaction. For others, it amounts merely to a communications medium—a way to send and receive messages. The traditional playwright and the Internet junkie can both use the Net to their advantage.

The Internet does not assure us that more worthwhile material will be produced. The material on the Net is a potpourri—chat, provocative ideas, art, innovation, idiosyncrasy, valuable information, and junk—and will develop as such regardless of what laws or incentives are imposed on the Net.

The copyright incentive structure will influence how much valuable new material we receive from Internet use. Soft copyrights offer clear advantages in the Internet environment since they tend to favor author and user claims of access, as contrasted with owner or producer claims of protection. Flexible copyright tends to protect the individual author at the time when he or she engages in creative work. It would be wise for Congress and other decision makers to alter the existing copyright balance only when proponents of change demonstrate a clear likelihood of increased author incentive. The focus should remain on author creativity, rather than protection of investments made by non-author entities. To the extent that the current balance between copyright and access claims is preserved, individual authors will find more breathing space for their own creative work, and the Internet will encourage valuable new works.

any one would accomplish. By so doing, they facilitate a group authorship, but the non-author corporation or company owner, not the collective of authors, receives the copyright.

129. The Dayton Conference organizers inspired the speculation with their question: "Does the technology and use of the Internet threaten or enhance the incentives given to authors to create new copyrighted works?" Dayton School of Law: A Scholarly Symposium—Copyright Owners' Rights & Users' Privileges on the Internet.