March 1995

Computer Bulletin Boards and the Green Paper

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COMPUTER BULLETIN BOARDS AND THE GREEN PAPER

I. INTRODUCTION

Present copyright law is being tested heavily in the rapidly growing area of cyberspace, the often hazy meeting place of computers and telephone lines. The proliferation of computer bulletin boards (BBSes) and the ease with which files containing almost perfect copies of everything from text to pictures can be uploaded and downloaded has created tension between copyright owners and those who use and operate the world of electronic communications.

1 A bulletin board (BBS) is a computer system that acts as an information and message center for users. Most bulletin boards have a central menu, which displays the options accessible by the users (e.g., e-mail, files, on-line games, conversation (chat) areas). Users access a BBS over a telephone line which is connected to the user's computer by modem. A computer, modem, and inexpensive software are the only equipment necessary to create a bulletin board. Internet access can be obtained by calling an Internet access provider, who leases the BBS a telephone line and provides the necessary software. Rex S. Heinke & Heather D. Rafter, *Rough Justice in Cyberspace: Liability on the Electronic Frontier*, *Computer Law.*, July 1994, at 1. See Erik Delfino, *The Basics on Setting Up an Electronic Bulletin Board System*, *Online*, March 1993, at 90 (describing basic setup and operation of bulletin boards).

2 Files contain digitized information which can consist of data, programs, pictures, music, or any combination of these. Computer bulletin boards can carry both files and messages. This Recent Development is primarily concerned with files, which can contain copyrighted material, as opposed to messages, which often involve defamation and obscenity issues.

3 Uploading is the process of transferring a computer file onto a bulletin board. The original program remains in the sending computer and a reproduction is transmitted to the receiving computer. *Peter Dyson, The PC User's Essential Accessible Pocket Dictionary* 531 (1994).

4 Downloading is the process of transferring a file from a bulletin board or a computer network into a computer system. The original program remains on the bulletin board or file server and a reproduction is received by the downloading system. *Id.* at 167.
The question is not whether someone should be held liable for copyright infringement in cyberspace,⁵ but rather who. Copyright holders are reluctant to pursue individual consumers who actually upload and download the infringing files because of the possibility of damaging goodwill and the expense of pursuing a lawsuit against someone who lacks the financial resources to pay a judgment. Copyright owners claim that the responsibility should fall on the systems operators (sysops) who run the bulletin boards. The sysops respond that they can do little or nothing to stop the infringements and should not be held accountable for the actions of others.⁶

The 1976 Copyright Act is of little aid in guiding courts in determining the copyright liability of BBSes and their operators. Existing copyright law is unclear with respect to many of the difficulties imposed by digitized information.⁷ This lack of clarity makes it difficult for courts and sysops to determine the scope and extent of liability that BBS operators should have for copyright infringement.

Recently, a federal report has suggested recommendations to update copyright law to address the new digitized technology.⁸ This Recent Development explores the impact these proposals will have on the liability of sysops for copyright infringing materials present on their bulletin boards, and concludes that imposing liability on them is an unrealistic solution.

⁵ Few would oppose the argument that software piracy must be controlled. Total software piracy (foreign and national) cost the industry over $1.5 billion in 1993 (although how much of this loss occurred on BBSes is not known). See Barbara Carton, Man Charged in Software Piracy, BOSTON GLOBE, Sept. 1, 1994, Economy Section, at 41 (discussing software manufacturers’ estimated loss in potential retail sales in 1993).

⁶ Maurice Weitman, manager of the WELL BBS, states the basic position of most sysops: “We want people to be responsible for what they post—and not us... We think that the nature of our service... is such that we can’t possibly know or keep track of... the information posted here.” Susan Orenstein, The Law of the Highway, THE RECORDER, August 26, 1994, at 1.

⁷ Digitization is the process of converting information (text, pictures, music, etc.) into a series of ones and zeros, which can be read by computers and transmitted over telephone lines. Teresa Riordan, Writing Copyright Law for an Information Age, N.Y. TIMES, July 7, 1994, at D1.

II. LEGISLATIVE BACKGROUND OF WORKING GROUP

Copyright issues in the light of new technology was one of the stimuli behind President Clinton's Information Infrastructure Task Force (IITF), which was formed in early 1993 to examine the impact of the National Information Infrastructure (NII) on intellectual property.

The Working Group on Intellectual Property Rights was established as part of the Information Policy Committee, one of the three committees that form the IITF. The Working Group’s tentative proposals were released in July, 1994, in a preliminary draft called the “Green Paper.” These proposals claim to represent “fairly minimal tinkering” with existing law, although there are those who would disagree. The proposals are intended to strengthen copyright protection on the NII because, according to Commerce Secretary Brown, copyright owners “will not be willing to put their interests at risk if appropriate systems are not in place to permit them to set and enforce the terms and conditions under which their works are made available via the NII.”

While the proposals have received enthusiastic backing from

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9 The IITF is chaired by Secretary of Commerce Ronald H. Brown. The Information Policy Committee is responsible for the issues involved in the successful implementation of the National Information Infrastructure. See generally Green Paper, supra note 8, at 1 (describing structure of IITF). The Working Group is chaired by Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks. Lehman was the principal legal advisor to the House Judiciary Committee for the Copyright Reform Act of 1976 and also for legislation passed in 1980 that made computer software copyrightable. Riordan, supra note 7.

10 The NII is envisioned as being able to deliver information anywhere in the country quickly and economically. It involves the growth of an organized information network comprised of everything from telephones to computers and satellites and is viewed as being a boost to both education and business. Green Paper, supra note 8, at 6; see also Patricia Schnaidt, Cruising along the Super I-Way: Cyber-pioneers look to the information superhighway to carry education, health care, and commerce applications, LAN MAGAZINE, May 1994, at S8 (discussing variety of possible uses for NII).

11 See supra note 9 (describing structure of IITF).

12 Supra note 8.

13 See Riordan, supra note 7 (quoting Working Group Chairman Bruce Lehman).

14 Jessica Litman, The Exclusive Right to Read, 13 CARDOZO ARTS & ENT. L.J. 29, 30 (1994) (arguing that proposed changes “would amount to a radical recalibration of the intellectual property balance.”).

copyright owners, an increasing amount of criticism is being heard as Internet providers, academics, and attorneys study and weigh the proposals. The Internet Business Association has warned that liability could be a "roadblock" in the information superhighway's progress.

III. TRADITIONAL COPYRIGHT BACKGROUND

Copyright law is designed to promote the development and dissemination of knowledge. It accomplishes this by affording authors a limited monopoly on their works, provided that those works fall within the Copyright Act's requirements for copyrightability. The framers of the Constitution recognized that a certain amount of protection was necessary for the advancement of general knowledge, and thus created the Copyright Clause, which gives Congress the ability to secure "for limited Times to Authors . . . the exclusive Right to their . . . Writings." This protection encourages individuals to develop new ideas and furthers the "Progress of Science and useful Arts" as the Constitution intends.

Congress derives its power to enact copyright legislation under the Constitution's authority. From the Copyright Clause's basic establishment of copyright, Congress has developed the five exclusive rights found in the 1976 Copyright Act.

The owner of a copyright is able to sue for copyright infringement

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16 An example of the groups backing the proposals is the Creative Incentive Coalition, which includes the Association of American Publishers, Magazine Publishers, Magazine Publishers of America, Motion Picture Association of America, National Music Publishers Association, and the Newspaper Publishers Association of America. Id.

17 Id.; Litman, supra note 14.


19 See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A], at 1-44.27 to 1-44.28 (1994) (discussing purpose of copyright to "secure the general benefits derived by the public from the labor of authors"); see also id. at n.3 (discussing case law supporting view that copyright is for benefit of public, not authors).

20 U.S. CONST. art. I, § 8, cl. 8.

21 Id.

and, if successful, has a variety of available remedies. To establish a prima facie case of copyright infringement, a plaintiff must prove: (1) ownership of a valid copyright in the infringed work, and (2) "copying" of original material by the defendant. "Copying" is generally viewed by the courts as the necessary basis for infringing any of the exclusive rights of the copyright owner listed in § 106. Copyright infringement is also a criminal offense if the requirements of willful intent and commercial advantage or private financial gain are satisfied.

Copyright infringement is a strict liability offense, thus, lack of knowledge is not a defense. With certain exceptions, courts have found that "[i]ntent to infringe is not needed to find copyright infringement . . . . [E]ven an innocent infringer is liable for infringement." 


The distribution right (17 U.S.C. § 106(3)) for example, can be violated by someone who does not actually copy the copyrighted work, but the material being distributed must have been copied in violation of the Copyright Act.


Subject to sections 107 through 120, the owner of copyright under this title has the 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.


Copyright law has evolved to meet the demands posed by new technology. The last major copyright overhaul was over twenty years in the making and culminated in the 1976 Copyright Act.\(^{31}\) It was designed to have the flexibility to incorporate new technology without having to be rewritten totally, but was thought by some to have been outdated by developing technology even before it was enacted.\(^{32}\) Over the years, additional changes have adapted the Copyright Act to new developments.\(^{33}\)

The technology of digitized information is the latest, and perhaps largest, challenge to copyright law. Text, pictures, music, video games, and many other types of copyrightable works can be converted into a series of ones and zeros\(^{34}\) and reproduced countless times with the first and the one hundredth "generation" of the work having the same quality.\(^{35}\) The information, stored in an electronic file, can be distributed to literally thousands of people over the country and around the world in a matter of minutes or hours.

IV. COPYRIGHT LAW & COMPUTER BULLETIN BOARDS

Courts have applied the Copyright Act to computer technology, finding that entering information into a computer constitutes copying under current law.\(^ {36}\) An example of such copying would


\(^{32}\) Id. at 11 n.30 (1991) (stating 1976 Act was outdated by technology before its effective date).

\(^{33}\) See Nimmer, supra note 19, at OV-2 (listing recent additions to Copyright Act).

\(^{34}\) Heinke & Rafter, supra note 1.

\(^{35}\) See Riordan, supra note 7 (discussing ability of modern technology to produce copies virtually identical to original).

\(^{36}\) See, e.g., Advanced Computer Servs. of Mich., Inc. v. MAI Sys. Corp., 845 F. Supp. 356, 363, 30 U.S.P.Q.2d (BNA) 1443 (E.D. Va. 1994) (finding that even program stored in computer's RAM is sufficiently fixed to satisfy fixation requirement of Copyright Act); see also Nimmer, supra note 19, at § 8.08[A][2] (discussing input of information into computer memory as copying under Computer Software Copyright Act of 1980). It should be noted, however, that just what constitutes "copying" into a computer is not a settled area of law. The position that information stored in RAM (which loses information when the computer is turned off) is "fixed" is definitely not without opposition. See Litman, supra note 14, at 41-42 (holding view that information stored in RAM too transitory to be reproduction under 17 U.S.C. § 106(1)); see also Pamela Samuelson, *The NII Intellectual Property Report*, 37 Communications of the ACM, 21, 22-23 (stating that if copying into RAM infringes reproduction right, holding book up to mirror also does because one can hold it there for
be a user uploading a file onto a BBS and another user downloading it. Both are copying the program, possibly in violation of the Copyright Act. The difficulty for courts, however, is not the liability involved in the act of placing the work on or downloading the work from the BBS. These both involve conduct resulting in a copy. The difficulty appears when the “transmission” of digitized information must be evaluated for liability. In the above example, courts would need to examine not only the liability of the uploader and downloader for transmitting the material, but also the potential liability of the sysop, who is undeniably an integral part of the transmission process.

The liability of the sysop of the BBS, therefore, is unclear in regard to existing copyright law. Two recent cases, although involving allegedly knowledgeable defendants, illustrate the need to prevent the expansion of existing copyright law from imposing unreasonable liability on innocent system operators for works on their BBSes which constitute copyright infringement.

In *Playboy Enterprises Inc. v. Frena*, the court found the defendant BBS sysop liable for copyright infringement for violating the distribution rights of the magazine. The court held the defendant liable, even though others had uploaded the pictures, because he had provided the infringing service, stating:

> [p]ublic distribution of a copyrighted work is a right reserved to the copyright owner, and usurpation of that right constitutes infringement. . . . There is no dispute that Defendant Frena supplied a product containing unauthorized copies of a copyrighted work. It does not matter that Defendant Frena claims he did not make the copies itself.

The court, by finding that Playboy's right of distribution was violated, seems to have viewed the transmission of the pictures as

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Such a view results in much greater liability for sysops than existed previously because it establishes infringement for merely being involved in the transmission process.

In examining the defendant's fair use defense, the court concluded that the "unrestricted and widespread conduct of the sort engaged in by the defendant . . . would adversely affect the potential market value for the copyrighted work." While this might be true, the court failed to explain how the possibility of widespread harm serves as a basis for imposing liability on sysops. It focused on the sysop's conduct, claiming that lack of knowledge is irrelevant, while ignoring the liability of those who did the actual damage (i.e., users who uploaded and downloaded the infringing materials).

The defendant in *Playboy*, however, had knowingly infringed *Playboy*'s rights. While the court said that "it does not matter that Defendant . . . may have been unaware of the copyright infringement," it also found "irrefutable evidence of direct copyright infringement." The court found that *Playboy*'s name had been removed from some of the photographs and replaced with the defendant's advertisement and phone number, making it difficult to claim that he lacked knowledge of the activity.

Frena, the defendant, claims that he removed the pictures after being notified of their existence on his BBS and has since monitored the BBS to prevent more of *Playboy*'s pictures from being

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40 It is interesting to note that, while the court found that Frena had violated *Playboy*'s distribution right, it did not discuss the reproduction right, although this seems to have been violated. The court may have avoided this issue because it was focusing on establishing direct copyright infringement, and a discussion of the reproduction right would have likely entailed a discussion of contributory infringement, introducing a knowledge requirement on Frena's part. See Green Paper, supra note 8, at 39 (suggesting that, under current law, reproduction right might fit this situation more closely than does right of distribution).

41 See Cable Home Communications Corp. v. Network Prod., Inc., 902 F.2d 829, 843, 15 U.S.P.Q.2d (BNA) 1001 (11th Cir. 1990) (citing Pacific & S. Co. v. Duncan, 744 F.2d 1490, 1494, 224 U.S.P.Q. (BNA) 131 (11th Cir. 1984), cert. denied, 471 U.S. 1004 (1985) (describing operation of fair use as affirmative defense to copyright infringement by allowing "limited and useful forms of copying and distribution that are tolerated as exceptions to copyright protection").


43 Id. at 1559.

44 Id.

45 Id.
Despite this, the court granted partial summary judgement to Playboy for copyright infringement based on Frena's "unauthorized display and distribution" of Playboy's copyrighted works.\(^{47}\)

_Sega Enterprises, Ltd. v. Maphia\(^{48}\)_ involved a similar suit against a BBS operator and referred to _Playboy_ several times. Sega, a manufacturer and distributor of computer video games and systems, sued the defendant computer bulletin board, known as Maphia, for copyright infringement resulting from the uploading and downloading of Sega games.

Sega alleged that Maphia encouraged its approximately four hundred customers to upload and download Sega games in violation of copyright laws. More specifically, Sega claimed that Maphia knew of and encouraged the copyright violations, sometimes charging a direct fee for downloading and "bartering" for downloading privileges.\(^{49}\) Maphia also sold copiers which enabled customers to transform the Sega game cartridges, ordinarily playable only in a Sega game console, into an uploadable form.\(^{50}\)

The court noted, in examining the defendant's fair use defense, that "[b]ased on Defendants' own statement that 45,000 bulletin boards like MAPHIA operate in this country, it is obvious that should the unauthorized copying . . . become widespread, there would be a substantial and immeasurable adverse effect on the market"\(^{51}\) for Sega. This court, like the _Playboy_ court, discussed the very viable possibility of harm, but failed to explain why sysops should be held liable for such damage instead of those actually harming Sega by uploading and downloading its games.

Although the _Sega_ court used the term "distribute" to describe some of the defendant's infringing activities, it did not specifically find that Sega's distribution rights had been violated. It found that the defendant's BBS was used to "make and distribute"\(^{52}\) the infringing copies, that the BBS was involved in the "unauthorized

\(^{46}\) Id. at 1554.


\(^{49}\) Id. at 683.

\(^{50}\) Id. at 684.

\(^{51}\) Id. at 688.

\(^{52}\) Id. at 684.
copying and distribution," and that the defendant profited from the "distribution" of the infringing copies. The court did not, unlike the Playboy court, draw the conclusion that Sega's distribution rights had been infringed.

The court found that Sega had established a prima facie case of direct copyright infringement because unauthorized copies of Sega games were uploaded, downloaded, and stored on the BBS. Further, Sega showed a strong likelihood of success on the merits of establishing a prima facie case of contributory copyright infringement. Thus, the court granted Sega a preliminary injunction.

Both Playboy and Sega illustrate the need for a clarification of existing copyright law. The liability of sysops for the transmission of an infringing work is not clear. In Playboy, the court found the defendant liable for distribution (apparently because he transmitted the copies) even though it is unclear under the Copyright Act whether he actually "distributed" anything. The Sega court did not mention distribution in its conclusions of law, even though it discussed the defendant's conduct as distribution.

The actions of the defendants in both Playboy and Sega clearly enabled copies of pictures and games to be distributed to others, despite the fact that no material objects were exchanged. What is not clear is whether the act of transmission in itself should constitute distribution. The court in Playboy seemed to feel that it should, but the Sega court was more cautious, as it did not list a violation of the distribution right in its conclusions.

These cases, among the first to hold sysops liable for copyright infringement, involved defendant sysops who knew that copying

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54 Id.
55 Id. at 689.
56 Transmission might be seen as violating the copyright owner's exclusive right of distribution, but 17 U.S.C. § 106(3) defines the distribution right as the ability to "distribute copies or phonorecords." "Copies" and "phonorecords" are defined in 17 U.S.C. § 101 as material objects. The confusion in cases involving a transmission stems from the fact that, while a material copy can be generated on the receiving end, the transmission itself is not a material object and so does not fall under the distribution right.
was occurring and either took part in it or actively encouraged it. The Sega court, in fact, stated that the defendant's "role . . . amounts to contributory copyright infringement," which requires knowledge on the defendant's part. Direct copyright infringement, however, is a strict liability offense and lack of knowledge is considered only in respect to damages. Even an innocent sysop who has no knowledge of the infringements and no realistic way to discover them is part of the transmission process and, under the rulings of Playboy and Sega, may be held liable for infringing materials simply because they are posted on his BBS.

V. THE WORKING GROUP'S RECOMMENDATIONS

The Working Group's Preliminary Draft is intended to clear up the confusion surrounding the application of copyright law to the transmission of digitized information in cases like Sega and Playboy.

As illustrated by Sega, some courts are hesitant to find that transmissions infringe the distribution right, even though they discuss transmissions in the distribution context. The Working Group has attempted to clear up this uncertainty by proposing that "transmission" be included in the exclusive right of distribution. The Green Paper recommends that § 106(3) of the Copyright Act

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60 Many of the cases against sysops for infringing material posted on their BBSes have involved situations where the operators allegedly knew of the infringements. See Barbara Carton, Man Charged in Software Piracy, BOSTON GLOBE, Sept. 1, 1994, Economy Section, at 41 (reporting indictment of and civil suit against Kenadek, owner and sysop of BBS called "Davey Jones' Locker," accused of offering more than two hundred computer programs with retail price of over $675,000 to subscribers in thirty-six states and eleven countries, although it is conceded that his BBS was primarily legitimate and contained thousands of shareware files); see also Third Largest BBS in US Hit in FBI Raid, NEWSBYTES NEWS NETWORK, Feb. 19, 1993, available in LEXIS, News and Business Library (quoting Peter Beruk, litigation manager for Software Publishers' Association, as saying "[w]e have every reason to believe that [Rusty 'n' Edie's sysops] were aware what was going on," although sysop says that he found infringing copies in past and removed them because he did not want to be test case for infringement action).

62 Supra note 28 and accompanying text.
63 Supra notes 52-54 and accompanying text.
64 See supra note 26 (providing text of 17 U.S.C. § 106(3)).
be amended so that the copyright owner would have the exclusive right:  

(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, or by transmission.

The amendment’s stated purpose is to clear up possible confusion of the copyright owner’s right “to distribute copies or phonorecords” under current law. Because “copies” and “phonorecords” are physical objects, the amendment is designed to include transmission in the distribution right. This will supposedly ensure the protection of the copyright owner through both the electronic and the physical medium. The reasoning behind the proposal is that if a program is transmitted to other locations, where it is copied, and the original program still exists in the transmitting computer, a distribution of copies has occurred. If one program is sent to ten different locations, ten copies have been distributed. The amendment attempts to focus on the fact that a distribution has occurred, not on whether the method of distribution was physical or electronic.

The Working Group also proposes that § 101 be amended to clarify that “reproductions,” as well as performances and displays, can be transmitted. The proposal includes a method for differentiating between “reproductions” and “performances or displays.” A “primary purpose or effect” analysis should be applied to the transmission, focusing on whether it was the intent of the transmitter to display or distribute the work and the receiver to hear or see the work as opposed to receiving a copy of it.

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64 Any language added by a proposed amendment is italicized. Proposed deletions are indicated by strike-through.
65 Green Paper, supra note 8, at 121.
66 Id. at 120-121.
67 Id. at 121.
68 Id. at 121-122.
69 Id. at 122. This “primary purpose and effect” test received almost unanimous disapproval at the public hearings in September, 1994. Litman, supra note 14, at 31 n.14.
"Transmit" would be defined by the proposal as follows:

To "transmit" a performance or display is to communicate it by any device or process whereby images or sound are received beyond the place from which they are sent. To "transmit" a reproduction is to distribute it by any device or process whereby a copy or phonorecord of the work is fixed beyond the place from which it was sent. In the case when a transmission may constitute both a communication of a performance or display and a distribution of a reproduction, such a transmission shall be considered a transmission of a reproduction if the primary purpose or effect of the transmission is to distribute a copy or phonorecord of the work to the recipient of the transmission.70

The reasoning behind this proposal is that it makes little sense to impose liability for transmitting information if an individual can transmit "reproductions," a category into which much computer communication falls, without liability.

Including "transmission" in the distribution right, however, poses problems. The "exclusive" right of distribution is circumscribed to a large extent by the first sale doctrine, which states that the copyright owner has exhausted his right to sell a copy once it is sold.71 This allows the purchaser of a copy or phonorecord that was legally made to "dispose" of it by sale, gift, or any other means without infringing on the copyright.72 Disposing of the work means, naturally, that the first owner no longer has a copy of the work. The doctrine does not apply to reproductions because the owner has not disposed of his copy. For this reason, the first sale doctrine does not ordinarily apply to transmissions, because the transmission of a work necessarily entails the reproduction of that

70 Green Paper, supra note 8, at 122.
71 See generally Nimmer, supra note 19, at 8.08[B][3] (discussing that first sale doctrine is not applicable to computer programs).
work where the transmission is received.\footnote{73 See HENN, supra note 31, at § 7.1 n.2 (discussing traditional separation of tangible property (i.e., phonorecords and copies) and intangible property (copyrights, etc.)).}

Including transmission with distribution logically would mean that the first sale doctrine applies to transmissions as well. This inclusion endangers the copyright owner by greatly limiting his right to control the dissemination of his work through transmissions. The Working Group feels that it would, in effect, nullify the benefit bestowed upon copyright owners by the recommended change to § 106(3).\footnote{74 Supra note 65 and accompanying text.}

The transmission would be a distribution, which would allow the application of the first sale doctrine, but would also result in a reproduction, against which the first sale doctrine provides no defense. This dilemma, it is claimed, could result in a great deal of confusion as to the applicability of the first sale doctrine to transmissions.

In order to clarify this situation, the Working Group recommends that transmissions be explicitly excepted from the first sale doctrine by amending § 109 to read:

(a) (1) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

(2) This subsection does not apply to the sale or other disposal of the possession of that copy or phonorecord by transmission.\footnote{75 Green Paper, supra note 8, at 124-125.}

According to the Working Group, this effectuates the intent of the first sale doctrine without destroying the copyright owner's ability to control his work.

One other proposed change merits attention. The Green Paper also recommends adding to § 101 the definition:
"Copyright management information" means information associated with a copyrighted work, including, but not limited to, the name and other identifying information of the copyright owner, the terms and conditions for uses of the work, and identification codes such as an ISBN number.\(^76\)

The Working Group continues by proposing that § 506 be amended to establish fines not to exceed $2,500 for both the removal or alteration of copyright management information as well as the linking or distributing of false copyright management information with copyrighted material.\(^77\) The purpose of these proposals is to ensure that copyright notices and information receive protection because such information "may be critical to the efficient operation and success of the NII."\(^78\)

VI. ANALYSIS

The Working Group's proposals clearly expand existing copyright law by establishing liability for the transmission of a copyrighted work. Because the proposals do not change the strict liability nature of copyright infringement, a sysop would be liable regardless of whether he knew of or took part in the actual infringement.

Before this widespread liability is imposed, however, it is necessary to look at the ability of the sysop to stop the infringing materials without slowing the rate of digitized communications to an unacceptable degree. The protection afforded to copyright owners and the possible negative impact on the dissemination of knowledge must be balanced. Such a balancing effectuates the intent of the Copyright Clause while maintaining the protection necessary to encourage individuals and companies to support the NII and to develop works without fear of facing huge losses from piracy.

The Copyright Clause promotes the development and dissemina-

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\(^76\) Id. at 131.
\(^77\) Id.
\(^78\) Id. at 130.
tion of knowledge. The fact that a certain amount of protection is necessary for the advancement of knowledge is reflected by the Copyright Clause giving Congress the ability to secure "for limited Times to Authors . . . the exclusive Right to their . . . Writings." The NII will make increasingly larger amounts of knowledge easily accessible to the public, furthering the Copyright Clause's goal. The NII is envisioned as the future in communication, capable of allowing almost immediate access to large amounts of information. It will allow everyone with a computer, a modem, and a phone line to access information. Schools, businesses, and households will benefit from the online availability of data, pictures, music, games, computer programs, and more. With the ease of access to the information, however, comes increased risk to copyright owners. When individuals can freely send and reproduce copies of the same quality as the original at little or no cost, copyright owners worry whether their copyrights will have any real meaning.

If the application of the Working Group's proposals places unreasonable restrictions on sysops, however, it will create a bottleneck in the flow of information. If sysops have no reasonable means to control the infringing materials on their BBSes, holding them liable for the transmission of those materials will do little to aid the advancement of public knowledge. It would actually have the opposite effect, as many BBS operators would simply shut their boards down rather than face the potentially enormous liability of unknowingly carrying infringing materials. The recommendations of the Working Group, therefore, must be carefully examined to determine their impact on BBS operators and

79 See Nimmer, supra note 19, at § 1.03 (discussing public benefit as primary purpose of copyright law).
80 U.S. CONST. art. I, § 8, cl. 8.
81 Supra note 79 and accompanying text.
82 See Richard Raysman & Peter Brown, Liability on the Internet, N.Y. L.J., Nov. 8, 1994, Computer Law Section, at 3 (describing many industries' fear of Internet's ability to transfer easily copiable materials).
83 Cf. Josh Hyatt, Highway Robbery: The Information Superhighway Has Not Yet Reached Homes, But the Legal Issues It Raises are Already Generating Traffic in the Courts, BOSTON GLOBE, Jan. 2, 1994, Economy Section, at 29 (discussing recent suits against BBSes as involving issue of how to protect intellectual property rights without creating bottleneck on superhighway).
84 Telephone Interview with Greg Sims, Computer Instructor, Robert Morgan Vocational Technical Institute, Miami, Florida (Sept. 15, 1994).
COMPUTER BULLETIN BOARDS

the dissemination of information.

The primary focus should be whether it is realistic to hold sysops liable for not adequately screening files uploaded by users for copyright infringing material. If it is possible for sysops to screen the information on their boards effectively, then liability for infringing materials placed on the BBS would be logical.

Most bulletin boards currently require that their users agree to upload only "legal" files. Users who violate this rule are generally expelled from the BBS. Responsible BBSes require users to submit their real names before gaining access to the BBS, even if pseudonyms are allowed after the actual names are verified. This allows the sysop to identify who uploaded the infringing materials and bar access to them if necessary.

Many sysops, in an attempt to keep infringement to a minimum, already screen the uploaded files before they are made accessible to their users. This is done by sending the files to a "sanitation area" where the files are checked for copyright infringements and screened for computer viruses. If an infringing file is found, it is "killed" and never makes it to the BBS menus accessible to the users.

While most responsible sysops screen files, imposing liability for infringing materials puts a huge burden on sysops because it is impossible to effectively screen all the files uploaded onto the

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85 Id.
86 Some feel that this is a more effective deterrent to copyright violations than infringement suits. See, e.g., Samuelson, supra note 36, at 26 (saying that some informal methods of enforcing copyrights should be considered by Working Group).
88 Id.
89 There is a difference between screening the "files" on a BBS and screening the "messages" on the same BBS. Files are usually individually uploaded by users of a particular BBS and are subject to more control by the sysop. Hundreds or thousands of messages are posted on even a fairly small BBS each day and often involve issues of defamation and obscenity. Many of the messages are automatically transmitted to the bulletin board from individuals all over the world by networks linked by the Internet. Arguments in favor of the sysop are even stronger in reference to messages, but that is outside the scope of this Recent Development. See generally Heinke & Rafter, supra note 1 (discussing effect of defamation, obscenity, intellectual property, and other issues on liability in electronic communications).
There are several reasons why sysops cannot find and delete all files containing copyrighted information. The first problem is that the sysop must find an infringing file before he can remove it. Obviously, the larger the BBS, the more difficult this becomes. Large BBSes have literally thousands of files online. Commercial systems like Compuserve and America Online, which may operate hundreds of individual BBSes, claim that it is virtually impossible to find a specific infringing file.

A second difficulty in finding infringing files is that file names identifying copyrighted works can be changed, which makes it difficult to identify the work and determine whether it is copyrighted. The defendant in Playboy stated that, after receiving the summons, he removed the infringing pictures and monitored the BBS to ensure that others were not uploaded. Finding and removing the files would not have been difficult for Frena because the pictures were stored under the file names “Playboy” and “Playmate,” making it rather obvious what the files contained. If a file is stored under a different name, however, it can be extremely difficult for a sysop to locate and remove the file even if he knows that it is somewhere on the BBS.

Another problem that the proposed changes would introduce into the screening process is that they would require the sysops to have a working knowledge of copyright law. Those who wish to impose liability on sysops argue that such knowledge is not required to

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91 See Dennis Fowler, Treading the Boards; Bulletin Board Services, COMPUTER SHOPPER, June 1993, at 602, available in LEXIS, Nexis Library, CURNWS File (describing large BBSes including Invention Factory, a New York BBS which can take 23,500 simultaneous calls and has 7.8 gigabytes of memory with over 200,000 available files).

92 Compuserve supplies over 2000 services and activities to 1.5 million subscribers. Curry, supra note 87, and NEW YORK NEWSDAY, April 25, 1994.

93 See Heinke & Rafter, supra note 1 (quoting telephone interviews with Kent Stuckey, General Counsel of Compuserve, and Ellen M. Kirsh, General Counsel of America Online, saying that most America Online can do on learning of infringing material is attempt to remove it, a difficult task at best). Compuserve's claims that it does its best are supported in part by Federation Against Software Theft representative Bob Hay, who says that Compuserve is "scrupulous and a model for bulletin boards." Curry, supra note 87.

94 Sims, supra note 84.


96 Id. at 1559.
determine whether a file can be legally uploaded because many files can be identified as shareware,\textsuperscript{97} freeware,\textsuperscript{98} or copyrighted material by information in the file.\textsuperscript{99} The sysop need only read this section to check the copyright status of a file.\textsuperscript{100}

As previously discussed, however, files can be altered and information changed or removed, a fact recognized by the Working Group.\textsuperscript{101} The Working Group's proposal to include copyright management information with copyrighted materials and to fine individuals who tamper with the information addresses this problem to a certain extent.\textsuperscript{102} It also reinforces the point that sysops who have no way of knowing if the information has been altered or deleted should not be held liable simply because they provide a service on which the files can be found.

Another large and increasingly important reason for limiting sysop liability is digital plasticity, the ability to manipulate digital information.\textsuperscript{103} Many recognize the ability to alter digitized files as one of the advantages offered by the electronic medium, allowing text, music, and pictures to be merged and edited in many different ways.\textsuperscript{104} This advantage can make it extremely difficult, if not impossible, for a sysop to determine whether the material in a file is copyrighted.

Although there is little doubt that Frena knew that the infringing pictures in \textit{Playboy} were subject to copyright protection, another scenario could be easily imagined. A user on Frena's BBS scans three copyrighted pictures from three different magazines into his computer and uploads them to the BBS, violating three

\textsuperscript{97} Shareware are programs that may be used freely without copyright liability. If someone likes the program they are encouraged to send money to the address listed in the program. \textsc{Dyson, supra} note 3, at 468.
\textsuperscript{98} Freeware consists of programs which are to be used and enjoyed, no strings attached. \textsc{Dyson, supra} note 3, at 238.
\textsuperscript{99} \textsc{Sims, supra} note 84.
\textsuperscript{100} \textit{Id.}
\textsuperscript{101} \textsc{Green Paper, supra} note 8, at 130-31. The Working Group's concern with the alteration of copyright information necessarily recognizes that such information can be changed.
\textsuperscript{102} \textit{Id.}
\textsuperscript{103} See Pamela Samuelson, \textit{Copyright's Fair Use Doctrine and Digital Data}, \textsc{Communications of the ACM}, January 1994 (describing ability of digital information to be "manipulated, transformed, and/or inserted into other works").
\textsuperscript{104} \textit{Id.}
different copyrights. Without any manipulation, it would be difficult for Frena to determine whether the pictures were copyrighted.

Before uploading, however, the user alters the pictures by morphing them into a single picture using inexpensive and widely available software.\textsuperscript{106} He then further alters the picture by giving it the texture of a painting, making it even more difficult to identify. Under the proposed law, Frena could be held liable for violating all three copyrights that were combined in the single picture simply because he was involved in the transmission of the picture, even though it is extremely doubtful that he could identify it as a combination of copyrighted works.

Another argument against holding sysops liable for transmitting infringing material is that it is possible to transmit infringing files using the BBS without allowing the sysop to have a chance to see them. Files of infringing information can be linked to e-mail and sent to a specific user's private electronic address, either on the same BBS or routed through the BBS to someone three states away.\textsuperscript{106} BBSes regularly carry e-mail for each other, with tens of thousands of messages being carried by larger BBSes every day. Holding the sysop liable because he operated a bulletin board which transmitted this data would be like holding the post office liable because it delivered a package which contained an infringing software program. The potential liability could spread to each BBS that carried the e-mail file, literally freezing the flow of electronic communications.

Most bulletin boards operating today try to obey copyright laws as best they can. Even the Software Publisher's Association, which vigorously enforces its members' copyrights, says "[m]ost bulletin

\textsuperscript{106} Morphing is a technique that, through the use of computers, allows shapes to be changed and blended into each other. Common examples are the transforming effects in the motion picture \textit{Terminator II} and an Exxon commercial, which transformed a car into a tiger. Once extremely expensive, morphing programs are now available for under $100. See Valerie Hall, \textit{Morphing in 2-D and 3-D}, DR. DOBB'S JOURNAL OF SOFTWARE TOOLS, July 1993, at 18, available in LEXIS, Nexis Library, CURNWS File (describing technical process of morphing and availability of relatively inexpensive morphing software). See also William T. Park, \textit{Use a Morph, Go to Jail}, DIGITAL MEDIA, Aug. 23, 1993, at 20, available in LEXIS, Nexis Library, CURNWS File (discussing some legal problems that morphing can produce and advising individuals to seek copyright holder's permission before using original works).

\textsuperscript{106} Sims, \textit{supra} note 84.
board systems in North America are scrupulously honest and periodically purge copyrighted software from the systems."\textsuperscript{107} This raises doubts about the validity of the concerns of widespread copying which the courts in both \textit{Playboy} and \textit{Sega} expressed.\textsuperscript{108}

If even the most careful sysops cannot effectively screen all uploaded files for copyright infringing content, the arguments for imposing liability are unconvincing. The Working Group's proposals fail to balance the protection offered to copyright owners with the Copyright Clause's goal of disseminating knowledge. Alan L. Shulman, attorney for music publishers in a recently filed case against Compuserve,\textsuperscript{109} states "[j]ust because the computer comes around that enables you to copy in a different way, that doesn't mean you can copy without permission."\textsuperscript{110} Few would argue with Mr. Shulman, but many would point out that the sysops are not the ones doing the copying.

The Working Group misses this point and has issued its report with such a bias for those seeking to hold all sysops liable that "not since the King of England in the 16th century gave a group of printers exclusive rights to print books ... has a government copyright policy been so skewed in favor of publisher interests and so detrimental to the public interest."\textsuperscript{111}

\textbf{VII. CONCLUSION}

The difficulties that the Copyright Act must overcome in the world of digitized information are many. The new technology which has given rise to computer bulletin boards has also created uncertainty as to the liability of their operators for copyright infringing material. Two recent cases have done little but demonstrate the need to limit the expansion of copyright law before it exposes even the most careful sysops to liability for actions over

\begin{itemize}
  \item \textsuperscript{107} SPA Says First BBS Sysop is Indicted, \textit{Newsbytes News Network}, Sept. 1, 1994, \textit{available in LEXIS, Nexis Library, CURNWS File}.
  \item \textsuperscript{108} See \textit{supra} notes 42, 51 and accompanying text (describing courts' views that copying from BBSes could result in widespread harm and must be stopped).
  \item \textsuperscript{109} Frank Music Corp. v. Compuserve, Inc., No. 93 Civ. 8153 (S.D.N.Y. filed Nov. 29, 1993).
  \item \textsuperscript{110} Hyatt, \textit{supra} note 83.
  \item \textsuperscript{111} Samuelson, \textit{supra} note 36, at 22.
\end{itemize}
which they have little control.

The Working Group’s proposals do not answer the questions raised by copyright protection in cyberspace because the proposals expand copyright protection to the detriment of the Copyright Clause’s goal of disseminating knowledge. As the Working Group’s report fails to properly balance the interests involved, it should be heavily revised, if not rejected. Solutions can then be developed that take into account the realities and difficulties faced by those who operate the world of cyberspace.

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