

**COMPUTER NETWORKS -- CURRENT  
INTELLECTUAL PROPERTY ISSUES  
INFRINGEMENT IN CYBERSPACE**

**Presenter:**

**PATRICIA A. HOLLANDER**  
**General Counsel**  
**American Association of University Administrators**  
**New York, New York**

**Stetson University College of Law:**

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Introduction

We know that one can be liable for infringement for unauthorized use of copyrighted computer programs. *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F2d 1240 (3rd Cr. 1983), cert. dismissed, 464 U.S. 1033 (1984).

But what do we know about one's liability for the infringing acts of third parties? For example, is one liable if one operates a bulletin board from which users download copyrighted programs or other works without authorization?

In educational settings particularly, is the doctrine of "fair use" changing? Does fair use include browsing in on-line libraries as in off-line libraries?

Does the language of the Copyright Act of 1976, as amended, 17 U.S.C. Sec. 101 et seq., need to be changed to protect intellectual property in cyberspace?

## Computer Networks — A Few General Remarks

Computer networks, simply put, combine computers and telephone lines to provide services to users. A computer network, today sometimes referred to as an information conduit, can connect service providers and users. Some networks connect parties who are nearby, such as networks which reach only throughout one office or building. Networks also may connect over great distances, such as those networks which reach world-wide academic, government, research, and commercial information sources.

To access a computer network, one needs only a personal computer, a modem, and a telephone line. By dialing a telephone number on one's computer, one can be connected to a variety of computer networks, such as the academic-research-government network known as the Internet which currently supports over 23 million users in 74 countries ("More and More People Caught Up in the Net," Washington Times, August 22, 1994) or one of the commercial online networks, such as America Online.

Once connected to a network, one will have a number of choices, from electronic messaging to banking to games. Electronic messaging features are the most popular and include public message areas, electronic mail (E-Mail) areas, file areas, and news services.

Public message areas are areas where any user may post a message and any subscriber to the network may read the message.

Electronic mail (E-Mail) areas, in contrast, permit a private sender to post a message to a named addressee who is the only one who may read the message.

File areas contain all kinds of "files," such as collections of text or data posted by users. Files may contain one-page memos or whole dictionaries. Sometimes a public file

area may contain, among other things, pirated copyrighted software. Books have been sold over the Internet. Stephen King recently offered a short story for sale over an electronic network, the transactions for which were handled by On-Line Bookstore in Massachusetts. Textbooks and course materials could be sold in the same way.

News service areas provide access to news wire services, newsletters, magazines, and similar news information sources.

### Intellectual Property — A Quick Overview

Computer networks fall into a category of property called intellectual property.

Copyrights are available to protect computer software, as already noted. This includes host programs, which allow computer users to connect to various computer networks. Copyrights also protect text, including data bases stored on bulletin boards, as well as interfaces, artificial intelligence, and computer-generated works. See Miller, Arthur R. "Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since Contu?" *Harvard Law Review*, 106, 5, p. 977, March 1993.

Patents are available to protect computer hardware, that is, the machines themselves. Software sometimes may be patentable, as in those situations where the software is integral to the process for which the hardware was developed, such as a computer program containing a mathematical algorithm that governs how long heat is to be applied during a rubber molding process. *Diamond v. Diehr*, 450 U.S. 175 (1981). See also Kahn, Stephen, D. and Parks, Kenneth R., "Computer Law Cases: The Year in Review." *New York Law Journal*, December 5, 1994, p. S2.

Copyrights and patents generally belong to whoever created or invented the work. However, where an individual has been hired by an employer to create or invent a work, the work is called a "work made for hire" and usually belongs to the employer.

### Liability for Infringement

Copyright infringement occurs when copyrighted property is used without proper authorization.

#### Authorized use includes the following:

1. Licensed use - One way to secure authorization for use is to negotiate a contract for a license with the owner of a copyright or patent and pay a license fee or royalty for that use.

2. Making an archival or backup copy of a computer program — The 1976 Copyright Act, Sec. 117, permits making an archival or backup copy of a program which, however, must be destroyed if the original is sold to someone else.

3. Fair Use — The 1976 Copyright Act, Sec. 107, provides for "fair use," that is, making copies for use in teaching, scholarship, or research. Fair use takes into account: (1) the purpose of the use; (2) the nature of the work; (3) the amount copied; and (4) the effect on the potential market for or value of the work.

a. Reverse engineering, that is, taking apart a product to see how it works, is considered a fair use if it is used for legitimate purposes such as recreating lost source codes or debugging programs, but not if the purpose is to create a functionally equivalent work to be sold as a cheaper substitute for the original product.

b. Decompilation, that is, translating a computer program from machine-readable form to human — readable form, very recently has been found to be permitted as a fair use under extremely limited conditions. For instance, fair use was held to permit decompilation only by someone who merely seeks to create a product that is complementary to, and not a substitute for, an existing product, and then only when it is impossible to gain access to the unprotected aspects of the copyrighted work by any other means. *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992). *Atari Games Corp. v. Nintendo of America, Inc.*, 975 F.2d 832 (Fed. Cir. 1992). P75:ST

#### Liability for Contributory Infringement

Contributory infringement is a concept that says that one can be a contributory infringer where one furnishes a copyrighted work to an infringer and where one is able to control the use of the copyrighted work. *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417, (1984).

Similarly a Bulletin Board Service ("BBS") operator was found liable for infringement by directly encouraging its subscribers to upload and download unauthorized copies of copyrighted video games. *Sega Enterprises Ltd. v. MAPHIA*, No. C93-4262 CW, 1994 U.S. Dist. LEXIS 5266, 857 F. Supp. 679 (N.D. Cal. Mar. 28, 1994).

However, it is unsettling to note that there are cases that find contributory infringement even without awareness of the copyright infringement. A BBS operator was found liable for infringement simply by running a bulletin board in which subscribers,

without the BBS operator's knowledge, uploaded and allowed others to download copyrighted photographs. *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

Another case which is still pending may help clarify the situation. A group of music publishers claim CompuServe is infringing their copyrights by permitting or acquiescing in CompuServe's customers' uploading and downloading musical works from a musical bulletin board on the CompuServe Information Service. *Frank Music Corp. v. CompuServe, Inc.* 93 Civ. 8153 (S.D.N.Y., filed 1993).

See also: Deutsch, Sarah B. "Super Liability on the Superhighway?" *The Multimedia Law Report*, November 1994, p.4.; Besek, June M. "Future Copyright Protection: Is Existing Law Adequate in a Networked World?" *New York Law Journal*, December 5, 1994, p.1.

#### The "Green Paper" — Cyberspace and the Copyright Act

Can the 1976 Copyright Act as presently written protect intellectual property rights in Cyberspace? Most commentators believe it can, with minimal changes.

In fact, recommendations for changes in the Copyright Act are in the works. In July 1994 the Working Group on Intellectual Property of the Federal government's National Information Infrastructure (NII) Task Force presented a preliminary draft of its report. The report is called "Intellectual Property and the National Information Infrastructure," informally referred to as the "Green Paper." The comment period has closed, and a "White Paper" is expected early in 1995.

The following are some of the recommended changes.

1. Change the present language which refers to distribution by the transfer of physical copies to include distribution by transmission.
2. Change the present "first sale" doctrine, which allows the legitimate owner of a copy to dispose of it without infringing the copyright owner's distribution rights, to make it an infringement to dispose of a copy by transmission.
3. Change the present language regarding technological protection against unauthorized copying to make it illegal to import, manufacture, or distribute any device whose principal purpose is to remove or bypass either encryption or copy — protection mechanisms. Critics ask whether this change would affect Sec. 117 which permits making a backup copy of a computer program, or Sec. 107, which permits fair use.
4. Add criminal penalties for the fraudulent removal of copyright management information such as the name of the copyright owner or licensing terms digitally linked to a work. This recommendation also includes stiffening civil penalties.
5. Change the "publication" language so that where copies are distributed to the public by transmission the work would be deemed "published." An objection to this change is that it would trigger Sec. 407, which requires placing copies of works in the Library of Congress, whether or not copyright registration is sought. Thus if the Library of Congress becomes a national digital library this change may have a substantial effect on the potential market for a work. Another objection is that this change would cause essentially private communications to be deemed "published" merely by their transmission.



6. Change the language to create a public performance right in the digital transmission of sound recordings. This change is opposed by broadcasters who would have to pay additional royalties.

No recommendations were made regarding the following:

1. Fair Use and "browsing" on-line as is done now in schools and public libraries off-line.

The Working Group seems to want to make things "freely available" on the NII but not necessarily "available free."

2. Should there always be a fee for on-line access to collections?

3. Should libraries be permitted to copy in digital form in order to preserve works, to provide works in digital form through interlibrary loan, and to provide on-line access to collections?

4. Should use of digitally transmitted works be permitted in face-to-face teaching activities, as presently is permitted for physical copies of works?

To try to draw up some guidelines on educational and library use of works on the NII, the Working Group has set up meetings among educators, librarians, authors, and publishers, hoping that they can reach consensus similar to that of the educational photocopying guidelines that appear in the legislative history of the 1976 Copyright Act. Others have suggested there be a commission to study and report recommendations, similar

to the National Commission on New Technological Uses of Copyrighted Works (CONTU), which was established in 1974.

### Multimedia Law

Multimedia law is one of the latest specialties which confront lawyers who represent producers, suppliers, or users of multimedia works. This new specialty has been called a lawyer's ultimate nightmare because it crosses over a number of traditional specialties such as computer law, publishing/media law, entertainment law, and telecommunications law. For those interested in this field of law, see Scott, Michael D. *Multimedia: Law and Practice*. Englewood Cliffs, N.J.: Prentice Hall Law & Business. 1993, 1994 (3-ring binder). See also *The Multimedia Law Report*, a newsletter, Managing Editor is David Nimmer, publisher is business Development Associates, Inc., Washington, D.C., 202/737-1212.

### Conclusion

Whether one is a creator of intellectual property, a supplier of it, or a user of it, liability for infringement can mean big money — in civil penalties such as injunctions, royalties, and fees, or even in criminal penalties, such as fines (and possible imprisonment).

Some of the best legal tools to deal with cyberspace infringement issues are the old tried and true preventive law tools, such as carefully crafted copyright and patent policies set forth in documents relating to governing boards, employees, and students, as the use of clear language in specific contracts covering works made for hire.

Computer — Related Publications by the Presenter

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