4 Tex. Intell. Prop. L.J. 13

Texas Intellectual Property Law Journal
Fall, 1995

Symposium: The Emerging Law of Computer Network

SYSTEM OPERATOR LIABILITY FOR A USER'S COPYRIGHT INFRINGEMENT

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***14 I. Background**

System Operators (Sysops) who administer and manage multi-user or networked computer conferencing systems[1] are currently facing a wide variety of potential liabilities. This exposure stems not only from the acts and omissions which sysops themselves engage in during the day-to-day maintenance of their system, but also from the acts of third parties who access the system directly or through the Internet and similar networks.[2] The problems are magnified by the evolving nature of the laws and precedents which govern, or might be argued to govern, on-line dealings. This article explores one particular area of potential sysop liability: copyright infringement resulting from the acts of third-party users of the system.

The threat of copyright liability for sysops is a real one. Sysops, whose users or subscribers rely on the system to facilitate infringing activities, or use it when engaging in such activities, are susceptible to both claims of direct infringement and the various forms of third-party liability, such as contributory infringement and vicarious liability.[3] This is particularly troubling for sysops who maintain file collections that allow users to upload and download unsolicited files.[4] The files in these collections may represent computer software, digital images or video, digital audio, text, or novel combinations of all these media (multimedia).[5] Once placed on the system by a user, these files can be downloaded by other users and subscribers. The system acts as a data repository allowing users to "swap" their favorite files with others. Some systems even maintain an upload/download ratio which governs the number of files a given user can retrieve based on the number of files that user has contributed. Using these and similar methods, many large on-line services have amassed enormous file collections of tens or ***15** even hundreds of thousands of selections. The problem facing the sysop is that each of these files could represent an independent infringement, unless the user who contributed the file properly obtained permission from the copyright owner to upload the file.[6] This places the sysop in the untenable position of needing to somehow verify the legitimacy of every upload received, a nearly impossible task.[7] Plaintiffs who find that their copyrighted works are being swapped in this way might allege that the sysop, by virtue of running the system, directly infringed the copyright, or, in the alternative, that the sysop is liable under a theory of vicarious liability or contributory infringement.

This article examines the validity of such claims by exploring the potential copyright liability faced by sysops for copyright infringement occurring on or through their bulletin boards. Parts II, III, and IV discuss the applicability of direct infringement, contributory infringement, and vicarious liability doctrines, respectively. Part V explains how recent federal courts have attempted to apply these doctrines. Finally, Part VI takes a look at the future of copyright liability for sysops and the various directions this rapidly evolving body of law may take. For the purposes of this paper, the factual backdrop assumes that the sysop is neither specifically responsible for placing the copyrighted work in the file collection areas nor explicitly solicits such conduct.[8] Instead, the copyrighted works are assumed to have been uploaded by system subscribers on their own accord, and later downloaded by other users, all potentially unbeknownst to the sysop.

II. Direct Infringement

One possible claim against the sysop is direct copyright infringement, because arguably, the sysop actually copied, displayed, distributed, or otherwise violated one of the enumerated rights under section 106 of the Copyright Act.[9] To establish direct ***16** infringement, a plaintiff must prove ownership of the copyright by the plaintiff and actual copying by the defendant.[10] Assuming the first element is satisfied, the issue turns on whether the defendant actually copied the plaintiff's work. At this point, a claim that the sysop's activities constitute direct infringement proves problematic because under these facts, the sysop is not the one who actually commits the acts which constitute infringement. A user/subscriber uploads the file onto the bulletin board, then another user may download it. The sysop does neither. Holding sysops liable for direct infringement simply ignores the fact that someone else is using the bulletin board to conduct infringing activities.

Recently, some courts have relied on Congressional legislative history and the "to authorize" language in section 106 to find direct infringement when a defendant authorizes an act by a third party which violates one of the five enumerated rights in section 106.[11] Other courts, however, have expressed doubt as to whether "authorization" constitutes a separate method of infringement from contributory infringement.[12] Even assuming authorization is a separate form of liability, the sysop's conduct does not qualify. Authorization presupposes that the authorizing party grants the authorized party permission to do a specific act with knowledge that these specific acts will be committed. In *Columbia Pictures Industries v. Aveco, Inc.,*[13] the defendants authorized their customers to play a specific videocassette in a certain video ***17** booth.[14] In a more recent case, a

California district court opined that there might have been illicit authorization to broadcast horse races based on a contract specifically providing for such broadcasts.[15] Many sysops do not negotiate or enter into any contractual agreement with users prior to use of the system. Therefore, this essential grant of authority needed to establish a direct infringement is missing. Even sysops who do enter into such agreements do not universally authorize users and subscribers to violate the copyright laws. The agreements typically sanction subscribers to use the entire bulletin board, including the file collection areas, but the sysop does not authorize its users and subscribers to upload or download copyrighted files. In fact, many sysops have access agreements expressly warning users/subscribers not to upload copyrighted materials.[16] In addition, this cautionary language is often displayed within the file collection areas themselves.

Moreover, by simply allowing public access, the sysop does not necessarily have knowledge that these infringing activities will actually occur. Most users and subscribers never violate the copyright laws, and some do not even use the file collection areas. To hold a sysop responsible for knowing that each user/subscriber intends to commit copyright infringement simply because he allows access, assumes bulletin boards are used solely for illegitimate activities, an idea far removed from reality.[17] These problems make an allegation of direct infringement tenuous, at best, since the sysop does not commit the infringing act and almost never expressly authorizes infringement.

III. Contributory Infringement

Although the sysop's conduct probably does not constitute direct infringement, the sysop might face liability for infringements committed by third parties under a theory of contributory infringement. Based on the concept of joint tortfeasorship,[18] contributory infringement is only possible if there is an actual direct infringement by a third party.[19] The Second Circuit in *Gershwin Publishing Corp. v. Columbia Artists* ***18** *Management, Inc.*[20] articulated the standard for contributory infringement: "[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer."[21]

The courts have recognized two types of contributory infringers: those who provide the means (usually a product) to infringe and those whose physical conduct participates in or furthers the infringement.[22]

A. Means to Infringe

In the landmark case of *Sony Corp. of America v. Universal City Studios, Inc.,*[23] the Supreme Court held that those who provide an instrumentality used to commit a direct infringement face liability regardless of either the amount of control they have over the direct infringer or whether they have an economic interest in the infringing activity.[24] In *Sony,* television program copyright holders alleged that the sale of video tape recorders (VTRs) allowed consumers to conduct illicit copying of television programs.[25] The plaintiffs argued that the consumers should be held liable as contributory infringers since Sony and the other defendants manufactured and marketed VTRs.[26] Borrowing patent law's test of substantial non-infringing use, the Court decided that the VTRs are capable of a substantial non-infringing use, and therefore, the defendants should not be held liable for contributory infringement.[27] The substantial non-infringing use relied on by the Court was "time-shifting," which occurs when consumers tape a television program for viewing at a later date.[28] Although this seems to constitute an infringing activity, the Court held that time-shifting was a protected fair use under the Copyright Act, and thus, did not amount to infringement.[29] The dissent criticized the substantial non-infringing use test, arguing that only very unimaginative manufacturers could not delineate a substantial non-infringing use for most technologies even if the technology was primarily designed for infringement.[30]

***19** How does this test play out for technologies other than video recorders? Some previously troubling scenarios become easy to analyze under the *Sony* test. For example, a library which makes photocopiers available to the public is clearly facilitating infringement in cases where library visitors use the copiers for illicit copying, but since the photocopier has substantial non-infringing uses, the library should not be considered a contributory infringer.[31]

Courts have also applied the *Sony* test in the context of computer software. In *Telerate Systems, Inc. v. Caro,*[32] the court relied on the *Sony* test in holding a software manufacturer liable for contributory infringement.[33] The defendants' alleged primary non-infringing use was, in actuality, the main infringing activity.[34] However, in *Vault Corp. v. Quaid Software Ltd.,*[35] the Fifth Circuit used the *Sony* test to find a software manufacturer not liable for contributory infringement on the basis that its program had substantial non-infringing uses.[36] The *Vault* court reached this conclusion even though the manufacturer

conceded that it had actual knowledge that its product was used to make unauthorized copies of copyrighted material.[37] This is important in the context of sysops, as discussed below in Section C.

B. Participatory Infringement

While similar to the "means to infringe" doctrine, participatory infringement focuses on the conduct of parties who have knowledge of the infringing activity and induce, cause, or materially contribute to the infringing conduct of others.[38] In *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.,*[39] the infringer violated plaintiff's copyrights on certain musical compositions by copying and reproducing an unauthorized album.[40] The plaintiff sued not only the organization who produced the album, but also an advertising agency for placing non-infringing advertisements for the ***20** sale of the infringing albums, a radio station for broadcasting such advertisements, and a packaging agency for shipping the infringing albums.[41] The court held that the advertising agency, the radio station, and the packaging agency could be liable for contributory infringement if they knew or should have known the infringing nature of the specific albums.[42] In *Gershwin Publishing,* the defendant was a manager of concert artists and a creator and producer of local concert associations which provided audiences for its artists.[43] The court found the defendant liable for contributory infringement because the defendant knew that its artists included copyrighted compositions in their performances and that neither its local associations nor its performing artists had secured copyright licenses.[44] The court in that case described the defendant's activities as "pervasive participation" and agreed with the lower court that the defendant "caused this copyright infringement."[45] A recent California case discussed the issue of how much participation is needed to trigger contributory infringement.[46] In this case, which parallels the on-line scenario posed here, the defendant was the owner of a swap meet at which independent vendors were selling counterfeit music tapes.[47] Although the court accepted plaintiff's assertion that the defendant knew the illegal activities were occurring, it nevertheless held that the defendant's actions were passive and not substantial enough to constitute contributory infringement.[48] "Merely renting booth space is not 'substantial participation' in the vendors' activities."[49] In addition, the court noted that the plaintiffs failed to plead how the defendant acted "in concert with the vendors to accomplish the purpose or plan of selling counterfeits."[50] As will be discussed below, participatory infringement may be developing as one means of addressing the sysop liability for acts of a third-party problem with regard to copyright on-line.

*21 C. Means or Participatory Infringement?

1. The BBS as a "Means to Infringe"

Depending on the nature of the sysop and his bulletin board, both theories of contributory infringement might be applicable. If considered under a means to infringe analysis, sysops would be subject to the same scrutiny as VTR manufacturers in the *Sony* case. Many sysops know that some people use their bulletin boards for infringing purposes, as did the software publishers in *Vault.*[51] In these cases liability will hinge on the substantial non-infringing use analysis. If the focus is on the bulletin board as a whole, there is a very good argument that the bulletin board has many substantial non-infringing uses.[52] If the focus is narrowed to focus on the file collection area, the analysis becomes more complicated. Unlike the VTR, the bulletin board not only provides the means to infringe but also contains the copyrighted material within it. It is analogous to shipping a photocopy machine to customers with copyrighted material sitting on the glass and awaiting duplication. If plaintiffs convince some future judge that a bulletin board should be treated in this narrow way, sysops may not be able to show a substantial non-infringing use which would otherwise shield them from liability.

2. The Sysop as a Participatory Infringer

Both elements of participatory infringement are problematic when it comes to sysops. Although sysops know or should know that some users/subscribers may use the bulletin boards to violate the copyright laws, this knowledge might not be specific enough to satisfy the knowledge required by participatory infringement. The cases indicate that the knowledge must be specific as to what is infringed and who is infringing.[53] Sysops, however, rarely know which files are copyrighted, or, in some cases, which users are responsible for uploading them onto the system. Determining the scope of requisite knowledge will be important in deciding sysop liability under participatory infringement.

The second element requires the sysop to aid, induce, or materially contribute to the infringer's conduct. The conduct of the

sysop considered here will rarely be considered "pervasive participation" which causes the infringement, like that found in ***22** *Gershwin.*[54] Instead, the situation here more closely resembles the one in *Fonovisa,Inc. v. Cherry Auction, Inc.*[55] In both situations, the actual infringers will have used defendants' "premises" to violate the copyright laws. Courts could determine, as did the *Fonovisa* court, that the sysop's conduct amounts to nothing more than passive participation. If the courts begin to require the sysops and actual infringers to act "in concert," the sysop may escape liability altogether.

IV. Vicarious Liability

A final theory under which a defendant might be held liable for copyright infringement committed by third parties is vicarious liability. Stemming from respondeat superior,[56] recovery under a vicarious liability claim requires the plaintiff to show that the defendant not only had the right or ability to supervise or control the actions of the infringer, but also had a financial interest in "exploitation of the copyrighted material."[57] As with contributory infringement, there must be a corresponding direct infringement.[58]

Although the most obvious cases of vicarious liability will involve agents or employees of the defendant acting as the direct infringer, this relationship is not necessary if the elements of vicarious liability are otherwise established.[59] In *Shapiro, Bernstein & Co. v. H.L. Green Co.,*[60] the leading case in this area, the infringer was licensed to operate a record store in defendant's department store. The license agreement provided the evidence necessary to satisfy the first element (supervision/control).[61] It stated that the infringer and its employees were to abide by all the rules and regulations promulgated by the defendant department store, and that the defendant would have unreviewable discretion in discharging any employee for improper conduct.[62] The license agreement also provided the defendant with a ***23** percentage of the record store's gross receipts.[63] The court deemed this enough to satisfy the direct financial interest element.[64] With the two necessary elements met and the underlying requisite direct infringement, the defendant department store was held vicariously liable.[65]

A. Landlord/Tenant and Dance Hall Cases

Two distinct lines of cases have also emerged that play an important role in defining the contours of vicarious liability. The first of these involves the landlord/tenant cases.[66] In these cases, a landlord leases his property to a tenant who thereafter engages in copyright-infringing conduct on the leased premises. When landlords lease their premises without knowledge of the tenant's impending infringement, exercise no supervision over the tenant, charge a fixed rent, receive no other benefit from the infringement, and in no way contribute to the infringement, they are not held liable for the tenant's wrongdoing.[67] The second intriguing line of cases includes the dance hall cases.[68] These cases hold the dance hall proprietor liable for copyright infringement resulting from the performance of a musical composition by a band or orchestra whose activities provide the proprietor with a source of customers and enhanced revenue. The proprietor is liable whether or not he has knowledge of the compositions to be played or any control over their selection.[69]

*24 B. Booth Rental Cases

A third line of cases recently emerged which can be best described as "booth rental" cases.[70] Defendants in these cases rented out booth space for an event in which some of the booth renters committed copyright infringement.

1. Supervision/Control

In addressing the element of supervision, the *Fonovisa* court held that the mere renting of booth space does not constitute control of the infringers' activities.[71] Relying on *Shapiro,* the court distinguished between the power to supervise the direct infringers in their general course of business, an *a priori* supervisory power, and the power not to rent to a vendor found selling counterfeits, an *a posteriori* supervisory power.[72] The court stated that the former was needed to find a defendant vicariously liable.[73]

Similarly, the court in *Artists Music, Inc. v. Reed Publishing, Inc.*[74] avoided holding the defendants vicariously liable for the infringing activities of its booth renters by equating the organizer/exhibitor relationship with the landlord/tenant relationship.[75] Several facts proved relevant. First, the defendant distributed a manual setting forth the rules and regulations concerning conduct at the event.[76] The manual was silent as to the performance of copyrighted music.[77] It did, however,

contain a flyer advising each exhibitor to contact the plaintiff for a license to perform copyrighted music at his or her booth.[78] Second, the defendant, prior to the event, had negotiated with the plaintiff regarding the potential purchase of a license.[79] The court went on to point out that although these activities facilitated plaintiff's dealings with the individual exhibitors, they did not constitute the ability to exercise control.[80]

In addition, both cases rejected the plaintiffs' contention that the defendants should have policed the booth renters for infringing conduct. Even though the ***25** defendants in *Fonovisa* had knowledge that some booth renters were violating the copyright laws, the court noted that the defendants were not in the best economic position to prevent the wrongdoing.[81] Its business involved the renting of cheap spots to vendors and not "the business of overseeing that market, ensuring the integrity of the goods sold, or otherwise pleasing customers."[82] Forcing liability on the defendants would force them to take foreign measures, such as hiring people to patrol for infringing conduct.[83] The court noted that it was easier for the plaintiffs to police the infringing activity themselves, citing as an example the plaintiffs' ability in the current instance.[84] In *Artists Music,* the court accepted the defendant's argument that, although technically possible, such policing would have been prohibitively expensive.[85] The defendant would have had to hire investigators to identify music, to determine if it was copyrighted, to ascertain whether the use was licensed, and finally to determine if such a use was a fair use.[86] The court held that the defendant had no duty to perform such extensive and costly analysis without showing an "obvious and direct financial benefit."[87]

Despite having a fact pattern similar to *Artists Music,* the court in *Polygram International Publishing, Inc. v. Nevada/TIG*[88] reached a result different from the other booth rental cases.[89] The court determined, after an analysis of both legislative history and case law, that control is present whenever defendants "either actively operate or supervise the operation of the place wherein the performances occur, *or* control the content of the infringing program."[90] The court concluded the defendant had actively supervised the trade show and had the contractual ability to control the infringing ***26** performances.[91] To support its first conclusion, it relied on the fact that during the trade show defendant's employees walked the aisles to ensure "rules compliance" and were available to address exhibitor concerns and complaints.[92] These activities were enough for the court to distinguish the defendant from an absentee landlord. The court relied on defendant's rules and regulations to justify its second conclusion.[93] It noted that the defendant had the power to alter the rules and regulations to prohibit music altogether but did not do so.[94] The court pointed out that the rules themselves illustrated the amount of control that the operators had over the exhibitors.[95] It provided the defendant with the power to restrict exhibits which became objectionable "because of noise, method of operation, materials or any other reason."[96] The rules also gave the defendant the right to police exhibitors during the show. The court did not address, as did the court in *Artists Music,* the cost of actually policing the show for infringing activity. One reason may lie in the analysis of the second element, as discussed below.

2. Financial Benefit

In concluding the defendant did not receive a direct financial benefit from the infringing sales, the court in *Fonovisa* examined two theories. First, the court failed to find that the defendant received a percentage of the infringers' gross sales.[97] Second, the plaintiffs failed to prove that absent counterfeit tape sales, the defendant would have suffered diminished booth rentals.[98]

The court in *Artists Music* addressed the issue in a similar manner. It rejected plaintiff's argument that revenue generated by admissions is a direct financial benefit.[99] The court stated that there was "no evidence that so much as a single attendee came to the [trade show] for sake of the music played by four out of 134 exhibitors."[100] The court also dismissed plaintiff's argument that the music created an ambiance necessary ***27** to the success of the trade show.[101] It commented that if this were true, the defendant would have provided the music himself.[102]

In *Nevada/TIG,* the court drew a distinction between infringing sales which require a direct financial interest, and an infringing performance which only requires that the performance confer an inferred, overall benefit on an establishment.[103] Reasoning that the trade show was for multimedia products and that the music helped attract attention to the booths, the court held that the organizers received a benefit substantial enough to satisfy the direct financial benefit prong.[104] The court was not persuaded by the argument that only four of the two thousand exhibitors played copyrighted music. It stated that the "crucial question for establishing the benefit prong of the test for vicarious liability is not the amount of benefit, but only whether the defendant derived a benefit from the infringement that was substantial enough to be considered significant."[105]

C. Sysop Liability

Although the booth cases do not answer the question of how to treat sysops, they do shed light on what factors to consider in determining control/supervision and direct financial benefit.

Finding control/supervision will be the main hurdle in finding sysops liable under a theory of vicarious liability. Under *Fonovisa's* formulation, plaintiffs are unlikely to prevail because sysops lack *a priori* supervisory power. They do not exercise control over the general course of business of their users/subscribers. When a plaintiff bases his claim on the *Artists Music* standard, it seems more difficult to resolve because the control issue becomes immediately intertwined with the direct financial benefit analysis. *Artists Music* stated that the defendant could have policed for infringement, but was not required to do so unless it obtained a direct financial benefit from the infringement.[106]

The question then becomes whether sysops obtain a direct financial benefit from the infringement. Since sysops generally do not receive a royalty based on the number of illegal uploads, the direct financial benefit would have to come from access fees. If a plaintiff can establish for a particular bulletin board either that the revenue generated from access fees is reduced by the removal of copyrighted works or that people use the ***28** bulletin board solely to download copyrighted works, this showing might be enough to satisfy the direct financial interest element, and consequently the control/supervision element under *Artists Music*. How much of a showing is required under this standard is still unclear. One main difference between the two scenarios, however, is that some on-line services have millions of subscribers, while the trade show in *Artists Music* contained only 134 exhibitors.

Plaintiffs might have greater success under the *Nevada/TIG* standard. The control/supervision element requires the defendants to "either actively operate or supervise the operation of the place wherein the [infringing act] occurs, or control the content of the infringing [act]."[107] The sysop is the one who creates, develops, and updates the actual bulletin board as well as its contents and services, therefore, sysops will be hard pressed to argue that they do not actively operate their own bulletin boards. Although bulletin boards are extremely costly to police, the court in this case did not concern itself with the cost or logistics of such policing. However, at least one court, albeit in a different context, has noted the extreme burden faced by sysops who are forced to monitor the contents their system carries.[108] The *Nevada/TIG* court seemed impressed with the fact that the organizer had the contractual power and ability to control the infringing activities by eliminating the playing of music.[109] Sysops almost always have the contractual right and ability to shut down the file collection areas completely.

V. Sysops, Copyright Infringement, and Third-Party Liability

A. Under What Model?

As discussed above, determining the proper legal posture of a sysop whose system has been implicated in copyright infringement is a tricky task. None of the traditional models of direct infringement, contributory infringement, or vicarious liability fit the sysop's conduct precisely.[110] Each model has its own problems dealing with the sysop who neither uploads the copyrighted material nor solicits such conduct. Of all the models, the *Nevada/TIG* standard provides plaintiffs with the best chances of success. So far, however, plaintiffs have not pursued either line of reasoning. This is illustrated ***29** by reviewing the case law which has recently surfaced, and by exploring some of the pending litigation in this area.

B. *Playboy Enterprises, Inc. v. Frena*[111]

In December of 1993, the U.S. District Court for the Middle District of Florida was faced with a claim of copyright infringement brought by Playboy Enterprises against the sysop of a commercial bulletin board system.[112] Playboy claimed that Frena, the sysop of the "Techs Warehouse" BBS, infringed on Playboy's copyrighted images. One-hundred and seventy of the files available in the Techs Warehouse file collection were copies of images taken from Playboy's copyrighted material.[113] Frena admitted that the images were available on his system, and that each had, in the past, been downloaded by his subscribers.[114] However, he denied that he had placed the images there himself, arguing that they were unsolicited uploads from subscribers over whom he had no control.[115] Playboy moved for partial summary judgment under the theory that Frena violated Playboy's exclusive rights to distribute and display its material.[116]

Rather than tackle contributory infringement, the plaintiffs sidestepped the issue and claimed that Frena, through the Tech's Warehouse BBS, directly violated Playboy's statutorily guaranteed rights under the Copyright Act.[117] The court first addressed the public distribution claims. Recognizing that section 106(3) of the Copyright Act grants the copyright owner

"the exclusive right to sell, give away, rent or lend any material embodiment of his work,"[118] the court found that there was no dispute that Frena's bulletin boards supplied a product containing unauthorized copies of a ***30** copyrighted work.[119] The court went on to announce that "it does not matter that defendant Frena claims he did not make the copies itself [[[sic]."[120]

The court then addressed the "display right."[121] Referring to legislative intent, the court explained that the display right covers "the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information, storage and retrieval system."[122] A place is open to the public even if access is limited to paying customers.[123] The court also noted that such a display must be "public," which means that it occurred at a place open to the public or "where a substantial number of persons outside of a normal circle of family and social acquaintances is gathered."[124] Under this analysis, the court found that as a matter of law Frena's distribution of the Playboy images to his subscribers constituted a public display, and thus, Frena was liable as a direct infringer.[125]

Frena raised two basic defenses to Playboy's claims. First, he argued innocent infringement.[126] The court dismissed this noting that even innocent infringers are liable for infringement.[127] Next Frena argued that his commercial use was so insignificant that the principal of *de minimis non curat lex*[128] justified holding in his favor.[129] This argument was coupled with a more substantial fair use defense under the Copyright Act.[130] The court found that as a matter of law, Playboy's interests in its images were of such a nature that neither *de minimis non curat lex* nor fair use justified Frena's infringement.[131] Thus, the court granted partial summary judgment for Playboy with regard to the copyright infringement claim.[132]

***31 C. *Sega Enterprises Ltd. v. Maphia*[133]**

Three months later, the U.S. District Court for the Northern District of California relied on *Frena* in issuing its findings of fact and conclusions of law in support of a preliminary injunction and confirmation of a seizure order in an action brought by Sega Enterprises against the "Maphia" BBS.[134] There, the defendant was a system operator of a bulletin board run from his home.[135] The bulletin board, called "Maphia," was open to the public and had approximately 400 users.[136] The court went on to note that the copyrighted Sega video games were available for download by Maphia's users. The court acknowledged that it appeared that such files had not been uploaded by the defendants themselves, but by users of their service.[137]

The court held that Sega had established a prima facie case of direct infringement under 17 U.S.C. § 501 by showing that unauthorized copies of games were made when the games were uploaded to the bulletin board with the knowledge of the defendants.[138] The court further held that unauthorized copies were made when users (different individuals than those who originally uploaded the programs) downloaded the files.[139]

More importantly, the court held that this copying was facilitated and encouraged by the Maphia bulletin board, and that even if the defendants did not know exactly when the games would be uploaded or downloaded from the bulletin board, their "role in the copying, including provisions of facilities, direction, knowledge and encouragement, amounts to contributory copyright infringement."[140]

It is significant that the court justified a finding of contributory infringement on the part of the defendants. The court listed several factors upon which it based its finding of contributory infringement. These included knowledge and encouragement of the system operators of the direct infringement by the users.[141]

VI. The Future of Sysop Copyright Liability

In November of 1993, Frank Music filed a copyright infringement suit against CompuServe which involved new issues in the law of sysop copyright liability. Frank ***32** Music, alleged that CompuServe stored and distributed digital copies of a copyrighted song published by the company.[142] CompuServe's digital music library contains hundreds of user-provided files which arguably could be violating the copyright of the song writers or music publishers who own the rights to those pieces. Some reports have indicated that up to 140 different music publishers are considering joining Frank Music in its attempt to hold CompuServe liable for the activities of its subscribers.[143] This lawsuit may provide yet another opportunity for a court to explore whether an on-line service like CompuServe should face liability as a direct infringer, under third-party liability, or at all.

Recognizing that the current legal uncertainty regarding how to properly address the sysop copyright infringement problem could hamper development of the national information infrastructure, a working group chaired by Assistant Secretary of

Commerce and Commissioner of Patent and Trademark Office, Bruce Lehman, issued a report in July of 1994 recommending reforms to the Copyright Act.[144] The report suggests a modification of the Act by creating a new exclusive right for owners referred to as the "transmission" right.[145] Depending on the definition of the transmission right, system operation and data transmission may prove a risky undertaking.

Footnotes

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1 The terms "Bulletin Board System," "Computer Conferencing System," and "On-Line Service" will generally be used interchangeably throughout this article. These systems often allow members of the public ("users" or "subscribers") to exchange computer files representing software, digital images, audio and other data. Such systems often offer users the ability to interact with one another via electronic mail or in public forums, where groups of users publicly comment on a wide variety of topics.

2 Some of the grounds for liability not involving copyright include defamation, violations of privacy rights, criminal responsibility based on user acts, and liability for a breach of the standard of care relating to providing a secure system. Jonathan Gilbert, Note, *Computer Bulletin Board Operator Liability for User Misuse,* 54 Fordham L. Rev. 439 (1985); Cheryl S. Massingale, *Risk Allocation for Computer System Security Breaches: Potential Liability for Providers of Computer Services,* 12 W. New Eng. L. Rev. 167 (1990).

3 Although the Copyright Act of 1976, 17 U.S.C. §§ 101-1010 (1976) [hereinafter Copyright Act], does not explicitly delineate a cause of action for vicarious or contributory infringement based on the acts performed or caused by others, the U.S. Supreme Court has clearly indicated that such liability exists under the law. Sony Music Corp. v. Universal Studios, Inc., 464 U.S. 417, 435, 220 U.S.P.Q. (BNA) 665, 675 (1984) ("The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity.").

4 The term "download" refers to retrieving files from the host system, while "upload" refers to the transferring of files from a remote location to the host.

5 Not all of these files are necessarily copyrighted or represent potential liability when uploaded or downloaded through the system. Often these files can be freely distributed as part of the public domain (freeware) or distributed on a limited basis pursuant to a special license which contemplates this use (shareware).

6 Before initiating a non-infringing transfer, the contributor would have to obtain permission directly from the copyright owner, or be assured that such transfer was not violative of any governing licenses.

7 Not only does the sheer number of uploads make it almost impossible to monitor, but some users also remove the copyright notice from the file or encrypt the file in such a way that even the sysop cannot view it. *E.g.,* Gilbert, *supra* note 2, at 448.

8 These activities would most likely constitute direct infringement by violating the copyright owner's reproduction, display, and distribution rights, as defined in section 106 of the Copyright Act. 17 U.S.C. § 106 (1994). *See infra* note 9.

9 Section 106 of the Copyright Act provides, in pertinent part that "the owner of a copyright under this title has exclusive rights to do and to authorize any of the following:
(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based upon the copyrighted work;
(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly."
17 U.S.C. § 106 (1994) (Depending on a file's underlying subject matter, the uploading of that file could violate one or more of the rights listed above.).

[10] Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361, 18 U.S.P.Q.2d (BNA) 1275, 1284 (1991).

[11] *See* Columbia Pictures Indus., Inc. v. Aveco, Inc., 800 F.2d 59, 230 U.S.P.Q. (BNA) 869 (3rd Cir. 1986) (holding defendants liable for direct copyright infringement for authorizing a third party to violate one of the five enumerated rights in section 106. The defendants were the owners of video rental stores which rented out both video cassettes and viewing booths. The court held that the customers' in-store viewing constituted a public performance and that the defendants had illicitly authorized this performance in violation of plaintiff's rights under section 106). *See also* ITSI T.V. Prods. v. California Auth. of Racing Fairs, 785 F. Supp. 854, 863 (E.D. Cal. 1992) ("[U]nder the 1976 Act the holder of a copyright enjoys the right 'to do' or 'to authorize' certain acts; violation of either of these rights is a 'direct' act of infringement."), *rev'd on other grounds,* ITSI T.V. Prods., Inc. v. Agricultural Assoc., 3 F.3d 1289 (9th Cir. 1993).

[12] Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1092, 30 U.S.P.Q.2d (BNA) 1746,1749 (9th Cir. 1994) ("[T]he addition of the words 'to authorize' was not meant to create a new form of liability for 'authorization' but was intended to invoke the preexisting doctrine of contributory infringement."); Polygram Int'l Publishing, Inc., v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1334, 32 U.S.P.Q.2d (BNA) 1481, 1495 (D. Mass. 1994) ("[A] defendant can be held contributorily liable for *authorizing* another to."); Danjaq, S.A. v. MGM/UA Communications, Co., 773 F. Supp. 194, 200-02, 21 U.S.P.Q.2d (BNA) 1665,1670-71 (C.D. Cal. 1991) (concluding that the scope of authorization liability should be confined to the bounds of contributory infringement), *aff'd,* Danjaq, S.A. v. Pathe Communications Corp., 979 F.2d 772 (9th Cir. 1992).

[13] 800 F.2d 59, 230 U.S.P.Q. (BNA) 869 (3rd Cir. 1986).

[14] *Id.* at 62, 230 U.S.P.Q. at 870.

[15] *ITSI T.V. Prods. v. California Auth. of Racing Fairs,* 785 F. Supp. 865 (E.D. Cal. 1992).

[16] LANCE ROSE, NETLAW: YOUR RIGHTS IN THE ONLINE WORLD 263 (1995).

[17] The non-infringing uses of such systems have been well documented. *See generally,* Eric Schlacter, *Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions,* 16 HAST. COMM. L.J. 87 (1993).

[18] Fonovisa, Inc., v. Cherry Auction, Inc., 847 F. Supp. 1492, 1496 (E.D. Cal. 1994); Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F. Supp. 399, 403, 150 U.S.P.Q. (BNA) 523, 526 (S.D.N.Y. 1966); 3 MELVIN B. NIMMER, NIMMER ON COPYRIGHTS § 12.04[A].

[19] Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 780 F. Supp. 1283, 1298, 20 U.S.P.Q.2d (BNA) 1662,1673 (N.D. Cal. 1991) ("Absent direct infringement, there is no contributory infringement."); Demetriades v. Kaufmann, 690 F. Supp. 289, 292-93, 8 U.S.P.Q.2d (BNA) 1130, 1132-33 (S.D.N.Y. 1988).

[20] 443 F.2d 1159, 170 U.S.P.Q. (BNA) 182 (2d Cir. 1971).

[21] *Id.* at 1162, 170 U.S.P.Q. at 184-85.

[22] NIMMER, *supra* note 18, at §§ 12.04[A][2][L3].

[23] 464 U.S. 417, 220 U.S.P.Q. (BNA) 665 (1984).

[24] *Id.* at 435, 220 U.S.P.Q. at 667.

[25] *Id.* at 419-20, 220 U.S.P.Q. at 669.

[26] *Id.* at 420, 220 U.S.P.Q. at 669.

[27] *Id.* at 456, 220 U.S.P.Q. at 684 (using 35 U.S.C. § 271(c) (1988)).

[28] *Id.* at 423, 220 U.S.P.Q. at 670.

[29] *Id.* at 442, 220 U.S.P.Q. at 678; 17 U.S.C. § 107 (1994) (containing the requirements for the fair use defense).

[30] *Id.* at 491-93, 220 U.S.P.Q. at 699.

[31] Libraries, while serving as good examples, need not actually worry about this type of liability since qualifying libraries may be exempt from liability for the infringing conduct of those who use the library reproduction equipment unsupervised. 17 U.S.C. § 108(f)(1) (1994).

[32] 689 F. Supp. 221, 8 U.S.P.Q.2d (BNA) 1740 (S.D.N.Y. 1988).

[33] *Id.* at 228, 8 U.S.P.Q.2d at 1745.

[34] *Id.* at 227-28, 8 U.S.P.Q.2d at 1744-45. The court incorrectly stated that in the intellectual property context vicarious liability and contributory infringement are one and the same. *Id.* at 228 n.8, 8 U.S.P.Q.2d at 1745 n.8. The court, however, applied the *Sony* analysis. *Id.* at 228, 8 U.S.P.Q.2d at 1745.

[35] 847 F.2d 255, 7 U.S.P.Q.2d (BNA) 1281 (5th Cir. 1988).

[36] *Id.* at 264, 7 U.S.P.Q.2d at 1289-90.

[37] *Id.* at 262, 7 U.S.P.Q.2d at 1288.

[38] Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162-63, 170 U.S.P.Q. (BNA) 182, 184-85 (2nd Cir. 1971).

[39] 256 F. Supp. 399, 150 U.S.P.Q. (BNA) 523 (S.D.N.Y. 1966).

[40] *Id.* at 401, 150 U.S.P.Q. at 524.

[41] *Id.* at 401-02, 150 U.S.P.Q. at 524-25.

[42] *Id.*

[43] *Gershwin,* 443 F.2d at 1160-61, 170 U.S.P.Q. at 183.

[44] *Id.* at 1162-63, 170 U.S.P.Q. at 185.

[45] *Id.* at 1163, 170 U.S.P.Q. at 185.

[46] Fonovisa, Inc. v. Cherry Auction, Inc., 847 F. Supp. 1492 (E.D. Cal. 1994).

[47] *Id.* at 1494.

[48] *Id.* at 1496.

[49] *Id.*

[50] *Id.*

[51] Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 263-64, 7 U.S.P.Q.2d (BNA) 1281, 1288 (5th Cir. 1988).

[52] *See* Schlacter, *supra* note 17.

[53] *See* Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1161, 1163, 170 U.S.P.Q. (BNA) 182, 184, 185 (2nd Cir. 1971) (noting that the defendant knew the musical compositions to be played, who was playing them, and that no copyright license had been obtained); Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F. Supp. 399, 403-05, 150 U.S.P.Q. (BNA) 523, 527. (S.D.N.Y. 1966) (noting that it would find liability if the defendants knew or should have known that the specific album contained unauthorized renditions).

[54] *Gershwin,* 443 F.2d at 1162-63, 170 U.S.P.Q. at 184-85.

[55] 847 F. Supp. 1492 (E.D. Cal. 1994).

[56] Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307, 137 U.S.P.Q. (BNA) 275, 277 (2d Cir. 1963); NIMMER, *supra* note 18, at § 12.04 [[[A][2].

[57] *Shapiro,* 316 F.2d at 307, 137 U.S.P.Q. at 277.

[58] Polygram Int'l Publishing v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1323-24, 32 U.S.P.Q.2d (BNA) 1481, 1486-87 (D. Mass. 1994)

(refusing to find vicarious liability without allegations of direct infringement); NIMMER, *supra* note 18, at § 12.04[A][3].

[59] For instance, a manufacturer's authority to control the use of equipment by others and the financial interest which accompanies sale and distribution of the equipment have been held to lead to vicarious liability for copyright infringement on behalf of purchasers of the equipment. RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co., 845 F.2d 773, 778, 6 U.S.P.Q.2d (BNA) 1692, 1696 (8th Cir. 1988).

[60] 316 F.2d at 306, 137 U.S.P.Q. at 276.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 308, 137 U.S.P.Q. at 278.

[65] *Id.*

[66] *See, e.g.,* Deutsch v. Arnold, 98 F.2d 686 (2d Cir. 1938); Fromont v. Aeolian Co., 254 F. 592 (D.C.N.Y. 1918).

[67] *See Deutsch,* 98 F.2d at 688; *Fromont,* 254 F. at 594.

[68] *E.g.,* Famous Music Corp. v. Bay State Harness Hose Racing & Breeding Ass'n, Inc., 554 F.2d 1213, 194 U.S.P.Q. (BNA) 177 (1st Cir. 1977) (upholding a judgment against a racetrack who retained an infringer to supply music to paying customers); Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354 (7th Cir. 1929) (finding liability against a dance hall who hired an orchestra to supply music to paying customers); KECA Music, Inc. v. Dingus McGee's Co., 432 F. Supp. 72, 199 U.S.P.Q. (BNA) 764 (W.D. Mo. 1977) (finding liability against the manager of a cocktail lounge which hired musicians to supply music to paying customers); Buck v. Crescent Gardens Operating Co., 28 F. Supp. 576 (D. Mass. 1939) (finding liability against a manager of a ballroom for infringing songs performed by an orchestra he had hired).

[69] Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307, 137 U.S.P.Q. (BNA) 275, 277; *Dreamland,* 36 F.2d at 355. Unlike contributory infringement, there is no knowledge requirement. "The imposition of vicarious liability on a controlling individual, even in the absence of any knowledge of infringement, is premised on the belief that the defendant is in a position to police the conduct of the primary infringer." Boz Scaggs Music v. KND Corp., 491 F. Supp. 908, 914, 208 U.S.P.Q. (BNA) 307, 311 (D. Conn. 1980) (quoting *Shapiro,* 316 F.2d at 309, 137 U.S.P.Q. at 279).

[70] Polygram Int'l Publishing v. Nevada/TIG, Inc., 855 F. Supp. 1314, 32 U.S.P.Q.2d (BNA) 1481 (D. Mass. 1994); Artists Music, Inc. v. Reed Publishing, Inc., 31 U.S.P.Q.2d (BNA) 1623 (S.D.N.Y. 1994); Fonovisa, Inc. v. Cherry Auction, 847 F. Supp. 1492 (E.D. Cal. 1994).

[71] *Fonovisa,* 847 F. Supp. at 1496-97.

[72] *Id.* at 1497.

[73] *Id.*

74 31 U.S.P.Q.2d (BNA) 1623 (S.D.N.Y. 1994).

75 *Id.* at 1626.

76 *Id.* at 1624.

77 *Id.*

78 *Id.* at 1627.

79 *Id.* at 1624.

80 *Id.* at 1626.

81 *Fonovisa,* 847 F. Supp. at 1497.

82 *Id.*

83 *Id.*

84 *Id.*

85 *Artists Music,* 31 U.S.P.Q.2d at 1627.

86 *Id.*

87 *Id.*

88 855 F. Supp. 1314, 32 U.S.P.Q.2d (BNA) 1481 (D.Mass. 1994).

89 *Nevada/TIG,* 855 F. Supp. at 1323-25, 32 U.S.P.Q.2d at 1486-87. Three facts present in *Artists Music* were also present in this case: (1) the defendant instructed the booth renters to comply with the copyright laws; (2) the defendants handed out a handbook describing rules and regulations that the exhibitors were bound to follow; and (3) negotiations failed between the defendant and plaintiff. That handbook, of course, did not mention anything about the performance of copyrighted material. Instead of using these factors to absolve the defendant, the court used them to impose liability. As for the instruction to comply, the court here viewed it as an attempt to shift legal responsibility, something that did not work before. *Id.* The court cited Famous Music Corp. v. Bay State Harness Horse Racing, 423 F. Supp. 341 (D. Mass. 1976), *aff'd,* 554 F.2d 1213, 194 U.S.P.Q. (BNA) 177 (1st Cir. 1977), a dance hall case. The court would have found the defendant vicariously liable if the plaintiff would have alleged a direct infringement had occurred.

90 *Nevada/TIG,* 855 F. Supp. at 1328, 32 U.S.P.Q.2d at 1490 (emphasis in original).

[91] This analysis sounds similar to *Fonovisa's a priori* supervision.

[92] *Nevada/TIG,* 855 F. Supp. at 1328-29, 32 U.S.P.Q.2d at 1491.

[93] *Id.* at 1329, 32 U.S.P.Q.2d at 1491.

[94] *Id.* at 1328, 32 U.S.P.Q.2d at 1491.

[95] *Id.*

[96] *Id.* at 1329, 32 U.S.P.Q.2d at 1491.

[97] *Fonovisa,* 847 F. Supp. at 1497.

[98] *Id.*

[99] *Artists Music,* 31 U.S.P.Q.2d at 1627.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Nevada/TIG,* 855 F. Supp. at 1330-31, 32 U.S.P.Q.2d at 1492-93.

[104] *Id.* at 1331-33, 32 U.S.P.Q.2d at 1493-95.

[105] *Id.* at 1333, 32 U.S.P.Q.2d at 1494.

[106] *Artists Music,* 31 U.S.P.Q.2d at 1627.

[107] *Nevada/TIG,* 855 F. Supp. at 1328, 32 U.S.P.Q.2d at 1490 (quoting *House Report of the Judiciary Committee,* No. 94-1476, 159-60).

[108] Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991) (granting summary judgment for system operators where they neither knew or had reason to know of defamatory material disseminated by the system); *see also Artists Music,* 31 U.S.P.Q.2d at 1626-27.

[109] *Nevada/TIG,* 855 F. Supp. at 1328, 32 U.S.P.Q.2d at 1491.

[110] One commentator has advanced a variation of vicarious liability which focuses on the sysop's knowledge as a solution. Kelly Tickle, *The Vicarious Liability of Electronic Bulletin Board Operators for the Copyright Infringement Occurring on Their Bulletin Boards,* 80 IOWA L. REV. 391 (1995).

[111] 839 F. Supp. 1552, 29 U.S.P.Q.2d (BNA) 1827 (M.D. Fla. 1993).

[112] *Id.* at 1554, 29 U.S.P.Q.2d at 1829.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.* Playboy also moved for summary judgment on a trademark claim and Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). The court granted Playboy's motion on both counts based on the fact that file descriptions of the images in question referred to registered trademarks ("Playboy" and "Playmate") and that Frena's actions of deleting Playboy's text which originally accompanied the photograph and adding some of his own text identifying his bulletin to the image violated the Lanham Act. *Id.* at 1561-62, 29 U.S.P.Q.2d at 1835-36.

[117] *Id.* at 1555, 29 U.S.P.Q. at 1830. 17 U.S.C. § 106 provides that "the owner of a copyright has the exclusive right to do and authorize any of the following: (1) to reproduce the copyrighted worked in copies; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies of the copyrighted work to the public; [and] (4) in the case of pictorial works to display the copyrighted work publicly." 17 U.S.C. § 106 (1994).

[118] *Playboy,* 839 F. Supp. at 1556, 29 U.S.P.Q.2d at 1831 (quoting NIMMER, *supra* note 17, at § 8.11[A], at 8-124.1).

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.* (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 64 (Sept. 3, 1976), reprinted in 1976 U.S. Code Cong. and Admin. News 5659, 5677).

[123] *Id.* (citing NIMMER, *supra* note 18, at § 8.14[c], at 8-169 n.36).

[124] *Id.* (quoting NIMMER, *supra* note 18, at § 8.14[c], at 8-169).

[125] *Id.*

[126] *Id.* at 1559, 29 U.S.P.Q.2d at 1833.

[127] *Id.* (citing D.C. Comics, Inc. v. Mini Gift Shop, 912 F.2d 29, 15 U.S.P.Q.2d (BNA) 1888 (2nd Cir. 1990)).

[128] The doctrine that the law does not care for small things; the law does not bother with trivial matters.

[129] *Playboy,* 839 F. Supp. at 1559, 29 U.S.P.Q.2d at 1833.

[130] *Id.* at 1557, 29 U.S.P.Q.2d at 1831-32.

[131] *Id.* at 1559, 29 U.S.P.Q.2d at 1833.

[132] *Id.* at 1563, 29 U.S.P.Q.2d at 1836.

[133] 857 F. Supp. 679 (N.D. Cal. 1994).

[134] *Id.* at 686.

[135] *Id.* at 682.

[136] *Id.* at 683.

[137] *Id.*

[138] *Id.* at 686.

[139] *Id.*

[140] *Id.* (referring to Playboy, Inc. v. Frena, 839 F. Supp. 1552, 29 U.S.P.Q.2d (BNA) 1827 (M.D. Fla. 1993)).

[141] *Id.*

[142] Nathaniel Slavin, *Copyright Issues Keep CompuServe's Kent Stuckey Busy,* CORPORATE LEGAL TIMES, 20 (Apr. 1995).

[143] Lance Rose, *Legal Beat,* WIRED 32 (July 1994).

[144] WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INFORMATION INFRASTRUCTURE TASK FORCE, U.S. DEP'T OF COMMERCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: A PRELIMINARY DRAFT OF THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1994).

[145] *Id.*