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Entrepreneurship, Copyright, and Personal Home Pages

AS people have noted repeatedly throughout this conference, the free copying of copyrighted material pervades the Internet. Copyright law exists primarily to prohibit the unauthorized duplication of copyrighted material, and copyright could easily be interpreted to eliminate a lot of this free copying. This essay takes a preliminary look at whether such an interpretation of copyright is truly in the public interest.

I

THE CASE FOR ELIMINATING FREE COPYING FROM THE INTERNET

The case for eliminating free copying from the Internet starts with our desire to support entrepreneurs. Entrepreneurs are admired for good reason. Entrepreneurs imagine how the public might benefit from new things and often take above average economic risks to realize these dreams. This activity is important, even essential to our future prosperity. Therefore, it is sound policy to encourage entrepreneurship.

Strict copyright regulation of the Internet might serve this policy. The Internet offers entrepreneurs great opportunities to realize profits from their works. Images, text, sound, data, and software can all be distributed cheaply and widely through the Internet. Entrepreneurs who provide these things could exploit the Internet by offering their products to a large audience for less money than is presently spent. The cost savings would be split between consumers who pay lower prices and entrepreneurs who reap higher profits.

Unfortunately, there is one major glitch in this vision of the

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Internet. People copy things on the Internet, making it impossible for entrepreneurs to exploit the Internet safely. After all, what entrepreneur would reasonably be expected to expose her work to copying by others? The solution is simple: use copyright law to eliminate the free copying of copyrighted material on the Internet. If copyright guaranteed entrepreneurs that Internet users could not copy their copyrighted works without being forced to pay, presumably entrepreneurs would use the Internet more. Society would benefit from the increased entrepreneurial activity.

II

THE IMPACT OF USING COPYRIGHT TO ELIMINATE FREE COPYING FROM THE INTERNET

The foregoing analysis of the Internet rests on the view that the Internet's free copying poses an unmitigated threat to the public interest. However, the Internet's free copying supports, as well as threatens, the public interest. It therefore makes sense to take a more circumspect and careful approach towards copyright on the Internet than a simple prohibition against copying.

Consider, for example, the copying associated with the creation and use of personal home pages.¹ Typically, the creation of a personal home page involves copying. People often download an existing home page whose design is admired and then modify the content of the home page. This involves changing the text, images and sound of the home page, but not the underlying structure and coding. Additionally, many home pages contain photographs, text or other images copied from the Internet, CD-ROMS, or even conventional print media. Furthermore, the very process of viewing a personal home page implies copying. When a home page is viewed, the user makes a copy of the home page in the RAM (random access memory) of the viewer's computer and at any intermediate sites of the Internet through which the information passes. To the extent that a given home page

¹ Personal home pages make an excellent subject for study because they typify the Internet's threats to entrepreneurship. Private individuals create personal home pages, so their content is subject to essentially no central control. Moreover, personal home pages facilitate, even require, abundant copying of copyrighted material. One might therefore think that strict copyright regulation of personal home pages would serve the cause of entrepreneurship well. However, such a conclusion would be premature, because personal home pages support entrepreneurship in significant ways.

contains copyrighted works whose reproduction has not been authorized, the viewer of a home page will necessarily make another unauthorized copy of the copyrighted works. Finally, viewers of home pages often download material from home pages they view.

The copying associated with the creation and use of personal home pages suggests that copyright law could greatly affect the Internet. First, personal home pages are probably copyrightable subject matter.² This makes the downloading of home pages a copyright infringement because downloading requires duplication.³ If precedent such as *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*⁴ is followed, even the process of downloading a home page and replacing its content might become illegal.⁵

Second, copyright law reserves the right of reproduction and display to the owners of copyright. Thus, copyright violations undoubtedly occur when home page creators use copyrighted materials in their home pages. Copyright violations may also occur when viewers download and store copyrighted material from personal home pages on their hard disks. In some cases, however, this downloading may be protected as fair use under precedent such as *Sony Corp. v. Universal City Studios, Inc.*⁶

Third, those who browse through personal home pages may

² Section 102 of the copyright code grants copyright protection to "original works of authorship." 17 U.S.C. § 102(a) (1994). Typically, courts identify copyrightable subject matter by inquiring whether the work in question required creative selection and arrangement for its creation. This threshold requirement is very low. See *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). Personal home pages obviously require creative selection and arrangement by creators who choose a home page's content and its layout. Thus, copyrightability is quite likely.

³ See 17 U.S.C. § 106 (1994) (reserving rights of reproduction to the holders of copyrighted works).

⁴ 797 F.2d 1222 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

⁵ *Id.* *Whelan* is generally cited for the proposition of extending protection to the sequence, structure, and organization of computer programs. Since the creation of a home page requires coding not unlike computer programming, one could claim that *Whelan* also protects the structure and format of a home page.

⁶ 464 U.S. 417 (1984). *Sony* held that copies made of on-air telecasts for purposes of timeshifting are a "fair use." To the extent that viewers of home pages download material for temporary storage to make later viewing convenient, *Sony* appears to offer some protection. However, if material is kept on a long term basis, or if material is downloaded for commercial (as opposed to personal non-profit) use, *Sony* may not apply. See *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994), (holding that a commercial researcher's archival storage of scientific journal articles was not "fair use").

themselves be copyright infringers. As noted above, the viewer of a home page makes a copy of the page and its contents in the RAM of the viewer's computer and any intermediate sites. To the extent that this copy encompasses material created by the home page creator, the viewer probably has an implied license to make a copy of the page in RAM. However, to the extent that a given home page contains unauthorized copies of copyrighted material, no implied license flows through to the viewer. Since viewers of home pages cannot know in advance whether a home page they want to view contains unauthorized copyrighted material, surfing the Internet easily becomes a series of unintentional copyright infringements.⁷

Finally, one might apply doctrines of contributory or vicarious infringement to hold system operators liable for any acts of infringement which occur on their systems. Although case law and legislation in this area is far from complete, there is some indication that courts are willing to hold system operators liable for the acts of those who are using their systems.⁸

The foregoing analysis shows that copyright could easily be interpreted to make copyright infringers of many who make and use personal home pages. The effects of this could be quite severe. If copying is curtailed, the cost of creating home pages will increase. Since the easiest way to start a home page is by copying another and replacing its content, strong copyright protection for personal home pages would reduce the number of people who ever begin designing home pages. Similarly, if the cost of acquiring content for personal home pages rises significantly, the creation of home pages would likely decrease. This would harm society because personal home pages are important testing grounds for the ideas of future entrepreneurs. While most personal home pages are obviously the "toys" of their creators, the pages do represent the creator's ideas for how the Internet might be used. Occasionally, the ideas which are first tried on a personal home page become the basis for commercially significant

⁷ One might not think that a RAM copy would be sufficiently fixed to constitute reproduction. However, the Ninth Circuit has consistently held that RAM copies are infringing copies. See *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993). Furthermore, it is important to note that unintentional copying is not excused under copyright law. See *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976), *modified*, *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983).

⁸ See *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

Internet-based services or products.⁹ Therefore, it is important to preserve personal home pages as a valuable incubator of entrepreneurship. If the creation of personal home pages dries up, the Internet will become a stagnant, less valuable resource whose capabilities remain untested and unexplored.

Similarly, if those who browse the Internet become copyright infringers, use of the Internet will be curtailed as users either forego browsing completely or else restrict their exploration to known "safe" sites. Finally, if system operators are held liable for all infringements which occur on their systems, one would expect privately imposed restrictions on Internet use to soon follow. This too would curtail use of the Internet.

CONCLUSION

The important lesson to be learned from the foregoing is that the free copying associated with the Internet is not an unmitigated threat to the public interest. Free copying is integral to the Internet's ability to foster entrepreneurship and benefit society. Accordingly, it is unwise to simply adopt interpretations of copyright which eliminate copying on the Internet. Instead, copyright law should be interpreted or amended to make sure that a healthy amount of copying continues at a reasonable cost.

For example, the scope of copyright in home pages should be limited. Although it is tempting to grant home pages "fat" copyrights under precedents like *Whelan*, such action would undesirably reduce the number of home pages created and compromise the Internet's ability to act as the incubator of future entrepreneurs.¹⁰

Similarly, the ability of home pages to make information available to the public at low cost must be preserved. Presently, this is done by the free copying of copyrighted materials, a problematic endeavor because it deprives copyright owners of exclusive rights of reproduction, distribution, and display. On the other hand, forcing all creators of home pages to negotiate with copyright holders risks placing unnecessary burdens on the creation of valuable home pages. A possible compromise solution might be the

⁹ The most prominent example of this may be Yahoo, the widely used Internet directory of links. Yahoo started as the personal home page of two Stanford University graduate engineering students. Today, Yahoo has received around \$1 million in venture capital financing. Joan Hamilton, *A Couple of Yahoos*, STANFORD MAGAZINE, Sept. 1995, at 32-38.

¹⁰ See *Whelan*, *supra* note 4.

implementation of a compulsory licensing scheme. Although some may reject compulsory licensing as unwise interference in the free market,¹¹ policy makers should be reminded that compulsory licensing has been used before to make sure that new technology is fully exploited. When phonograph records and other mechanical reproductions of music became popular, Congress did not allow copyright holders to control whether records were made. Instead, a compulsory license with a statutorily capped rate was imposed.¹² Interestingly, the result of this has not been disaster. Our recorded music industry is extremely healthy, with many people anxious to both write and record music. The same could easily be true of the Internet.

There also seems to be little justification for making the act of viewing home pages an activity fraught with unintended surprise copyright infringements. To be sure, copies of copyrighted material are often made when a home page is viewed. However, the ephemeral nature of RAM copies suggests that any threat posed to copyright incentives is speculative at best, while restricting these copies will curtail use of the Internet. Hence, a clear fair use "safe harbor" for browsing the Internet would surely serve the public interest.¹³

Finally, great care must be used in defining when a system operator may be held vicariously or contributorily liable for infringements happening on his system. There will undoubtedly be times when an operator's knowledge or involvement in infringing activity justifies full liability. However, operators who realistically cannot monitor the behavior of their users should not be forced

¹¹ A prime example of such thinking is the recent National Information Infrastructure (NII) report [hereinafter White Paper] which states,

The Working Group finds that, under current conditions, additional compulsory licensing of intellectual property rights is neither necessary nor desirable. Compulsory licensing disregards marketplace forces. Such licensing schemes treat all works alike, even though their value in a competitive marketplace would likely vary dramatically. It also treats all users alike. It alters the free market relationship between buyers and sellers.

White Paper at 52.

¹² 17 U.S.C. § 115 (1994). See CRAIG JOYCE ET AL., *COPYRIGHT LAW* 515 (3d ed. 1994); ROBERT A. GORMAN & JANE C. GINSBURG, *COPYRIGHT FOR THE NINETIES* 451-52 (1993).

¹³ The possibility of fair use "safe harbors" is ignored by the White Paper, which created a committee to study the problem of fair use and to make recommendations. Unfortunately, there is already momentum to implement the recommendations of the White Paper before any fair use recommendations are made. This is a perfect example of overly hasty application of copyright to the Internet.

into the impossible task of guaranteeing the behavior of people whom they cannot control. If the law holds operators liable too easily, any one of three things could happen: Operators could restrict the types of users to whom they will sell access; operators could raise their rates significantly; or operators could invade the privacy of users by trying to discover and stop infringing activity. None of these possibilities seems desirable.

The Internet is clearly a powerful, fascinating phenomenon. In many ways, its power is the direct consequence of the free copying of copyrighted materials. Understandably, our society may try to curtail that copying out of the well-intentioned belief that entrepreneurship will otherwise suffer. Hopefully, this essay will help policy makers and judges think carefully before we smother the Internet with too much copyright.