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Speaking Frankly About Copyright Infringement on Computer Bulletin Boards: Lessons to be Learned from "Frank Music, Nctcom" and the White Paper

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**Speaking Frankly About Copyright Infringement
on Computer Bulletin Boards: Lessons to be
Learned from *Frank Music*, *Nctcom*, and the
White Paper**

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I. INTRODUCTION

Copyright law operates primarily as a strict liability¹ regime whenever infringing behavior constitutes a direct infringement² of copyright. When behavior qualifies as an indirect infringement, gaps in copyright protection are filled by principles of contributory and vicarious liability.³ Although the application of these liability constructs has never been a simple matter,⁴ recent growth in the on-line industry⁵ has resulted in a dramatic confusion and divergence of

1. Strict liability refers to the fact that neither knowledge nor intent on the part of the defendant is required to support a finding of copyright infringement. See *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198 (1931) ("Intention to infringe is not essential under the Act"); *De Acosta v. Brown*, 146 F.2d 408, 411 (2d Cir. 1944) (stating that the ignorance of the copyright infringer is immaterial); Ralph S. Brown and Robert C. Denicola, *Cases on Copyright, Unfair Competition, and Other Topics Bearing on the Protection of Literary, Musical, and Artistic Works* 474 (Foundation, 6th ed. 1995) (stating that "'innocence' does not excuse the infringement"). See also *D.C. Comics Inc. v. Mini Gift Shop*, 912 F.2d 29, 35-36 (2d Cir. 1990) (noting that innocence or willfulness may nonetheless be relevant to an award of statutory damages under § 504(c) of the Copyright Act).

2. Direct infringement occurs when liability is premised upon the defendant's own behavior; indirect infringement, on the other hand, occurs when the defendant's liability is premised upon infringing acts committed by another.

3. The Copyright Act does not explicitly recognize infringement based upon the actions of third parties. However, language in the Act and its legislative history illustrate that Congress intended to recognize common law principles of vicarious and contributory liability. See Copyrights Act, H.R. Rep. No. 1476, 94th Cong., 2d Sess. 61 (1976) ("House Report"). See also Melville B. Nimmer and David Nimmer, 3 *Nimmer on Copyright* § 12.04[A] at 12-70 (Matthew Bender, 1995) (noting that the House Report "establishes the liability, whether vicarious or as a contributory infringer, of one who does no more than cause or permit another to engage in an infringing act"). In addition, the Supreme Court has recognized that copyright liability can be imposed for acts of infringement committed by others. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (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").

The standards for imposition of vicarious or contributory liability in cases of indirect infringement are higher than the imposition of strict liability in cases of direct infringement. Vicarious liability may only be imposed "[w]hen the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials—even in the absence of actual knowledge." *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963). Contributory liability applies when "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

4. *Shapiro, Bernstein*, which provides explication of the application of vicarious liability to copyright law, contains an irresistible passage that has perhaps unparalleled applicability to the issues addressed in this Note: "This action for copyright infringement presents us with a picture all too familiar in copyright litigation: a legal problem vexing in its difficulty, a dearth of squarely applicable precedents, a business setting so common that the dearth of precedents seems inexplicable, and an almost complete absence of guidance from the terms of the Copyright Act." 316 F.2d at 305.

5. I use the term "on-line industry" loosely to describe the vast and ever-increasing array of interactive information network services currently existing. These services include computer

views. In particular, the law is currently unclear in two important respects. First, opinions differ greatly as to whether computer bulletin board operators ("sysops"⁶) should incur liability for the infringing misdeeds of individual subscribers.⁷ Second, the law is unclear regarding whether an individual subscriber can be held liable merely for browsing⁸ a copyrighted work that resides on a computer bulletin board system ("BBS") without the copyright owner's permission.⁹

bulletin boards ("BBSs"), the Internet and its related entities, and so-called "on-line service providers" such as CompuServe, Prodigy, and America On-Line.

6. The sysop is the person who sets up, owns, and operates the BBS (in many cases for a profit). This person establishes and is responsible for the procedures by which users interact with the BBS. See generally Eric Schlacter, *Cyberspace, The Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions*, 16 *Hastings Comm/Ent L. J.* 87, 101-07 (1993) (discussing the roles and responsibilities of the sysop).

For purposes of general discussion, I use the terms BBS and sysop (an abbreviation of systems operator) to include actual BBSs and BBS operators as well as similarly situated parties. For a similar approach, see *id.* at 90 n.6. Such parties include on-line service providers such as CompuServe, creators of Web pages on the World Wide Web, and other commercial or non-commercial information service providers. It is conceded that these parties and systems are often technically and technologically distinct, and that the capacity for control over the information in these systems varies with the system. However, each of these systems acts in some capacity as a repository of information; a place (for lack of a better word) where data and files are stored for the benefit of the system's remote users. Consequently, each sysop takes responsibility to some extent for the material residing in his or her system. The repository may be as small as a home computer with a couple of dedicated telephone lines or as large as CompuServe's vast computer banks. Nonetheless, these parties are similarly situated in that they all face the potential specter of copyright liability for infringing material within their systems. As will be discussed below, sysops of information repositories incur liability when, through the operation of their systems, infringing copyrighted material is made available to the public. See Part III.C.

7. In the copyright context, the term "infringing misdeeds" refers primarily to the uploading and downloading of infringing copyrighted material by individual subscribers without the help or knowledge of the BBS operator or sysop. See, for example, the analysis provided in Edward A. Cavazos and G. Chin Chao, *System Operator Liability for a User's Copyright Infringement*, 4 *Tex. Intell. Prop. L. J.* 13, 15 (1995).

8. Digital browsing refers to the mere "experiencing" of a copyrighted work through interaction with the BBS. When browsing, the user does not download, screen capture, or print a permanent copy of the work. Browsing refers merely to viewing images and text, listening to music, watching or playing an audiovisual work such as a film or video game, and so forth. In all cases, the browsing user does not create a permanent reproduction of the work for use after she disengages contact with the BBS.

As will be discussed at length below, it is the position of this Note that browsing in the digital domain constitutes a fundamental right of the public to use copyrighted works without incurring copyright liability. See Part III.

9. Either of these two legal uncertainties could alone encompass an entire Note. As a practical matter, however, the issue of sysop liability is of far greater importance at this time to courts, commentators, litigants, and this Note. Nonetheless, this Note treats the issues of sysop and browser liability together due to their conceptual inseparability in the existing structure of the Copyright Act.

This Note analyzes these issues by reference to the factual scenario in *Playboy Enterprises, Inc. v. Frena*,¹⁰ which reflects the fact pattern underlying virtually all of the relevant cases. First, subscriber A uploads unauthorized copyrighted material to a BBS. Second, subscriber B browses the copyrighted material without downloading it. Third, subscriber C downloads the copyrighted material. At all times during the fact pattern, the sysop has no actual knowledge of the presence of the unauthorized copyrighted material on the BBS.

A determination of the proper liability regime for the sysop in this fact pattern requires the resolution of three issues. First, one must determine which of the copyright owner's rights have been infringed by the activities listed in the fact pattern.¹¹ Second, one must identify the specific party or parties who violated these rights. Third, one must determine the role played by each infringing party during the infringement: was the party a direct infringer of the implicated rights, or merely a contributor to the direct infringements committed by another party? This Note will attempt to answer these questions by reference to the 1976 Copyright Act,¹² the Act's legislative history¹³ (the "House Report"), and relevant case law.

Commentators and courts seeking to resolve these issues have generally fallen into one of two basic groups. One group favors what this Note refers to as an under-protectionist interpretation of copyright doctrine. Basically, the under-protectionist approach asserts that a sysop is not responsible for unlawful acts perpetrated by individual subscribers. Instead, the sysop should incur liability only for copyright infringements of which she has knowledge.¹⁴ This

10. 839 F. Supp. 1552 (M.D. Fla. 1993). *Playboy* itself will be examined more closely in Part II of this Note.

11. Copyright owners are granted five exclusive rights under the Copyright Act: reproduction, adaptation, distribution, public performance, and public display. 17 U.S.C. § 106 (1994 ed.). For the full text of § 106, see note 55.

12. 17 U.S.C. § 101 et seq. (1994 ed.).

13. For full citation, see note 3.

14. Some commentators have proposed approaches that are far more under-protectionist than the approach addressed here. See, for example, John Perry Barlow, *The Economy of Ideas: A Framework for Rethinking Patents and Copyrights in the Digital Age (Everything You Know About Intellectual Property Is Wrong)*, *Wired* 84, 85 (March 1994) (arguing that traditional copyright law "cannot be patched, retrofitted, or expanded to contain digitized expression," and, consequently, that "[w]e will need to develop an entirely new set of methods as befits this entirely new set of circumstances"); Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 *Cardozo Arts & Ent. L. J.* 345, 407-10 (1995) (concluding ultimately that sysops should not face liability even when they have actual knowledge of infringing activity). In the context of this Note, I would characterize such approaches as proposals for a radical departure from existing law as they provide no real protection for copyrighted works in a digital medium.

group consists primarily of the sysops themselves,¹⁵ scholarly commentators,¹⁶ interested Internet and BBS users,¹⁷ and at least one court.¹⁸ Essentially, this camp views contributory liability as the proper legal framework under which to analyze sysop liability.

The second basic group, consisting mainly of copyright owners¹⁹ and the governmental authors of the White Paper,²⁰ has adopted

Although such proposals may increase in importance in decades to come, they are not addressed here. This Note simply seeks to make sense out of the technical aspects and policy objectives of existing law as it applies to electronic environments.

15. After publication of the Green Paper, see note 20, a number of sysops and related parties submitted a lengthy response document calling for an "actual knowledge" standard of liability. See Comments of Online Service Providers on a Preliminary Draft of the Report of the Working Group on Intellectual Property Rights from Jeffrey P. Cunard of Debevoise & Plimpton, Washington, D.C., to the Commissioner of Patents and Trademarks (Sept. 7, 1994) (on file with the Commissioner). The Comments were prepared by Jeffrey P. Cunard (who, as it happens, represented CompuServe in *Frank Music*, see note 228), and was submitted on behalf of CompuServe, America On-line, Delphi Internet Services, GE Information Services, Lexis Counsel Connect, Prodigy Services, Lance Rose & Associates (representing numerous independent BBSs), and Ziff Communications.

16. See, for example, M. David Dobbins, Note, *Computer Bulletin Board Operator Liability for Users' Infringing Acts*, 94 Mich. L. Rev. 217, 219 (1995); Cavazos and Chao, 4 Tex. Intell. Prop. L. J. at 15-17 (cited in note 7).

17. See, for example, Intellectual Property and the National Information Infrastructure, Public Hearings on the Preliminary Draft of The Report of the Working Group on Intellectual Property of the Information Infrastructure Task Force (Sept. 22, 1994) (testimony of Brian Kahin, Interactive Multimedia Association). The transcripts to all four public hearings are on file with the Commissioner of Patents and Trademarks and are currently available on-line at gopher server itf.doc.gov under "Speeches, Testimony and Documents." See also Comments on the Green Paper from Professor Mitchell Golden of Harvard University to the Commissioner of Patents and Trademarks (on file with the Commissioner); Comments on the Green Paper from Professors Neil Netanel and Mark Lemley of the University of Texas School of Law to the Commissioner of Patents and Trademarks (Sept. 2, 1994) (on file with the Commissioner).

18. The *Netcom* court, whose opinion will be addressed at length below, determined that sysops could not be held strictly liable under the Copyright Act. *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361, 1372-73 (N.D. Cal. 1995). For discussion of the opinion, see Part IV.A.

19. Numerous copyright owners, including authors, songwriters, software developers and publishers, and their representatives, have noted the increasing difficulty of maintaining adequate copyright protection in the flourishing on-line environment. See, for example, Public Hearings (Sept. 16, 1994) at 16 (cited in note 17) (testimony of Jeff Barry, songwriter); *id.* at 35 (testimony of James Newton Howard, composer); *id.* at 30 (testimony of William Barlow and Robert Steinberg, Times-Mirror Company); *id.* at 50 (testimony of Thomas White, artist rights enforcement consultant); *id.* at 55 (testimony of Steven Ames Brown, recording artist and small production company representative); *id.* at 83 (testimony of Milton Olin, A & M Records); *id.* at 79 (testimony of Mike Malone, Alliance to Promote Software Innovation). The transcripts to all four public hearings are on file with the Commissioner of Patents and Trademarks and are currently available on-line at gopher server itf.doc.gov under "Speeches, Testimony and Documents."

20. The "White Paper" is formally known as *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* (Sept. 1995). This report is a 238-page document that examines in great detail the intellectual property issues involved in information network communication systems such as computer bulletin boards and the Internet. The Working Group on Intellectual Property Rights, which is a subcommittee of President Clinton's Information Infrastructure Task Force, issued the White

what appears to be an over-protectionist approach to the relevant copyright issues. As is evidenced by the White Paper and the draft Green Paper, this group seeks to enhance the strong monopoly of copyright owners.²¹ Its approach goes beyond imposing strict liability upon sysops, and expands the definition of what constitutes infringing activity to include a subscriber who merely browses a work without downloading it.²²

In contrast to the two positions outlined above, this Note advances a balanced approach. This approach rests on three underlying premises. First, existing law contains implicit answers to the complex issues at hand.²³ Second, the rapidly evolving nature of technology makes it unwise to create new laws or to make exceptions to current laws at this early stage. Third, market forces can and should determine the future development of the on-line industry.²⁴

Paper as a final, follow-up document to the Draft Report it submitted in July 1994 (commonly referred to as the "Green Paper"). The White Paper uses the term "National Information Infrastructure," or "NII," to refer to its vision of the future aggregation of on-line services, BBSs, and the Internet. Copies of each of these documents are on file with the Commissioner of Patents and Trademarks and are currently available on-line at gopher server iitf.doc.gov under "Speeches, Testimony and Documents."

At least one scholarly commentator has also espoused views similar to those advocated by copyright owners and the White Paper. See Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 Colum. L. Rev. 1466, 1479-81 (1995).

21. The Green Paper was criticized as an "advocacy document" which "at times misrepresents the state of current law." Jessica Litman, *The Exclusive Right to Read*, 13 Cardozo Arts & Ent. L. J. 29, 32 (1994). This view has been echoed in the works of a number of commentators. See, for example, Pamela Samuelson, *Legally Speaking: The NII Intellectual Property Report*, 37 Comm. of the ACM 21, 22 (Dec. 1994) (stating that "not since the King of England in the 16th century gave a group of printers exclusive rights to print books in exchange for the printers' agreement not to print heretical or seditious material has a government copyright policy been so skewed in favor of publisher interests and so detrimental to the public interest").

22. See White Paper at 64-66 (cited in note 20). For discussion, see Part III.B.

23. The balanced approach adopts the position announced in *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3rd Cir. 1984). In *Redd Horne*, the court stated that "[a] defendant . . . is not immune from liability for copyright infringement simply because the technologies are of recent origin or are being applied to innovative uses. Although this case involves a novel application of relatively recent technological developments, it can nonetheless be readily analyzed and resolved within the existing statutory framework." *Id.* at 157-58.

24. The varying size and nature of BBS and on-line systems available, along with the relative newness of the industry, suggest that rules governing behavior should be bargained for and negotiated by the individual parties to any given situation, as opposed to being dictated by legislative or judicial mandate. Use of a market-oriented "contracts" paradigm for the governance of sysops, subscribers, and copyright owners has been proposed or considered by a number of commentators. See, for example, Trotter Hardy, *The Proper Legal Regime for "Cyberspace"*, 55 U. Pitt. L. Rev. 993, 1043-46 (1994); David R. Johnson and Kevin A. Marks, *Mapping Electronic Data Communications Onto Existing Legal Metaphors: Should We Let Our Conscience (And Our Contracts) Be Our Guide?*, 38 Vill. L. Rev. 487, 489 (1993); Maureen A. O'Rourke, *Copyright Liability of Bulletin Board Operators for Infringement by Subscribers*, 1 B.U. J. Sci. & Tech. L. 6, *11-14 (1995). For a related discussion of the use of a contracts

Unwarranted departures from existing law that veer in either an under- or over-protectionist direction will lead to market distortions that will eventually result in increased uncertainty, more litigation, and greater costs.

Part II of this Note initiates the discussion by reviewing the Florida District Court's decision in *Playboy Enterprises, Inc. v. Frena*²⁵ and outlining the interpretations of that case put forth by under- and over-protectionist commentators. Part III provides a detailed analysis of the liability that existing copyright law calls for in BBS transactions and disputes the interpretations of both groups of commentators. Part III concludes that under existing copyright law individual subscribers should not be held liable for mere browsing. By the same logic, however, it follows that copyright law does in fact impose strict liability on sysops. Part IV examines one court's departure from existing law in this area. In *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*,²⁶ the District Court for the Northern District of California adopted a contributory liability approach in its treatment of a sysop. Part IV argues that this departure from strict liability, if applied widely, would disrupt the balance of interests achieved by the Copyright Act. In addition, Part IV reviews aspects of the settlement reached in *Frank Music Corp. v. CompuServe Inc.*²⁷ The *Frank Music* settlement provides a provocative example of market forces at work in the on-line environment. Part IV thus evaluates the "contracts" approach to resolving copyright issues in the on-line industry.

approach to dealing with hacking and criminal computer access issues, see Robert L. Dunne, *Deterring Unauthorized Access to Computers: Controlling Behavior in Cyberspace through a Contract Law Paradigm*, 35 *Jurimetrics* 1, 11-15 (1994).

25. 839 F. Supp. 1552 (M.D. Fla. 1993). *Playboy* was chosen because its facts give life to the otherwise sterile hypothetical described above. Additionally, it was the first BBS/copyright case decided, and therefore has provided fodder for articles, comments, and criticism from a large number of commentators and reporters as well from the White Paper.

26. 907 F. Supp. 1361 (N.D. Cal. 1995) (holding that a computer bulletin board operator could not be held strictly liable for copyright infringements allegedly perpetrated by his subscribers).

27. Civil Action No. 93 Civ. 8153 (S.D.N.Y. 1993). *Frank Music* was a copyright infringement suit brought against CompuServe based upon the operation of one of its computer bulletin boards. The case was settled by the parties on November 7, 1995, after just under two years of litigation. See *Settlement Reached in Music Publishers' Class Action Against On-Line Provider*, Daily Rep. for Executives (BNA) A216 (Nov. 8, 1995).

II. *PLAYBOY*: RECOGNITION OF THE DISTRIBUTION AND PUBLIC PERFORMANCE/DISPLAY RIGHTS AS CORNERSTONES OF COPYRIGHT PROTECTION IN ON-LINE ENVIRONMENTS

A. *The Decision*

In *Playboy*, Playboy Enterprises sued George Frena for alleged infringement of Playboy's copyrights in its magazine photographs.²⁸ At the time, Frena owned and operated a subscription BBS.²⁹ At some point in the operation of the BBS, an unknown number of Frena's subscribers uploaded one hundred seventy digital image reproductions of Playboy magazine photographs onto the BBS.³⁰ In addition, Frena admitted that each one of these files had been downloaded by one or more of his subscribers.³¹ Frena claimed, however, that he personally had never uploaded or downloaded any of the copyrighted photographs.³² Further, he claimed ignorance and an absence of intent to violate Playboy's copyrights.³³ Despite Frena's lack of knowledge and intent, and the fact that he himself had neither uploaded nor downloaded any of the copyrighted material, the district court granted Playboy's partial motion for summary judgment on the issue of copyright infringement.³⁴

The court began its reasoning by discussing Frena's infringement of Playboy's distribution right. The court concluded without substantial analysis that direct infringement had occurred. Characterizing Frena's activity as "supplying a product" that contained unauthorized copies of copyrighted works, the court dismissed as irrelevant Frena's claim that he did not make the copies himself.³⁵

28. 839 F. Supp. at 1554.

29. *Id.* For a fee, subscribers equipped with a modem could access the bulletin board. Once logged on, subscribers could upload material from their own computers, browse through the many directories and postings on the main computer, and download or print out material they wanted for future use. *Id.* This basic method of operation is common to all the parties I refer to with the term sysop. See note 6.

30. *Playboy*, 839 F. Supp. at 1554. It seems clear that Playboy would have had a colorable action against the subscribers to Frena's BBS who uploaded and downloaded the infringing images. No such action was taken by Playboy, however, perhaps due to its public relations concerns, its inability to identify these subscribers, or its belief that the pockets of individual subscribers might not be deep enough to compensate for the damages.

31. *Id.*

32. *Id.*

33. *Id.* at 1559; Defendant's Memorandum In Opposition To Plaintiff's First Motion For Partial Summary Judgment (Copyright Infringement) As To Defendant Frena 2, *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

34. *Playboy*, 839 F. Supp. at 1559.

35. *Id.*

This simplistic description of Frena's role was the extent of the court's analysis of the distribution perpetrated in the BBS transaction.³⁶

The court next discussed the infringement of Playboy's exclusive right to display its works publicly.³⁷ The court first determined, based on the legislative history of the Copyright Act, that the display right covered the type of postings found on Frena's BBS.³⁸ Moreover, the court deemed the display public despite the fact that only Frena's subscribers could access it.³⁹ The court based this conclusion on the fact that Frena's BBS was "open to the public,"⁴⁰ and because Frena's subscribers were largely persons outside his circle of family and friends.⁴¹

After dispensing with Frena's fair use defense,⁴² the court concluded by stating that Playboy had presented irrefutable evidence

36. The court's failure to provide a more thoughtful and penetrating analysis has caused many commentators to question its validity and reliability. See, for example, Elkin-Koren, 13 *Cardozo Arts & Ent. L. J.* at 357, 361 (1995) (cited in note 14) (arguing that "supplying a product" is an awkward and confusing description of the operation of a BBS).

37. *Playboy*, 839 F. Supp. at 1556.

38. *Id.* at 1556-57. For a full description of the legislative history upon which the court relied, see notes 100-01 and accompanying text.

39. *Playboy*, 839 F. Supp. at 1557.

40. *Id.*

41. *Id.* The language used by the court parallels the definition of publicly in the Copyright Act. See 17 U.S.C. § 101. For the full text of the definition and a more detailed discussion of its applicability to BBSs, see notes 102-06 and accompanying text.

42. The fair use defense is codified in the Copyright Act at § 107. That section allows for some technical violations of the Act to be excused as non-infringements. The preamble to the section establishes some uses that are presumptively fair, such as reproducing a portion of a work for the purposes of criticism, news reporting, research, etc. *Id.* In addition, § 107 lists four factors that should be evaluated by courts in determining whether a use should be considered fair: (1) the purpose and character of the use (commercial or non-commercial), (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion of the work used, and (4) the effect of the use upon the potential market for the work. *Id.*

In *Playboy*, the court found that all four factors of the fair use defense weighed against the defendant. 839 F. Supp. at 1557-59. Regarding the first factor, the court concluded that the commercial nature of the BBS weighed against Frena. *Id.* at 1557-58. Second, the court reasoned that the nature of the copyrighted work also weighed against Frena because the works were primarily used for fantasy and entertainment, making fair use less likely. *Id.* at 1558. The third factor—the amount and substantiality of the portion of the copyrighted work used—was also decided in Playboy's favor. *Id.* In reaching this conclusion, the court utilized a qualitative evaluation test established by the Supreme Court. *Id.* (citing *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d. 829, 844 (11th Cir. 1990)). The court concluded that "[t]here is no doubt that the photographs in Playboy magazine are an essential part of the copyrighted work. The Court is not implying that people do not read the articles in PEI's magazine. However, a major factor to PEI's success is the photographs in its magazine." *Id.* Finally, the court concluded that the fourth factor in § 107, effect of the use upon the potential market, weighed against Frena. *Id.* at 1558-59.

It is undoubted that the fair use defense will play an important role in the future development of the on-line industry. Nonetheless, a full discussion of the nature, scope, and application of the fair use defense as it relates to information systems is beyond the scope of this Note. An entire conference on the fair use defense, known as CONFU, was conducted by the authors of

of direct copyright infringement.⁴³ The fact that Frena was unaware of his infringing actions was irrelevant, because "even an innocent infringer is liable for infringement."⁴⁴ Thus, *Playboy* stands for the proposition that when a BBS contains unauthorized copyrighted material, the sysop of that bulletin board is strictly liable for direct infringement of the copyright owner's exclusive right to distribute its materials and to display them publicly.⁴⁵

B. Interpretations of Playboy

The under-protectionist camp claims that the *Playboy* court mischaracterized the role of the sysop when it categorized Frena's activities as a direct infringement of copyright, rather than an indirect infringement. This mischaracterization, the argument goes, results from a misunderstanding regarding which of the copyright owner's rights are implicated in the BBS transaction. These critics argue that the *Playboy* court should have focused upon the violations of the reproduction right perpetrated by the individual subscribers.⁴⁶ When subscriber A uploads unauthorized copyrighted material, and subscriber C downloads the same material, in each circumstance the subscriber has directly infringed upon the copyright owner's

the White Paper, the proceedings of which are on file with the Commissioner of Patents and Trademarks. See White Paper at 83-84 (cited in note 20).

43. *Playboy*, 839 F. Supp. at 1559.

44. *Id.* Frena's lack of knowledge or intent distinguishes *Playboy* from the result reached in a similar case, *Sega Enterprises Ltd. v. MAPHIA*, 857 F. Supp. 679 (N.D. Cal. 1994). In *Sega*, the defendant sysops of the MAPHIA BBS were charged with allowing unlawful distribution of Sega's copyrighted video games. *Id.* at 686-87. Although the circumstances were similar to *Playboy*, the *Sega* court concluded that the sysops had had actual intent and knowledge of the infringements of Sega's copyrights. *Id.* at 683. For this reason, *Sega* did not reach the issue of strict liability. Consequently, examination of *Sega* would not shed any further light on the issues discussed in this Note.

45. *Playboy*, 839 F. Supp. at 1559. Despite the court's limited analysis of the technological and policy considerations, this Note argues that the court reached the correct result, as will be demonstrated in Part III.

46. See Public Hearings (Sept. 22, 1994) at 3 (cited in note 17) (testimony of Brian Kahin, Interactive Media Association) ("When the technological nature of the transactions in *Playboy v. Frena* is properly understood as a reproduction, then it appears that the BBS operator is not an active infringer and is not liable unless contributory infringement can be established"). For similar interpretations, see Timothy F. Bliss, *Recent Developments: Computer Bulletin Boards and the Green Paper*, 2 J. Intell. Prop. L. 537, 543-44 (1995); Dobbins, 94 Mich. L. Rev. at 221-24 (cited in note 16). For a related, yet even more under-protectionist reading of *Playboy*, see Elkin-Koren, 13 Cardozo Arts & Ent. L. J. at 350-62, 407-410 (cited in note 14) (concluding that sysops should not face liability when they merely have knowledge of infringing activity, but only when they are "actively involved in copying and posting" unauthorized materials).

reproduction right by creating an unlawful reproduction of the material.⁴⁷

The sysop, on the other hand, makes no reproductions herself, but merely provides the means (or space) by which such infringements take place.⁴⁸ Thus, under-protectionist scholars conclude that the sysop is not a direct infringer of the plaintiff's copyright.⁴⁹ On the contrary, the sysop is merely an unknowing contributor to the direct infringements perpetrated by the subscribers. Therefore, proponents of this interpretation claim that the sysop should only be liable if she has knowledge, under a theory of contributory liability.⁵⁰

The flaw in this interpretation stems from its limited view of the rights involved in a BBS transaction. Under-protectionist commentators accurately characterize the uploading by subscriber A as an unlawful reproduction. Similarly, subscriber C's downloading from the BBS is clearly an unlawful reproduction. However, an additional step, which is ignored by under-protectionist commentators, occurs between the reproductions made by subscribers A and C. The sysop, whether innocently or not, has made the unauthorized copyrighted material available to the public through her BBS.⁵¹ The moment that the infringing material becomes available to the public for browsing or downloading, a violation of the plaintiff's public display and distribution rights occurs.⁵² Thus, it is simply

47. See notes 60-63 and accompanying text. The under-protectionist interpretation does not state specifically that subscriber B, who browses the copyrighted material without downloading it, should be liable for making a reproduction. In fact, it does not address liability for the browsing activity. This absence is one of this interpretation's critical flaws, for, as will be addressed in the next Section, the browsing subscriber who does not download is not a copyright infringer. Thus, the only protection a copyright owner would have in such circumstances is the display right, and the infringer would be the sysop. The under-protectionist interpretation ignores the fundamental BBS activity of browsing and also ignores the protection provided for it, the display right.

48. Elkin-Koren, 13 *Cardozo Arts & Ent. L. J.* at 356 (cited in note 14).

49. Dobbins, 94 *Mich. L. Rev.* at 221-24, 230-35 (cited in note 16).

50. *Id.* at 236-40. For a review of the general relationship between direct and indirect infringement, and strict and contributory liability, see notes 1-3. For examinations of current case law addressing contributory liability outside on-line environments, see Cavazos and Chao, 4 *Tex. Intell. Prop. L. J.* at 17-23 (cited in note 7); David Goldberg and Robert J. Bernstein, *Contributory and Vicarious Infringement*, N.Y. L. J. 3 (July 21, 1995).

51. The word innocently is meant to convey that the sysop may not have known that her operation of the BBS was making infringing material available to the public. In addition, the fact of public accessibility may have occurred through the sysop's own inaction.

52. In other words, subscribers B and C could not have browsed or downloaded the copyrighted material were it not for the material's public accessibility on the BBS. Thus, the fact that subscribers B and C are able to browse and download the material shows that the material must have been available for public display and distribution. This point will be more fully addressed in Part III.

underinclusive to claim that the subscribers' infringements of the reproduction right are the only direct infringements taking place.

In marked contrast to the foregoing interpretation, over-protectionist scholars tend to overstate the liability contemplated by the Copyright Act. They conclude that subscribers A (uploader), B (browser), and C (downloader) are all liable for making infringing reproductions. In addition, they believe the sysop is liable for infringement of the distribution and display rights.⁵³ Although this interpretation is not far from correct, it overstates liability in one important respect. As will be shown in the next Section, the browsing subscriber who does not download is not liable for copyright infringement under the Copyright Act.⁵⁴ Precisely for this reason, strict liability against the sysop is a necessary element of the Copyright Act. Although the strict liability component of the Act is overlooked by the under-protectionist interpretation, and glossed over by the over-protectionist interpretation, it is nonetheless mandated by the logic of the Act.

III. THE INTERNAL LOGIC OF THE COPYRIGHT ACT: HOW THE EXCLUSIVE RIGHTS OF THE COPYRIGHT OWNER ARE INFRINGED IN BBS TRANSACTIONS

A. In General

Section 106 of the Copyright Act grants copyright owners a set of specific, exclusive rights: the rights to reproduce, to distribute, to perform publicly, to display publicly, and to prepare derivative works.⁵⁵ The House Report addressing Section 106 explains that the

53. The White Paper and concerned copyright owners have been adamant that copyright liability attaches to all of the parties to the BBS transaction. See notes 71-75 and accompanying text.

54. See notes 110-13 and accompanying text.

55. Section 106 expressly establishes the following rights:

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

copyright owner holds these rights cumulatively, though they overlap in some cases.⁵⁶ Furthermore, the Report points out that although each right exists and may be enforced independently, a single act of infringement may violate more than one of these rights simultaneously.⁵⁷ Section 501(a) of the Copyright Act mandates that anyone who violates any of the exclusive rights of the copyright owner is an infringer of the owner's copyright.⁵⁸

B. *The Reproduction Right and the Public Display Right*⁵⁹

Section 106 of the Copyright Act establishes the copyright owner's reproduction right by granting the owner the exclusive right to produce duplicate copies of the copyrighted work.⁶⁰ Section 101 defines copies by reference to three essential requirements: the work must be *fixed* in a *material object* such that it can be *perceived, reproduced, or otherwise communicated*.⁶¹ The fixation requirement⁶² is met only when the embodiment of a work "is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than a transitory duration."⁶³ Reading

(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.

56. House Report at 61 (cited in note 3).

57. *Id.* ("A single act of infringement may violate [the rights of reproduction, derivative works, and distribution] at once, as where a publisher reproduces, adapts, and sells copies of a person's copyrighted work as part of a publishing venture. Infringement [also] takes place when any one of the rights is violated: where, for example, a printer reproduces copies without selling them or a retailer sells copies without having anything to do with their reproduction").

58. 17 U.S.C. § 501(a).

59. This Section focuses on the relationship between the reproduction right and the display right, due to the fact that *Playboy* involved the display of static, visual images. It appears that the performance right (applying to aural and audiovisual works) parallels the display right in its relationship to the reproduction right. Thus, one may substitute the performance right at any point in the following discussion and achieve the same result.

60. 17 U.S.C. § 106(1) (giving the copyright owner the exclusive right to "reproduce the copyrighted work in copies or phonorecords").

61. *Id.* § 101 (defining copies as "material objects, . . . in which a work is fixed by any method known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device"). The definition of "phonorecords" in § 101 is substantially the same as the one for copies, except that phonorecords are material objects in which *sounds* are fixed. *Id.*

62. See 2 *Nimmer on Copyright* § 8.02[B] at 8-28 (cited in note 3).

63. 17 U.S.C. § 101 (giving the definition of fixed). See 2 *Nimmer on Copyright* § 8.02[B] at 8-29 (cited in note 3). *Nimmer* notes that tangible embodiment in a material object and permanent or stable fixation are two quite distinct concepts. *Id.* For instance, writing in the sand at the beach creates a stable, perceivable image, but the image is not embodied in a material object. *Id.* Conversely, an image that appears on a television screen is embodied in a material object, but the image is not sufficiently permanent or stable to qualify as fixed. *Id.*

these components together, a person infringes the reproduction right only when she creates *fixed copies* of a work without authority; i.e., when she embodies a work in tangible objects such that it can be perceived, reproduced, or communicated for more than a transitory period. Thus, when a fixed copy has not been created, no infringement of the reproduction right has occurred.

The copyright owner also has the exclusive right to display certain categories of copyrighted works publicly.⁶⁴ Section 101 defines the "display" of a work as the showing of a copy of the work to the public.⁶⁵ The Act states that infringement of the display right can occur either directly, as in the case of the display of a painting in a museum, or indirectly, through the use of mechanical equipment such as a television, projection machine, or other device.⁶⁶ Even if one's activities meet this description, though, infringement will not be found unless the display was done publicly.⁶⁷

The display right complements the protection afforded the copyright owner by the reproduction right. As discussed above, the reproduction right only protects the copyright owner from the unlawful creation of fixed copies of the original work. This threshold of infringing activity is fairly high and does not fully protect the copyright owner from other market-infringing, exploitative uses of the work.⁶⁸ Consequently, the display right takes over where the reproduction right leaves off and protects the copyright owner from unlawful showings of the work.⁶⁹ The threshold of infringing activity for

Thus, in neither case has a copy been created, and in neither case has a reproductive activity taken place.

64. 17 U.S.C. § 106(5) (stating that the copyright owner has the exclusive right, "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").

65. Id. § 101 (stating that to display a work is to "show a copy of it, either directly or by means of a film, slide, television image, or any other device or process").

66. Id.

67. 2 *Nimmer on Copyright* § 8.20[A] at 8-274 (cited in note 3). See id. § 8.14[C] at 8-169 (discussing the public requirement in the context of the performance right: "It would, of course, be unthinkable for an infringement to arise every time someone for his own amusement, or that of his friends, were to read a book aloud, or sing a song").

68. House Report at 63 (cited in note 3) (noting that "performances and displays are continuing to supplant markets for printed copies").

69. See Copyright Law Revision, Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess. 20 (1965). As far back in the copyright revision process as 1965, copyright experts recognized the need for a display right to supplement the reproduction right:

It is not inconceivable that, in certain areas at least, "exhibition" may take over from "reproduction" of "copies" as the means of presenting authors' works to the public, and we are now convinced that a basic right of public exhibition should be expressly recognized in the statute.

violating the display right is somewhat lower, as it does not require fixation in a material object. On the other hand, the display right is subject to a greater limitation; it only applies to displays that are public.⁷⁰

The White Paper, in its haste to overstate the rights of copyright owners,⁷¹ draws some inaccurate conclusions in applying the reproduction and display rights to the browsing function⁷² in a BBS transaction. In sum, the White Paper concludes that the reproduction right and the display right are simultaneously infringed when a subscriber browses an infringing work. First, the White Paper asserts that the browsing subscriber makes a fixed copy of the work in her computer when she browses it without downloading.⁷³ Then, six pages later in the report, the White Paper characterizes the sysop as an infringer of the display right under identical circumstances.⁷⁴ The White Paper then claims, with some confidence, that "the law itself clearly . . . defines such acts [browsing] as implicating the display *and* reproduction rights."⁷⁵

The authors of the White Paper have ignored the fact that a transmitted image cannot simultaneously constitute both a display and a reproduction. The words "reproduction" and "display," as

Id.

Congressional concern for providing the copyright owner with protection beyond the reproduction right is also reflected in the public performance right. A songwriter's copyright would be severely limited if it protected only against the copying of sheet music or recordings. For her right to be meaningful, such a copyright owner requires protection from the unlawful public performance of her work in addition to the material object in which it is fixed.

70. For a description of the public requirement, see text accompanying notes 102-106. The public requirement effectively preserves the right of individual members of the public to use the work privately, while at the same time protecting the copyright owner from unauthorized commercial exploitation of the work. Paul Goldstein, 2 *Copyright* § 5.7.2 at 5:130 (Little, Brown, 2d ed. 1996). See also L. Ray Patterson and Stanley W. Lindberg, *The Nature of Copyright: A Law of Users' Rights* 154, 193-96 (U. Georgia, 1991) (recognizing the importance of the public's right to personal use and discussing the role of the public requirement in allowing protection of only the copyright owner's market interest).

71. See notes 19-21 and accompanying text.

72. For a description of the browsing function, see note 8.

73. White Paper at 66 (cited in note 20). The White Paper proclaims that "[u]nder current technology, when an end-user . . . [browses] a file resident on another computer such as a BBS or Internet host, a copy of at least the portion viewed is made in the user's computer." Id. (emphasis added).

74. Id. at 72. The White Paper states the following about the display right:

The right to display a work publicly is extremely significant in the context of the NII. . . . The definition of "display" clearly encompasses, for instance, the actions of the defendant BBS operator in the *Playboy* case. Thus, when any NII user visually "browses" through copies of works in any medium . . . , a public display of at least a portion of the browsed work occurs.

Id. (footnotes omitted).

75. Id. at 72 n.226.

defined in the Act, refer to two fundamentally different activities. As noted above, reproduction refers to the unlawful creation of new copies of the work, while display refers merely to a showing of the work.

In addition to the express text of the Act, the House Report describes reproduction and display as distinguishable rights.⁷⁶ The House Report states that the key distinction between reproduction and display is the fixation requirement. As noted above, the fixation requirement constitutes the primary means for determining whether or not a copy has been made.⁷⁷ When an infringing party creates a new, fixed copy of the work, then a violation of the reproduction right has occurred. On the other hand, when a work is displayed, the display itself constitutes merely a transitory representation of the work (i.e., the display is not itself fixed), and the action falls under the display right. The House Report reveals congressional intent with regard to the reproduction and display rights: Congress intended that the rights be mutually exclusive,⁷⁸ and intended that fixation or non-fixation be the crucial question in determining which of the two actions had occurred, a reproduction or a display. If the work is fixed, it is a reproduction, and if the work is not fixed, it is a display. It cannot be both simultaneously.⁷⁹

76. House Report at 62 (cited in note 3). The House Report provides the following explanation:

"Reproduction" under clause (1) of section 106 is to be distinguished from "display" under clause (5). For a work to be "reproduced," its fixation in tangible form must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."

Id. (emphasis added).

77. 2 *Nimmer on Copyright* § 8.02[B] at 8-28-29 (cited in note 3). See Jay Dratler, Jr., *Intellectual Property Law: Commercial, Creative, and Industrial Property* § 6.01[2] at 6-6 (Law Journal Seminars, 1994) (noting that the statutory requirement for fixation distinguishes the reproduction right from the public display right).

78. Earlier in the Report, Congress states that the rights "may overlap in some cases." House Report at 61 (cited in note 3). See text accompanying notes 56-57. The language in the House Report, however, states that reproduction "is to be distinguished from display." House Report at 62. See note 76. In addition, the reproduction and display rights were designed with different activities in mind. See notes 68-70 and accompanying text. These two facts indicate that the reproduction right and the display right were not meant to overlap.

79. The White Paper asserts that one should ignore the fixation distinction between the reproduction and display rights as it is established in the House Report. White Paper at 72 n.226 (cited in note 20). It contends that this distinction between the two rights is now obsolete because the House Report was written before the advent of the personal computer. Id. Under that logic, though, the bulk of the 1976 Copyright Act should probably also be deemed obsolete. Such an approach would seem to go far beyond the "minor clarification" that the White Paper ostensibly hopes to accomplish, id. at 17, and is the very sort of loose and one-sided interpretive method that has prompted attack from the under-protectionist camp, see note 21; John Perry Barlow, *Property and Speech: Who Owns What You Say in Cyberspace?*, 38 *Comm. of the ACM* 19, 20-21 (Dec. 1995).

The White Paper's interpretation of browsing overstates the liability contemplated by the Copyright Act. The copyright owner cannot simultaneously have an action against the sysop for making a public display and an action against the subscriber for making a reproduction. The copyright owner may in fact have a cause of action against the sysop for publicly displaying a work without authority. If that is the case, though, the image of the work must be un-fixed in the subscriber's computer. If it were fixed, the image would no longer be a display, but would instead constitute a reproduction. Likewise, if the subscriber has fixed the work in her computer, the copyright owner might have an action against that individual subscriber for making an infringing reproduction. But if that is the case, the copyright owner has no action against the sysop for making a public display.

C. Browsing as a Display and not a Reproduction

The preceding Section demonstrated that browsing cannot simultaneously violate both a copyright holder's reproduction right and her display right under the current Copyright Act. This Section argues that browsing is more properly construed as implicating the display right, rather than the reproduction right. To explain why this conclusion is called for, this Section first considers the opposing view, that browsing constitutes a reproduction.

The authors of the White Paper base their view that browsing implicates the reproduction right upon the 1978 Final Report of the National Commission on New Technological Uses of Copyrighted Works (the "CONTU Final Report"),⁸⁰ and subsequent interpretive case law.⁸¹ The CONTU Final Report was drafted to address the applicability of the Copyright Act to software and computer technology.⁸² The Report stated that the inputting of a copyrighted work into the memory of a computer constituted a reproduction of the work.⁸³

80. See National Commission on New Technological Uses of Copyrighted Works, Final Report (July 31, 1978). Relevant portions of the CONTU Final Report are reprinted in Robert A. Gorman and Jane C. Ginsburg, *Copyright for the Nineties: Cases and Materials* 686-95 (Michie, 4th ed. 1993).

81. See White Paper at 65 n.202 (cited in note 20).

82. See Pamela Samuelson, *CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form*, 1984 Duke L. J. 663, 665 & n.1, 694-95 (providing extensive legislative background on the CONTU Final Report).

83. CONTU Final Report, reprinted in Gorman and Ginsburg, *Copyright for the Nineties* at 693 (cited in note 80) ("The introduction of a work into a computer memory would, consistent with the [1976 Copyright Act], be a reproduction of the work, one of the exclusive rights of the copyright proprietor").

Subsequent to the CONTU Final Report, several cases have been decided that expand upon this fairly simple and uncontroversial conclusion. These cases have held that the running of a computer program, which inevitably requires the booting of the program from hard drive or floppy disk into the random access memory ("RAM")⁸⁴ of the computer, involves the creation of a fixed copy of the program into RAM.⁸⁵

Based upon these sources, the White Paper concludes that browsing copyrighted works on a BBS creates a reproduction in a subscriber's computer. The White Paper reasons as follows: (1) the CONTU Final Report states that putting a work into computer memory constitutes the making of a copy, (2) cases subsequent to the Report have found that the booting of a computer program from a hard drive to RAM constitutes the making of a copy, therefore, (3) any time any digital information is contained in RAM memory, a fixed copy has been created,⁸⁶ and finally (4) because browsing involves the use of RAM memory, browsing creates a reproduction in the user's RAM of the file residing on the BBS.⁸⁷

A number of distinguishing factors render the leap made by the White Paper in steps (3) and (4) problematic. First of all, it is unclear whether the authors of the CONTU Final Report intended that a temporary RAM version of a work should be construed as a fixed copy. The general language in the CONTU Final Report merely refers to the introduction of a work into the memory of a computer; it is unclear whether this reference includes introductions into RAM

84. RAM is an essential computer component which allows for the interaction between a computer user and the software that is stored permanently either on a floppy disk or the computer's hard drive. When a user wants to run a program, the user calls the program up from storage into RAM, where she can engage the program. During this process, the program is temporarily reproduced in RAM while the user is running the program. The moment that the user stops running the program, or when the computer is turned off, the temporary RAM version is erased and not saved.

85. See, for example, *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993); *Advanced Computer Services of Michigan, Inc. v. MAI Systems Corp.*, 845 F. Supp. 356, 365-66 (E.D. Va. 1994).

This view that RAM copies of computer programs are fixed copies under the Copyright Act has prevailed in judicial opinions despite the fact that *MAI Systems*, 991 F.2d at 519, the leading case on the issue, has been vigorously criticized. See, for example, Michael E. Johnson, Note, *The Uncertain Future of Computer Software Users' Rights in the Aftermath of MAI Systems*, 44 Duke L. J. 327, 333-36 (1994).

86. White Paper at 65 (cited in note 20) ("When a work is placed into a computer, whether on a disk, diskette, ROM, or other storage device or in RAM for more than a very brief period, a copy is made").

87. *Id.* at 66 (concluding that in browsing a work resident on a BBS, a copy of at least the portion viewed is made in the user's computer: "Without such copying into the RAM or buffer of the user's computer, no screen display would be possible").

alone.⁸⁸ The entire tenor of the Report conveys that its authors were concerned with protecting against the duplication of permanent copies of works by computer. For example, the Report explains that to satisfy the requirements of the fair use defense, an unauthorized researcher or other user must destroy any copies of works created after completion of the research project or other use.⁸⁹ However, users need only intentionally destroy or erase created works when the works are permanently fixed in a computer's hard drive or on a disk. When a work is placed only in RAM, the "copy" is automatically destroyed the moment the machine is turned off.

The notion that RAM-only versions of works constitute reproductions under the Copyright Act stemmed from cases construing the CONTU Final Report.⁹⁰ These cases, however, are distinguishable in that they only address the booting of computer programs.⁹¹ Computer programs are unique in copyright law in that they enjoy no protection from non-fixed use in the way that, for example, pictorial/textual works and musical/audiovisual works do. Whereas the Copyright Act protects a pictorial work from unfixed public display by the display right, and a musical work from unfixed public performance by the performance right, computer programs neither qualify as displayable or performable works under the Copyright Act, nor do they have any non-fixation right that is analogous to the display and performance rights.⁹² Thus, the Copyright Act provides protection for computer programs only in the reproduction right.

88. See Johnson, 44 Duke L. J. at 334 (cited in note 85) ("There is . . . little support for the proposition that CONTU intended to create liability under the Copyright Act for the mere act of loading a program into RAM"). *MAI Systems* itself expressed that it was "troubled" by the fact that none of the authorities upon which it relied, including the CONTU Final Report, had ever stated or held that a RAM version of a program, by itself, constituted a fixed copy. 991 F.2d at 519.

89. CONTU Final Report, reprinted in Gorman and Ginsburg, *Copyright for the Nineties* at 693-94 (cited in note 80).

90. Samuelson, 37 Comm. of the ACM at 22 (cited in note 21).

91. See *MAI Systems*, 991 F.2d at 518 (examining copyright infringement in the booting of an operating system into RAM for the purposes of repair); *MAI Systems*, 845 F. Supp. at 361 (examining copyright infringement in the booting of diagnostic software and an operating system into RAM for purposes of service and repair).

92. For a number of reasons, many commentators have observed that computer programs are radically different from the other forms of literary and artistic property that are protected by copyright law. See, for example, Samuelson, 1984 Duke L. J. at 705-54 (cited in note 82); Pamela Samuelson, Randall Davis, Mitchell Kapor, and J.H. Reichman, *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 Colum. L. Rev. 2308, 2315-32 (1994). These commentators conclude that, in many respects, copyright law is simply an "inappropriate vehicle" for the protection of computer programs. Samuelson, Davis, Kapor, and Reichman, 94 Colum. L. Rev. at 2347-56; J.H. Reichman, *Computer Programs As Applied Scientific Knowledge: Implications of Copyright Protection for Commercialized University Research*, 42 Vand. L. Rev. 639, 671-700 (1989).

This gap in the protection of computer programs may explain why courts have stretched the notion of reproduction to embrace a transitory RAM version of a computer program.⁹³ As a result of this expansion of the reproduction right, under current law it is conceptually impossible to run a non-fixed version of a computer program. As a practical matter, however, it is quite possible to see a non-fixed display or hear a non-fixed performance of an artistic or musical work. Because the cases to date have only dealt with computer programs, it is problematic to assert that any browsable RAM-only version of a copyrighted work constitutes a reproduction.⁹⁴

The text of the Copyright Act itself suggests that browsing is more properly characterized as a display rather than a reproduction. As discussed above, the reproduction right is not triggered unless a fixed copy is created.⁹⁵ Moreover, a copy is not fixed unless it is "*sufficiently permanent or stable* to permit it to be perceived, reproduced, or otherwise communicated *for a period of more than a transitory duration.*"⁹⁶ When a user browses a pictorial or textual work, in contrast, the image resides in the user's RAM for a transitory period.⁹⁷ The moment the user disengages her power or her contact

93. It may be that the *MAI Systems* court and the other courts following its interpretation were seeking to fill the gaps in protection for computer programs and to prevent inequitable losses to copyright owners. For a similar analysis, see Katrine Levin, Note, *MAI v. Peak, Should Loading Operating System Software into RAM Constitute Copyright Infringement?*, 24 Golden Gate U. L. Rev. 649, 681-682 (1994) (observing that the equities of the situation may have compelled the court to rule in favor of the plaintiff).

94. A number of commentators have criticized the notion that browsing constitutes a reproductive activity. In particular, Professor Samuelson puts the White Paper's conclusion in perspective in the following passage:

Proponents of the view that RAM copies infringe the copyrights argue that as long as the machine is on—and it can be on indefinitely—a copy of the copyrighted work stored there can be perceived or reproduced, thereby satisfying the "more than transitory duration" standard. (By this logic, holding a mirror up to a book would be infringement because the book's image could be perceived there for more than a transitory duration, i.e., however long one has the patience to hold the mirror.)

Samuelson, 37 Comm. of the ACM at 22-23 (cited in note 21). See Litman, 13 Cardozo Arts & Ent. L. J. at 42 (cited in note 21) ("I would argue that the better view of the law is that the act of reading a work into a computer's random access memory is too transitory to create a reproduction within the meaning of section 106(1)" (citation omitted)); Elkin-Koren, 13 Cardozo Arts & Ent. L. J. at 382 (cited in note 14) (claiming that "the view that loading information into a computer's RAM creates a 'copy' eviscerates the fixation requirement. . . . Such an interpretation extends the meaning of 'copying' to include the creation of both permanent and transitory duplications, and covers any information captured momentarily in the working memory of a computer" (citations omitted)); David Post, *New Wine, Old Bottles: The Evanescent Copy*, Am. Lawyer 103-04 (May 1995) (discussing the conceptual problems in characterizing browsing as a reproductive activity).

95. See notes 60-63 and accompanying text.

96. 17 U.S.C. § 101 (giving the definition of fixed) (emphasis added).

97. Functionally, browsing works on a BBS is similar to watching television. In both cases, the transitory, ephemeral image appears at the receiving end of the transmission (the

with the host computer, the image disappears.⁹⁸ Only when the user prints or downloads does she create a fixed reproduction.⁹⁹

In addition to the express text of the Copyright Act, the legislative history strongly suggests that Congress intended the display right to cover activities like browsing. The House Report states that the display right includes electronic transmissions of images in connection with any sort of information storage and retrieval system.¹⁰⁰ This description in the House Report seems to contemplate the browsing activity of a BBS user.¹⁰¹ A user retrieves information through her computer from a BBS, which probably qualifies as an information storage facility. Further, the image that the user retrieves, be it textual, pictorial, or aural, is then transmitted to her computer via "electronic or other means." Because the browsing activity so closely resembles the activity described in the House

television or the user's computer), and the fixed copy resides at the sending end (the television station or the BBS). With a television, when the viewer changes the channel or turns the television off, the image is gone. Similarly, on a user's computer, once the user changes files, ends her contact with the BBS, or turns off her computer, the image vanishes.

98. See Litman, 13 *Cardozo Arts & Ent. L. J.* at 41 n.57 (cited in note 21) ("A work's appearance in RAM is, by its nature, temporary; the work will disappear from RAM when the computer is turned off"); David J. Loundy, *E-Law 2.0: Computer Information Systems Law and System Operator Liability Revisited* *77 (copy on file with the Author) ("[I]f someone connects to the computer information system and just peruses the archives, if the information is not 'downloaded,' 'screen captured,' or otherwise recorded on computer disk, tape, or printout, then no fixation is made and thus, no copy").

99. When printing or downloading, the user clearly produces a fixed copy that is a permanent and stable reproduction that can be perceived for *more than* a transitory period.

Stating that browsing results in a fixed reproduction in the user's computer is simply an awkward and inelegant reading of the Act. Professor Litman notes that the Draft Report itself seems a little confused about this; compare IITF Green Paper, *supra* note 8, at 14 ("A transmission is not a fixation. While a transmission may result in a fixation, a work is not fixed by virtue of the transmission alone"), with *id.* at 36 ("[W]hen a computer simply 'browses' a document resident on another's computer, the image on the user's screen exists—under contemporary technology—only by virtue of the copy that has been reproduced *in the user's computer memory*" (emphasis in original)).

Litman, 13 *Cardozo Arts & Ent. L. J.* at 42-43 n.64 (cited in note 21). Juxtaposition of these passages begs the question: what kind of a transmission would not be fixed, if basic browsing, without downloading, constitutes fixation?

100. House Report at 63 (cited in note 3). The express language of the House Report is as follows:

The corresponding definition of "display" covers any showing of a "copy" of the work, "either directly or by means of a film, slide, television image, or any other device or process" . . . In addition to the direct showings of a copy of a work, 'display' would include 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*.

id. (emphasis added).

101. It was this language upon which the *Playboy* court based its finding of copyright infringement of the display right. See 839 F. Supp. at 1556.

Report, it is likely that Congress intended the display right to cover such activities.

The public nature of BBSs also suggests that browsing activities on a BBS fall under the public display right. In its definition of displaying a work publicly, the Act mentions both direct displays and, in the second clause, displays that are transmitted to the public by means of electronic devices or processes.¹⁰² In this second clause, the Act explains that the public requirement is satisfied even where members of the public receive such transmissions in separate places and at separate times.¹⁰³ Almost all BBSs satisfy this requirement. First, BBS subscribers qualify as members of the public. A public display merely requires that such display be open to the public.¹⁰⁴ Thus, the fact that some BBSs and services charge a fee for access does not render them non-public.¹⁰⁵ Second, the subscribers receive the display in separate places, that is, at each individual's own computer, whether at home, school, or work. Finally, BBS subscribers are capable of receiving the transmission at the same or different

102. 17 U.S.C. § 101. The Act offers the following definition:

To perform or display a work "publicly" means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to *transmit or otherwise communicate* a performance or display of the work to a place specified by clause (1) or to the public, *by means of any device or process*, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Id. (emphasis added).

103. Id. It seems clear that the Act views a television or radio broadcast as public in nature. However, the language in the definition of publicly goes beyond television and radio in its description. Television and radio broadcasts, although received by members of the public at separate places, are generally received at the same time throughout the broadcast area. By including transmission systems that are capable of being received by members of the public at separate places *and* separate times, the Act envisions more than television and radio. This view is bolstered by language in the House Report, explaining that the Act's concept of transmission "is broad enough to include all conceivable forms and combinations of wired and wireless communications media, including but by no means limited to radio and television broadcasting as we know them." House Report at 64 (cited in note 3).

104. See 2 *Nimmer on Copyright* § 8.14[C] at 8-173 (cited in note 3) (discussing the public requirement). See also House Report at 64 (cited in note 3) (stating that one of the primary purposes for the inclusiveness of the definition was to make clear that any displays "open to the public" or "semipublic," in other words, any group of people "outside of a normal circle of a family and its social acquaintances," were covered). In addition, the House Report makes clear that the public display right is triggered even though there is no proof that any of the potential recipients of the display actually viewed it. Id. at 65. Thus, the moment the display becomes open to the public, the right is triggered and liability attaches (assuming the display was unauthorized and no defenses are available).

105. The House Report makes clear that a display is public even though "the potential recipients of the transmission represent a limited segment of the public, such as the occupants of hotel rooms or the subscribers of a cable television service." House Report at 65 (cited in note 3).

times.¹⁰⁶ This close resemblance between the description provided in the Act and the actual operation of a BBS suggests that the public display right was intended to govern BBS browsing.

In addition to the language in the Act and the legislative history supporting characterization of browsing as a display rather than a reproduction, commentators have remarked upon the unique applicability of the display right to browsing-type functions. The Nimmer treatise, for instance, states that the true importance of the display right is in its applicability to computer browsing.¹⁰⁷ Such activity, according to the Nimmer treatise, simply does not implicate the reproduction right at all, and would not be infringing but for the display right.¹⁰⁸ This conclusion in the Nimmer treatise is particularly informative in light of the fact that Melville Nimmer was one of the predominant commissioner/authors of the CONTU Final Report.¹⁰⁹ Thus, at least one author of the Report was not of the opinion that all browsing constitutes a reproduction. The foundation for the White Paper's reliance upon the CONTU Final Report for such authority is therefore diminished.

Two additional reasons exist for construing browsing as a display rather than a reproduction. The first is a functional consideration. After a browsing transaction is complete, the user has no permanent copy of the copyrighted work.¹¹⁰ Thus, the copyright owner's fear that permanent copies may be made without remunera-

106. Displays would usually occur at different times, as each subscriber logs on to the BBS at her convenience. Receipt could of course be simultaneous, though, depending on how many users can log on at once (which in turn depends upon how many telephone lines support the operation of the BBS). Small BBSs generally have only a few dedicated phone lines, but some of the very large service providers can support hundreds of users simultaneously. Loundy, *E-Law* 2.0 at *9 (cited in note 98).

107. 2 *Nimmer on Copyright* § 8.20[A] at 8-276 (cited in note 3).

[T]he important function of the display right . . . can be found in its application to the transmission of the manuscript or printed version of such works [or, presumably, the pictorial version] so that they may be read [or viewed] by electronic means on cathode ray tubes or otherwise through computer technology. This does not involve an infringement of the reproduction right, nor does it constitute a performance of the work. Such conduct would become infringing only by reason of the display right.

Id. (emphasis added).

108. Id. See also Dratler, *Intellectual Property Law* § 6.01[4] at 6-20 to 6-21 (cited in note 77) (noting that the display right is of "great importance" to the works to which it applies because "[o]ur information society is rapidly replacing paper and other tangible copies with intangible transmissions and displays of recorded information, whether for viewing at a single time or repeatedly on demand. As transmitted information grows in commercial value, the . . . display rights assume even greater economic and social importance").

109. See Samuelson, 1984 Duke L. J. at 665-66 & 695 n.128 (cited in note 82) (listing Nimmer as the Vice Chair of the Commission and noting his role as the leading copyright law scholar).

110. See note 8.

tion to the copyright owner has not been realized. One copy originally existed in the memory banks of the BBS before the transaction, and one copy exists after the transaction is complete. Viewed at the macro level, this activity simply does not constitute the type of behavior that the reproduction right was designed to prevent.¹¹¹

Finally, one policy-related reason supports construing browsing as a display rather than a reproduction. As Jessica Litman has observed, copyright law does not give the copyright owner exclusive control over every single use of her work by every individual.¹¹² The law does not hold individuals liable merely for viewing, reading, or listening to an unauthorized copyrighted work.¹¹³ Thus, a museum or movie patron may view an unauthorized work at a museum or movie theater without incurring liability under the Copyright Act. The Copyright Act does not hold an individual liable for merely experiencing an unauthorized copyrighted work so long as, when the transaction is complete, the individual has not made an unauthorized permanent reproduction of the work. For this reason, browsing is more properly construed as a display rather than a reproduction.

D. The Sysop as the Party Responsible for the Display

Copyright law places liability on the party responsible for making the display or performance available to the public, not on the individual viewer. In the above example, the parties making the unauthorized display or performance available—the museum and the movie theater—were the responsible parties. If no defenses were available, these parties would incur liability.¹¹⁴ Because the copyright owner could not sue the individuals for viewing the works, her only recourse would be against the parties responsible for the public display or performance.

111. Review of the right analogous to the display right, the performance right, further highlights the improbability of the White Paper's position regarding browsing. When a user browses a musical work by merely listening to it (without downloading it), such activity involves a performance rather than a reproduction. Even if the user plays the work over and over again, one would not deem it permanently fixed in her computer until she actively downloads it. The work's presence on her computer is only of transitory duration until she creates a permanent copy of it in her hard drive.

112. See Litman, 13 *Cardozo Arts & Ent. L. J.* at 35 (cited in note 21).

113. As the CONTU Final Report says, "The way copyright affects games and game-playing is closely analogous: one may not adopt and republish or redistribute copyrighted game rules, but the copyright owner has no power to prevent others from playing the game." CONTU Final Report, reprinted in Gorman and Ginsburg, *Copyright for the Nineties* at 688 (cited in note 80).

114. See House Report at 79-80 (cited in note 3) (implying that the unlawful display of a work, either directly as in the case of a museum or gallery, or indirectly through projection or transmission, results in liability for the responsible party).

A copyright decision from the District Court for the Northern District of California illustrates this notion in a setting resembling a BBS transaction. In *On Command Video Corp. v. Columbia Pictures Industries*,¹¹⁵ a hotel provided video transmissions of movies for the benefit of its guests.¹¹⁶ The hotel employed a computerized transmission system and a bank of video cassette players centrally located in the hotel's equipment room.¹¹⁷ Guests, operating the system from their rooms by remote control, could choose among the available movies, and then the audiovisual image was transmitted to the television in the guest's room.¹¹⁸ The case was ultimately decided against the hotel based on the public performance right,¹¹⁹ but the significance of this case to this discussion lies in the fact that the copyright owner had no right of action against the individual guests who had viewed the movies. The guests were mere browsers; thus, the only recourse available to the copyright owner was suing the party responsible for making the works publicly available.¹²⁰

In a BBS transaction, the situation for the copyright owner is similar. When a subscriber browses works on a BBS without creating permanent reproductions, the copyright owner has no right of action against the subscriber. The Copyright Act dictates that the copyright owner pursue the party responsible for making the displayed work available to the public, rather than the individual members of the public viewing the display.¹²¹ In a BBS setting, this party is the sysop. Just as bookstores, record stores, libraries, museums, newsstands, and the hotel in *On Command Video* are responsible for the materials they carry and make available to the public, the sysop is responsible for the materials she stores and makes available to the public. Only through her operation of the BBS does the work in question become publicly available for browsing.

The preceding analysis has argued for recognition of three specific points. First, Part III.B demonstrated that the reproduction and public display rights are mutually exclusive, as they were designed to address fundamentally different activities. Part III.C then explained that, for a variety of reasons, browsing on a BBS is

115. 777 F. Supp. 787 (N.D. Cal. 1991).

116. *Id.* at 788.

117. *Id.*

118. *Id.*

119. *Id.* at 789-91.

120. See also *Redd Horne*, 749 F.2d at 159-60 (holding a video rental store liable for allowing public performance or "showcasing" of movies in individual exhibition booths in the rear of the premises).

121. See notes 112-13 and accompanying text.

more properly construed as implicating the public display right than the reproduction right. Finally, Part III.D reasoned that, because browsing implicates the public display right, the Copyright Act places liability, not upon members of the public, but upon the party responsible for making the display available to the public. That party is the sysop. Part III.E, which follows, makes a similar argument in the context of the distribution right.

E. The Distribution Right

As noted above, the Copyright Act grants to copyright owners the exclusive right to distribute copies of the work to the public.¹²² The broad language of the statute applies to the transfer of almost any interest in the work, whether that transfer be by sale, gift, loan, or rental or lease arrangement.¹²³ The scope of the distribution right, however, is limited in a manner similar to the display right; only distributions to the public trigger the right.¹²⁴ In addition, the distribution right is significantly limited by the first sale doctrine, as embodied in Section 109(a) of the Copyright Act.¹²⁵ The first sale doctrine essentially eliminates the copyright owner's ability to control the subsequent alienation of the copyrighted work (or a particular copy of the copyrighted work) once an initial valid transfer has taken place.¹²⁶ The first sale doctrine only applies, however, if the original sale or transfer constituted a legitimate transfer of an authorized copy.¹²⁷ The copyright owner's distribution rights would therefore remain

122. 17 U.S.C. § 106(3). Under the Act, the copyright owner has the exclusive right "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." *Id.* The House Report also states that the copyright owner has the right to control the "first public distribution" of any authorized copy of her work. House Report at 62 (cited in note 3).

123. 17 U.S.C. § 106(3).

124. *Id.*

125. *Id.* § 109(a). This provision states:

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.

Id.

126. "As section 109 makes clear, . . . the copyright owner's rights under section 106(3) cease with respect to a particular copy or phonorecord once he has parted with ownership of it." House Report at 62 (cited in note 3).

It is important to note, however, that the first sale doctrine only limits the copyright owner's rights when she has transferred an ownership interest in the work. Thus, a rental or lease agreement would not "exhaust" the distribution right through first sale.

127. Marshall A. Leaffer, *Understanding Copyright Law* § 8.13 at 220-21 (Matthew Bender, 1989). See House Report at 62 (cited in note 3) ("[A]ny unauthorized public distribution of copies or phonorecords that were unlawfully made would be an infringement").

intact in the case of any distribution of unlawfully made copies, whether it be the first, second, or thirtieth actual conveyance.¹²⁸

Similar to the problems arising in connection with the reproduction and display rights, application of the distribution right to BBSs gives rise to interpretive difficulties. First, it is unclear exactly what actions are necessary to trigger copyright infringement of the distribution right. Some authorities have identified an offering of the work to the public for distribution as the triggering event.¹²⁹ Under this standard, merely making the work available to the public for distribution could constitute infringement.¹³⁰ This standard suggests that an infringement might occur even absent any actual transfers of copies or of works.¹³¹

The Nimmer and Goldstein treatises, in contrast, claim that infringement of the distribution right requires an actual dissemination of copies of the work.¹³² Under this standard, a mere offering of copies of the work to members of the public, by itself, would

128. Leaffer, *Understanding Copyright Law* § 8.13[A] at 221 (cited in note 127) ("Any resale or other disposition of a pirated copy would constitute an infringing act even if the defendant had no knowledge of the piracy").

129. See, for example, *Wildlife Internationale, Inc. v. Clements*, 591 F. Supp. 1542, 1547 (S.D. Ohio 1984) (stating that an "offer of sale to the public or otherwise" could constitute copyright infringement). This is also the interpretation of the distribution right specifically endorsed by David Loundy in the context of BBSs. See Loundy, *E-Law 2.0* at *77 (cited in note 98) (claiming that if a user uploads unauthorized copyrighted material to the BBS, and the BBS operator makes the file accessible to other users, the BBS operator has infringed the copyright owner's distribution right, regardless of whether the material is ever actually downloaded by other users). In addition, such an interpretation comports precisely with the law of the United Kingdom, which holds that "making a work available to the public by means of an electronic retrieval system constitutes publication." White Paper at 219 n.548 (cited in note 20) (citing the Copyright, Designs and Patents Act of 1988 § 175(1)(b)).

130. Such a standard resembles the definition of publication established in the Act, which provides that, under some circumstances, an offer can be sufficient to trigger the distribution right. 17 U.S.C. § 101 (stating that where the purpose is for further distribution, performance, or display, an offer alone can constitute publication of a work). Commentator Jay Dratler argues that the language in the statute as well as language in the House Report indicate that the publication standard itself should be used to decide whether distribution has occurred. Dratler, *Intellectual Property Law* § 6.01[3][a] at 6-13 (cited in note 77). First, "the statute defines the term 'publication' in almost the exact same language that it uses to express the distribution right." *Id.* Second, the House Report twice refers to the distribution right as "publication" or the "exclusive right of publication." *Id.* Based on these pieces of evidence, Dratler concludes: "No doubt Congress also intended this language to determine what activities would and would not infringe the copyright holder's exclusive distribution right." *Id.*

131. This would seem to correspond to the House Report's interpretation of the display right, see note 103 and accompanying text, where the display right may be infringed merely by virtue of being open or available to the public, whether or not such display is ever actually viewed by users.

132. 2 *Nimmer on Copyright* § 8.11[A] at 8-137 (cited in note 3) (citing *National Car Rental System, Inc. v. Computer Associates Intern., Inc.*, 991 F.2d 426, 434 (8th Cir. 1993)); Goldstein, 2 *Copyright* § 5.5.1 at 5:102 (cited in note 70) (stating that "an actual transfer must take place; a mere offer of sale will not violate the right").

not suffice to trigger the distribution right.¹³³ The copyright owner would also have to prove that actual transfers to members of the public had taken place.

Defining when infringement takes place is important in the context of BBSs. Under the offer standard, a sysop could incur liability by making an unauthorized work available to the public for downloading from the BBS.¹³⁴ Under the actual dissemination standard, on the other hand, a sysop must actually disseminate copies of the copyrighted work. The plaintiff would therefore have to prove that downloading of the material had actually taken place.¹³⁵

The actual dissemination standard is problematic for two reasons. First, the sources that the Nimmer and Goldstein treatises rely upon in support of the standard do not actually state that an offer alone cannot trigger the distribution right. One of the three cases cited, *Greenbie v. Noble*,¹³⁶ was decided prior to the enactment of the 1976 Copyright Act and was based upon the "right to vend" embodied in the 1909 Act.¹³⁷ *Greenbie* states only that an offer was insufficient under the former Act to trigger the now-repealed right to vend. The Nimmer treatise itself notes that the distribution right in the current Act is broader than the right to vend in the 1909 Act.¹³⁸ Moreover, the Nimmer treatise admits that the distribution right was arguably intended to encompass both the former right to vend and the former right to publish.¹³⁹ Thus, reliance upon *Greenbie* for an actual dissemination standard under the 1976 Act is dubious.

Furthermore, neither of the other two cases cited, *Obolensky v. G.P. Putnam's Sons*¹⁴⁰ nor *National Car Rental System, Inc. v. Computer Associates Intern., Inc.*,¹⁴¹ says anything about the suffi-

133. 2 *Nimmer on Copyright* § 8.11[A] at 8-135 n.2 (cited in note 3) (noting that an offer is "apparently" not enough to trigger the distribution right).

134. See Loundy, *E-Law 2.0* at *77 (cited in note 98) (stating that once the digital file of a copyrighted work is available in a publicly accessible BBS archive, the sysop has violated the copyright owner's distribution right).

135. In accordance with the preceding Sections, browsing would not qualify as actual dissemination because in each of the transfers covered in the statute—gift, sale, rental, lease, and so forth—an actual possessory interest is conveyed. Mere viewing would not qualify, as a possessory interest would only arise with the creation of a permanent reproduction. See notes 109-13 and accompanying text.

136. 151 F. Supp. 45 (S.D.N.Y. 1957).

137. *Id.* at 63 (stating that, at that time, the copyright owner's exclusive rights included the rights to "print, reprint, publish, copy, and vend the copyrighted work").

138. 2 *Nimmer on Copyright* § 8.11[A] at 8-135 n.2 (cited in note 3).

139. *Id.* § 8.11[A] at 8-135 to 8-136.

140. 628 F. Supp. 1552 (S.D.N.Y. 1986), *aff'd* without opinion, 795 F.2d 1005 (2nd Cir. 1986).

141. 991 F.2d 426 (8th Cir. 1993).

ciency of an offer to trigger the distribution right. In *Obolensky*, the plaintiff sued because its copyrighted book had been listed incorrectly in Books in Print, making distribution by the plaintiff himself an impossibility.¹⁴² The court stated that the plaintiff's claim was not cognizable under the distribution right because the defendant had made no sales of the book.¹⁴³ The defendant, however, had never even possessed copies of the book, much less made an offer to the public.¹⁴⁴ Thus, the case does not support the view that offers to the public are insufficient to trigger the distribution right.¹⁴⁵

In *National Car Rental*, the court stated that infringement of the distribution right "requires an actual dissemination of . . . copies" of the work.¹⁴⁶ In so stating, however, the court sought to emphasize that the transfer of mere features or functions of the work was insufficient to constitute distribution.¹⁴⁷ The court used the actual copy standard to define how much of the work must be transferred to trigger distribution, rather than to determine whether an offer constituted a transfer sufficient to trigger distribution.¹⁴⁸ Thus, none of the cases cited by the Nimmer and Goldstein treatises seem to support fully the proposition that an offer to distribute is insufficient to trigger the distribution right.

The second problem with the view espoused by the Nimmer and Goldstein treatises concerns the BBS context itself. If the threshold of infringement is actual dissemination, the distribution right only arises when BBS users download copyrighted works. This interpretation seems unlikely. A court would probably not require the copyright holder to wait until a copy of the work is actually downloaded by a member of the public before recognizing an infringement.¹⁴⁹ Such a standard would place a strange burden of

142. 628 F. Supp. at 1555.

143. *Id.* at 1555-56.

144. *Id.* at 1555.

145. It may be that the Goldstein treatise cites *Obolensky* simply because the *Obolensky* court cited *Greenbie* regarding the right to vend. See Goldstein, 2 *Copyright* § 5.5.1 at 5:102 n.14 (cited in note 70). The *Greenbie* proposition, however, played no role in the *Obolensky* holding, and *Obolensky* does not state that an offer is insufficient to trigger the distribution right.

146. 991 F.2d at 25. Interestingly, the Nimmer treatise only cites *National Car Rental* for this proposition. 2 *Nimmer on Copyright* § 8.11[A] at 8-137 n.4.7 (cited in note 3). However, the case cites the Nimmer treatise for the proposition. *National Car Rental*, 991 F.2d at 25.

147. *National Car Rental*, 991 F.2d at 25. The court found that distribution of the "functionality" of a computer program was insufficient to trigger the distribution right. *Id.*

148. *Id.*

149. Loundy's interpretation, whereby the BBS operator would violate the Act immediately upon posting the copyrighted material, seems preferable in this respect. See note 134 and accompanying text. Although Loundy's interpretation moves the time of infringement up, and

proof upon a copyright owner. In order to establish infringement of her distribution right by the sysop, she would have to show that a user, a third party, downloaded the material.

The White Paper pinpoints the problem with making infringement contingent upon actual dissemination: the threshold acts for infringement—printing or downloading—more closely resemble a reproduction by the user than a distribution by the BBS operator.¹⁵⁰ For this reason, the offer standard of distribution infringement constitutes the preferable interpretation of the law in the BBS context. The sysop infringes the distribution right the moment she makes it available to the public for downloading.¹⁵¹ The user then makes an infringing reproduction when she downloads or prints the unauthorized material from the BBS.¹⁵²

Because the White Paper tends to overstate rights,¹⁵³ one may wonder why the White Paper is unwilling to categorize downloading by the user as both a reproduction and a distribution. The likely reason stems from the fact that the distribution right is specifically limited by the first sale doctrine.¹⁵⁴ As noted above, the first sale doctrine extinguishes the copyright owner's right to control subsequent alienation after an initial legitimate transfer.¹⁵⁵ The authors of the White Paper may have hesitated to categorize downloading as a distribution for fear that all downloading users would obtain rights to subsequent alienation.¹⁵⁶

The White Paper's concern, however, is misplaced. The actual dissemination of the copy from the BBS occurs through a reproduction by the subscriber. When the subscriber downloads or prints, she creates a fixed copy of the work. Thus, even though a distribution has occurred, it is the distribution of an unlawfully made reproduction.

in that sense seems harsher on the sysop, its advantage is that it places the infringing action within the control and responsibility of the person to whom liability will attach.

150. White Paper at 68-69 (cited in note 20). As noted above, the House Report states that a single act of infringement can violate more than one right on some occasions. See note 57 and accompanying text.

151. As mentioned above in note 104, this view is commensurate with the display right, which is infringed when the BBS operator makes the display available to the public for browsing, regardless of whether or not such display is ever actually viewed.

152. See note 99 and accompanying text.

153. See notes 19-21 and accompanying text.

154. See 17 U.S.C. § 109(a).

155. See notes 125-26.

156. The Green Paper observed that "if a transaction by which a user obtains a 'copy' of a work is characterized as a 'distribution,' then, under the current law, the user may be entitled to make a like distribution without the copyright owner's permission (and without liability for infringement [due to the first sale doctrine])." Green Paper at 39 (cited in note 20).

As noted above, the first sale doctrine never applies to unlawfully made reproductions.¹⁵⁷

*F. Systematic Application of Copyright Liability
Constructs to the BBS Transaction*

Each phase of a BBS transaction requires application of the copyright principles discussed throughout Part III of this Note. The facts of *Playboy* provide a workable illustration:

- Step 1: Subscriber A to Frena's BBS purchases one of Playboy's copyrighted magazines from an authorized distributor. Because the distribution was lawful, no infringement has occurred at this point. Due to the valid distribution, however, Playboy loses its right to control subsequent alienation of the magazine by operation of the first sale doctrine.¹⁵⁸
- Step 2: Subscriber A scans one of the pictures in Playboy's magazine into her computer using a digital scanner. Subscriber A is now directly liable for infringement of Playboy's exclusive right to reproduce.¹⁵⁹
- Step 3: Subscriber A uploads the digital image to Frena's BBS. Subscriber A is once again directly liable for infringement of Playboy's exclusive right to reproduce.¹⁶⁰
- Step 4: Frena, either through action or inaction, makes the image available to his subscribers for browsing or downloading

157. See notes 127-28 and accompanying text. The more difficult question in this respect concerns the application of the first sale doctrine when the distributed copy is a lawfully made copy. It would still seem that the first sale doctrine should not apply because the sysop has not disposed of her copy of the work. From a functional perspective, the first sale doctrine should only apply when the transaction involves a single copy of the work. Only when the distributing party sells, rents, gives, or otherwise disposes of the work to the receiving party, and the distributing party no longer has possession of a copy at the end of the transaction, should the first sale doctrine apply. Obviously, this will rarely be the case in the replicating medium that is the on-line environment. See Junda Woo and Jared Sandberg, *Copyright Law is Easy to Break on the Internet, Hard to Enforce*, Wall St. J. B6 (Oct. 10, 1994) (quoting noted information technology expert Michael Wolff as commenting, regarding the Internet, "It's a replicating medium and it's a mess"). For a further discussion of the problem with the application of the first sale doctrine to computer environments, see White Paper at 90-95 (cited in note 20).

158. See 17 U.S.C. § 109(a). See notes 125-26 and accompanying text.

159. See 17 U.S.C. § 106(1). Subscriber A has fixed an unauthorized copy into her computer. See notes 60-63 and accompanying text. The first sale doctrine would not apply in this case as the distribution was of an unlawfully made reproduction. See notes 127-28, 157 and accompanying text.

160. See 17 U.S.C. § 106(1). Subscriber A has fixed an unauthorized copy into the memory of the BBS. If Frena knowingly induces the upload, he is a contributory infringer of Playboy's rights. See note 3.

through his operation of the BBS. Frena is now directly liable for infringement of Playboy's exclusive rights to public display¹⁶¹ and distribution.¹⁶² This liability attaches regardless of whether Frena knows that the work is an unauthorized copyrighted work,¹⁶³ whether the image is ever viewed by a user,¹⁶⁴ and whether the image is ever downloaded by a user.¹⁶⁵ Moreover, if subscriber A knew or had reason to know that the work would be made available to the public for browsing and downloading through the operation of Frena's BBS, she incurs contributory liability regarding the infringements for which Frena is directly responsible in the operation of his BBS.¹⁶⁶

Step 5: Subscriber B to Frena's bulletin board logs on, finds the newly uploaded file, opens it, and views it without downloading it. A display has occurred, yet it does not trigger liability for subscriber B.¹⁶⁷

Step 6: Subscriber C logs on to the BBS, finds the image, and downloads the image to her own computer. Subscriber C is now a direct infringer of Playboy's exclusive right to reproduce,¹⁶⁸ regardless of whether she knew that the work was an unauthorized copy of a copyrighted work.¹⁶⁹

161. See 17 U.S.C. § 106(5). Frena is responsible for making a display of Playboy's unauthorized copyrighted work available to the public. See notes 113-20.

162. See 17 U.S.C. § 106(3). Frena has made the work available for distribution to the public. See notes 129-31 and accompanying text.

163. The ignorance or innocence of an infringer is immaterial to the attachment of liability. See note 1.

164. See note 104. As noted above, the House Report clarifies that a public display may occur even if there is no proof that actual browsing by subscribers has occurred. House Report at 65 (cited in note 3). Thus, the moment that the material becomes *available* for display to members of the public, an infringement of the display right occurs.

165. As noted above, the offer standard, rather than the actual dissemination standard, is the better interpretation of existing law regarding the distribution right. See notes 134-152 and accompanying text.

166. See note 3.

167. As noted above, Subscriber B cannot be held liable for merely viewing a work without downloading it because the copyright owner does not hold the "exclusive right to read." See notes 112-13 and accompanying text. This presumes, of course, that subscriber B is browsing the work in an individual capacity. If subscriber B were to retrieve the image from the BBS and then project it onto a large screen for viewing by an audience "outside of a normal circle of family and social acquaintances," House Report at 64 (cited in note 3), she too might be liable for making a public display. See note 103.

168. See 17 U.S.C. § 106(1). Subscriber C fixed an unauthorized copy into her computer. See notes 60-63 and accompanying text.

169. The ignorance or innocence of an infringer is immaterial. See note 1. However, if subscriber C is an individual making a single reproduction for personal, non-commercial use, it is likely that this technical infringement would be excused with respect to subscriber C by the

If Frena induced or encouraged the downloading, he is a contributory infringer of Playboy's reproduction right.¹⁷⁰ A distribution has occurred, but it is not a prerequisite for Frena's liability.¹⁷¹

As will be more fully argued below, the above principles provide a consistent framework for analyzing sysop liability. Nonetheless, certain courts and commentators have proposed changes to the current system that threaten to undermine the careful balance between the competing interests that the Copyright Act represents.

IV. PROSPECTIVE IMPLICATIONS: CLARIFYING THE NEED FOR STRICT LIABILITY

The resolutions reached in two recent cases provide good vehicles for evaluating the advantages of maintaining the strict liability regime that exists under current copyright law. First, a recent federal district court decision, *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*,¹⁷² helps illustrate the pitfalls of the under-protectionist interpretation of copyright doctrine as applied to BBSs. In this decision, the United States District Court for the Northern District of California held that contributory liability was the proper regime for analyzing sysop liability.¹⁷³ Although the *Netcom* court did not acknowledge that it was making a major departure from existing law, large-scale implementation of the *Netcom* analysis would disrupt the delicate balance that copyright law seeks to strike between the protection of a copyright owner's interests and the public's desire for broad dissemination of artistic and literary works.

The second resolution to be discussed is the settlement agreement reached between the parties in *Frank Music v. CompuServe*.¹⁷⁴ The *Frank Music* settlement demonstrates the power and ability parties have to define their legal relationships

fair use defense. As noted in *Playboy*, however, Frena, as the unlawful public displayer and distributor, would not have access to the fair use defense. See text accompanying note 42.

170. See note 3.

171. As noted above, an offer to distribute should suffice. See notes 134-49, 162, 165 and accompanying text.

172. 907 F. Supp. 1361 (N.D. Cal. 1995).

173. *Id.* at 1382.

174. Civil Action No. 93 Civ. 8155 (S.D.N.Y. 1993). *Frank Music* was settled on November 7, 1995. See note 27.

contractually in a BBS setting. It also highlights the fact that, as a default rule, strict liability effectively promotes and encourages such contractual bargaining.

A. *Netcom and the Problems with Departing from Strict Liability*

The facts and circumstances in *Netcom* closely resemble the facts of *Playboy*.¹⁷⁵ In *Netcom*, the Religious Technology Center ("RTC") held copyrights in various texts associated with the Church of Scientology.¹⁷⁶ RTC brought suit against three defendants in connection with a BBS transaction.¹⁷⁷ One defendant, Erlich, subscribed to a BBS that was operated by a second defendant, Klemesrud.¹⁷⁸ Without first obtaining authorization from RTC, subscriber Erlich uploaded copies of RTC's texts to the BBS.¹⁷⁹ Klemesrud did not exercise any control or supervision over uploads from his subscribers, and consequently the works became available to other users shortly after Erlich uploaded them.¹⁸⁰ The third defendant, Netcom, is a large Internet server that provided the Klemesrud BBS with access to the Internet.¹⁸¹ Due to the Internet connection, the works became available to Internet users worldwide within a matter of hours.¹⁸²

In contrast to the analysis applied by the *Playboy* court, the *Netcom* court found that, as a matter of law, the sysop could not be held directly liable for infringement of RTC's exclusive distribution and display rights.¹⁸³ The court's declaration that "[o]nly the sub-

175. One important distinction between the two is that in *Netcom*, the BBS was not independent; it was connected to the Internet. Thus, additional issues arise, such as the issue of liability for the Internet server that allowed connection to the Internet. Nonetheless, connection to the Internet should not alter the liability analysis for the sysop of the actual BBS involved.

176. 907 F. Supp. at 1365.

177. *Id.*

178. *Id.* at 165-66.

179. *Id.* at 1366.

180. *Id.* at 1381 (noting that Klemesrud's BBS was designed to store and distribute uploads automatically from his subscribers to the Internet at large).

181. *Id.* at 1366.

182. *Id.* at 1368. As the Internet server, it is unclear what Netcom's liability should be in this case. If Netcom acts as a mere information "conduit," rather than a "repository," "it would have a good argument for an exemption [from strict liability] if it was truly in the same position as a common carrier and could not control who or what was on its system." *Id.* at 1369 n.12 (citing the White Paper at 122 (cited in note 20)). Despite this argument, the *Netcom* court noted that the common carrier analogy is "not completely appropriate" as Netcom does have some ability to control who uses its services. *Id.* In any event, this Note does not seek to answer the question of Netcom's liability. Instead, this discussion focuses only upon the liability of the sysop Klemesrud, as the sysop is the owner and operator of the BBS and is the only party clearly responsible for its operations.

183. *Id.* at 1381-82.

scriber should be liable for causing the distribution of [RTC's] work"¹⁸⁴ provides a consummate example of the under-protectionist interpretation.¹⁸⁵ The court did not believe that making the works available to the public for browsing and downloading directly violated RTC's copyright.¹⁸⁶ Consequently, the court identified contributory liability as the only theory upon which RTC could base its claim against Klemesrud.¹⁸⁷

Technical and policy reasons compel the conclusion that *Netcom* should not be followed in assessing the liability of a sysop in BBS transactions of this nature.¹⁸⁸ Most importantly, the court ignored the role of the sysop in the infringement of RTC's copyrights. Once the works were made available for public browsing through the operation of the BBS, infringements of the display right occurred.¹⁸⁹ The operation of the BBS made such public browsing possible.¹⁹⁰ In addition to the Internet connection, the works were retrievable directly from the BBS by Klemesrud's subscribers.¹⁹¹ It was only

184. *Id.* at 1372.

185. The court stated that "[w]here the BBS merely stores and passes along all messages sent by its subscribers and others, the BBS should not be seen as causing these works to be publicly distributed or displayed." *Id.*

186. *Id.* Specifically, the court stated that it was "not entirely convinced that the mere possession of a digital copy on a BBS that is accessible to some members of the public constitutes direct infringement by the BBS operator." *Id.*

187. *Id.* at 1372, 1381-82.

188. From the outset, it is immediately apparent that even the structure of the opinion is unusual. The court spent the first 58 pages of the opinion addressing the liability of *Netcom*, the Internet server. It then spent only five pages addressing the liability of Klemesrud, the actual operator of the BBS. Regarding the direct liability of Klemesrud, the court merely stated that "[t]he allegations against Klemesrud fail for the same reason the court found that *Netcom* was entitled to judgment as a matter of law." *Id.* at 1381. This resolution alone is problematic in that it is not clear that the liability analysis for both parties is identical. As noted above, one could argue that *Netcom* acts merely as a conduit through which information flows as it is being distributed or displayed to a subscriber. See note 182.

189. See notes 161-65 and accompanying text.

190. It is beyond dispute that the subscriber who uploaded the works, Erlich, made unlawful reproductions of the works when he uploaded them to the BBS. See note 201. In addition, it appears that Erlich is at least partially responsible for the fact that the infringements of the public display right occurred. However, he was not the direct infringer. Erlich did not and could not have made the works available for public display. The BBS made the works publicly available, and Klemesrud is responsible for the actions and operations of his BBS. Thus, Klemesrud is the direct infringer of RTC's display right. See text accompanying notes 114-21. Erlich is more properly characterized as a contributory infringer, as he uploaded the materials with the knowledge that the works were protected by RTC's copyright, and with the knowledge that Klemesrud's BBS would innocently make the materials available to the public. See note 3.

191. As noted above, the *Netcom* court focused its attention upon the Internet connection through *Netcom*, and was unwilling to impose a "rule that could lead to the liability of countless parties . . . necessary for the functioning of the Internet." 907 F. Supp. at 1372. See note 188. This conclusion, however, ignores the role of Klemesrud's BBS in its independent capacity, aside from the Internet. The undisputed facts revealed that the BBS had approximately 500

through the BBS, functioning as an information storage, retrieval, and distribution facility, that the works became publicly displayed. As noted above, such a system was contemplated by the House Report when it delineated the scope of the display right.¹⁹²

Additionally, the unlawful offering of the works to the public, by virtue of their presence on the BBS, constituted a violation of the distribution right.¹⁹³ The *Netcom* court ignored the fact that the BBS was the principal means through which RTC's works were distributed to Klemesrud's subscribers and the Internet at large.¹⁹⁴ Were it not for Klemesrud's operation of the BBS, the works would not have been available for unlawful downloading.¹⁹⁵

The Copyright Act dictates that the party who is responsible for the storage facility is responsible for the contents contained therein. If the party chooses not to monitor those contents, she assumes the risk that subscribers will upload unauthorized copyrighted works.¹⁹⁶ The sysop must take responsibility for any works resident on the BBS that are accessible to the public for browsing or downloading.

Beyond the mandates of existing copyright law, a number of policy reasons exist for rejecting *Netcom* and maintaining strict liability for sysops. First and foremost, the erosion of strict liability would greatly increase the incidence of unremedied copyright infringement.¹⁹⁷ If courts adopted the *Netcom* reasoning on a large

subscribers of its own. 907 F. Supp. at 1366. Thus, aside from being a vehicle through which works were automatically distributed to the Internet, the Klemesrud BBS served as a direct information storage and retrieval facility for its 500 subscribers. As regards these subscribers, Klemesrud's actions and operations are no different from Frena's in *Playboy*, and liability should be assessed in the same manner. See notes 35-45, 102-106, 158-71 and accompanying text. Although the Internet connection undoubtedly gives rise to some novel issues, the *Netcom* court should not have used this unique aspect of the case to avoid any finding of liability for the sysop.

192. See notes 100-01 and accompanying text.

193. See notes 129-31, 162 and accompanying text.

194. As noted above, the court made no attempt to separate its analysis of the sysop's liability from that of the Internet server. See 907 F. Supp. at 1381-82. See also note 188.

195. In this respect the reasons given above for infringement of the display right apply similarly to the distribution right.

196. See White Paper at 118 (cited in note 20) ("The risk of infringement liability is a legitimate cost of engaging in a business that causes harm to others, and that risk apparently has not outweighed the benefits for the more than 60,000 bulletin board operators currently in business").

197. Public Hearings (Sept. 16, 1994) at 40 (cited in note 17) (testimony of William Daniels) (noting that if CompuServe and other sysops have their way, "we risk creating essentially electronic, not really free ports, but more like no copyright zones. And these could exist anywhere in the world because of the nature of electronic communications. The precedent for allowing that sort of safe harbor for profit makers to profit from other people's enterprise I think is astounding").

scale, the trend would greatly diminish any incentive a sysop might have had for attempting to discover and prevent copyright infringement.¹⁹⁸ In fact, *Netcom* encourages the opposite behavior; sysops have an incentive to avoid close monitoring of their BBSs because if they acquire knowledge of infringing behavior they may incur contributory liability.¹⁹⁹ Thus, an erosion of strict liability would result in a troubling head-in-the-sand defense for sysops.

Moreover, the adoption of a contributory liability regime for sysops would place a difficult burden on the copyright owner: proving knowledge on the part of the sysop. The burden of proving knowledge under a contributory liability regime did not worry the *Netcom* court for two reasons. First, the uploading subscriber, Erlich, was a named defendant in the action, and the court had already decided he would probably incur liability.²⁰⁰ Even if Klemesrud avoided liability altogether, at least one liable party would still be present.²⁰¹

Second, the undisputed facts showed that Klemesrud had refused to remove the infringing copies from the BBS even after having been notified of their infringing character by RTC.²⁰² Because it appears that Klemesrud had actual knowledge, RTC would probably succeed on its infringement claim even without strict liability. Had the *Netcom* facts more closely resembled the more common situation in which the uploading subscriber is unknown and there is no evidence of knowledge on the part of the sysop,²⁰³ the court may have been more reluctant to depart from strict liability.²⁰⁴

The White Paper notes other important reasons for maintaining strict liability for sysops. It observes that sysops are not alone in being at risk for "innocent" copyright infringement. Service providers

198. The White Paper correctly notes that altering the strict liability standard for sysops "would be a significant departure from current copyright principles and law and would result in a substantial derogation of the rights of copyright owners." White Paper at 114 (cited in note 20).

199. See note 3 for a discussion of contributory liability.

200. *Netcom*, 907 F. Supp. at 1361 n.3. The court had already granted RTC a preliminary injunction, stating that RTC had shown a likelihood of success on their copyright infringement claims against Erlich. *Id.*

201. The facts showed that Erlich had made unauthorized reproductions of the copyrighted works when he copied them into his computer and uploaded them to the BBS. See David J. Loundy, *Internet Case Shows Copyright Act Needs Revision*, Chi. Daily L. Bull. 6 (Dec. 14, 1995) (noting that the issue of Erlich's liability is fairly obvious and straightforward).

202. *Netcom*, 907 F. Supp. at 1382.

203. Such as, for example, the circumstances in *Playboy*. See 839 F. Supp. at 1554, 1556, 1559.

204. One additional factor may have contributed to the outcome of *Netcom*: the relative worthlessness of the copyrighted works in the eyes of the court. *Netcom* may have come out differently had the copyrighted material been a copy of Windows '95 or some other product of high commercial value with a strong and powerful lobby behind it.

in all types of fields face the same potential for ignorant or innocent infringement.²⁰⁵ In addition, the White Paper notes that as between two innocent parties (the sysop and the copyright owner), the sysop, by virtue of her control over the BBS and her business relationship with her subscribers, is in a far better position to prevent or stop infringements.²⁰⁶ The White Paper also points out that sysops often reap the rewards of storing infringing material on their BBSs.²⁰⁷ Indeed, it seems indisputable that software and other pirating in copyrighted materials can be big business.²⁰⁸

In his influential article, *The Proper Legal Regime for "Cyberspace,"* commentator Trotter Hardy provides additional reasons for maintaining strict liability.²⁰⁹ As Hardy explains, BBSs present somewhat of a new situation for copyright law because no existing legal analogies neatly apply to BBS environments.²¹⁰ When new fact patterns emerge, Hardy argues, the development of rules governing such situations should be developed from the bottom up by individual participants in response to particular facts and circumstances.²¹¹ The

205. The White Paper notes that

[m]illions of photographs are taken to photo finishers each day by individual consumers. It is virtually impossible for these service providers to view any of those works before they are reproduced from the undeveloped film. Yet, they operate under strict liability standards. Likewise, book sellers, record stores, newsstands and computer software retailers cannot possibly read all the books, listen to all the records, review all the newspapers and magazines or analyze all the computer programs that pass through their establishments for possible infringements. Yet, they may be held strictly liable as distributors if the works or copies they deal in are infringing.

White Paper at 116 (cited in note 20) (footnote omitted).

206. *Id.* at 117.

207. *Id.* at 117-18. The White Paper notes that sysops often charge fees for access to their systems. *Id.* Put simply, systems storing and providing access to provocative and valuable materials, especially copyrighted materials (software, pictures, music, movies, etc.), will be more popular among subscribers and will garner a greater profit for the sysops. Furthermore, even when the sysop does not charge a fee, she may receive the benefit of numerous free uploads of copyrighted material from subscribers.

208. See Steve Lohr, *Pirates Are Circling the Good Ship Windows 95*, N.Y. Times D6 (Aug. 24, 1995) (quoting Business Software Alliance estimates that the software industry lost \$15.2 billion last year to worldwide piracy); Robert Gebeloff, *Software Pirates Ply the Internet, Regulators Debate Ways to Control Problem*, Record B1 (Oct. 29, 1995) (describing an incident of software piracy and FBI and software industry attempts at dealing with the problem); *Pirate Bulletin Board Probe Settled*, 3 Report on Microsoft (Feb. 13, 1995) (noting that in exchange for allowing copyright piracy to take place on their systems, sysops receive compensation in the form of fees and uploaded copyrighted material).

209. Hardy, 55 U. Pitt. L. Rev. at 1043-44 (cited in note 24).

210. Hardy and others note that a number of legal analogies, including book stores, libraries, publishers, common carriers, broadcast media, etc., have been suggested to resolve legal issues regarding BBSs, but that none is entirely satisfactory. *Id.* at 1004-08. See Schlacter, 16 Hastings Comm/Ent L. J. at 98-101 (cited in note 6); Loundy, *E-Law 2.0* at *16-17 (cited in note 98).

211. Hardy, 55 U. Pitt. L. Rev. at 1026 (cited in note 24) ("After all, a problem that can be worked out satisfactorily between two people neither requires nor benefits from the adoption of

bottom-up approach is generally more flexible and decentralized, and takes advantage of self-enforcement mechanisms such as contract law and the development of appropriate customary behavior.²¹²

Because of the newness of BBSs and the diversity in their size and functions, Hardy suggests that the ideal legal system would be one that provides legal certainty and promotes a bottom-up approach to problem solving.²¹³ According to Hardy, the maintenance of a strict liability standard for all sysops best effectuates this goal.²¹⁴ Strict liability forces the sysop to address the issue of copyright infringement. She will perform a cost/benefit analysis to decide which preventive measures would most effectively protect her from liability: whether she should use indemnification contracts and, if so, what types; what percentage (if any) of her user uploads she should screen; whether and when she should limit uploads; whether she should require personal information from her users; and so forth.²¹⁵

In addition, strict liability provides sysops with an incentive to seek out the other parties involved in the BBS transaction—users and copyright owners—to resolve liability issues in advance.²¹⁶ With strict liability as the default rule, sysops will seek to contract around liability in order to continue to operate their systems.²¹⁷ Thus, Hardy con-

a federal statute, let alone a multi-lateral international treaty. It makes sense, therefore, to start with the presumption that the lowest level of resolution can solve control problems, working 'upward' in control mechanisms from there as necessary").

212. Hardy contrasts this with top-down rulemaking from a legislature or court. Top-down rulemaking is suboptimal in new situations because it tends to be overly broad, inflexible, and unresponsive to varying circumstances: "A uniform rule, whether judicial precedent or statute, would appear to be suboptimal in this case: it will be exactly right for some circumstances, and unnecessary or inappropriate for others." *Id.* at 1043.

213. *Id.* at 1043-44.

214. *Id.* at 1044-45. Such a standard forces each sysop to determine for herself "the most advantageous mix of preventative measures for that BBS." *Id.* at 1044.

215. *Id.*

216. As Hardy and others have noted, however, this approach will require that courts *allow* the parties to resolve the liability issues:

[Sysops] must be able to contractually shift liability when they and their users determine that such a shift is cost effective. In the case of a BBS, the [sysop] must be able to enforce any indemnification agreements entered into by BBS users. The beneficial effects of imposing strict liability on [sysops] would be lost if courts in practice were to find indemnity or other liability-shifting agreements to be unconscionable or unenforceable.

Id. at 1045. See O'Rourke, 1 B.U. J. Sci. & Tech. L. at *12, 16 (cited in note 24) (stating that courts should seriously consider market issues before setting aside such liability-shifting agreements).

217. Commentator Steven Metalitz has noted that even though contracts should replace litigation in the regulation of affairs on-line, the liability regime of copyright law will always form the basis of such contracts. Steven Metalitz, *The National Information Infrastructure*, 13 Cardozo Arts & Ent. L. J. 465, 471 (1995) ("Copyright continues to provide the ground rules. Copyright defines the rights that are the subject matter of these contracts, and it defines the default rules if a contract does not exist").

cludes that strict liability, like that imposed by the court in *Playboy*, provides the optimal means for promoting contract approaches to liability issues in BBS circumstances.²¹⁸

B. The Frank Music Settlement: A Move Toward Contractual Behavior

The litigation in *Frank Music* further illustrates the advantages of a contract approach in addressing the copyright issues in cyberspace. In this federal district court case, Frank Music and the National Music Publishers Association (the "NMPA") sued CompuServe for its role in infringing BBS transactions.²¹⁹ CompuServe operated a MIDI²²⁰ music BBS in which users could upload, browse, and download actual digital copies of popular songs.²²¹ CompuServe stored over nine hundred copies of digital songs on its BBS, including the popular "Unchained Melody."²²² Users could browse and download the songs residing on the BBS without the lawful authority of the copyright holders.²²³

Although commentators had hoped that the *Frank Music* litigation would resolve many of the copyright issues involved in BBS transactions,²²⁴ the court never ruled on these issues because the parties settled the case after two years of litigation.²²⁵ The settlement agreement nonetheless resulted in two great benefits, according to both sides of the dispute. First, it led to a highly innovative licensing agreement that allows for the continued operation of the MIDI music

218. Hardy, 55 U. Pitt. L. Rev. at 1047 (cited in note 24). "Under strict liability, [t]here is no need to ask the hard question of which branch of government is best able to make cost-benefit determinations, because the matter is left in private hands." Id. at 1044 n.126 (quoting Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Leg. Stud. 151, 188 (1973)).

219. See *Settlement Reached*, Daily Rep. for Executives (BNA) at 216 (cited in note 27).

220. The acronym "MIDI" stands for musical instrument digital interface and refers to digitized versions of music. For a general description of MIDI technology and related legal issues, see Christos P. Badaras, Note, *MIDI Files: Copyright Protection for Computer-Generated Works*, 35 Wm. & Mary L. Rev. 1135, 1139-48 (1994). The MIDI music BBS was a facility for MIDI enthusiasts to exchange and listen to one another's MIDI files.

221. *Settlement Reached*, Daily Rep. for Executives (BNA) at 216 (cited in note 27).

222. Id.

223. Id.

224. See *What's the Score? Frank Music Settlement Leaves Law Unsettled But Confirms Online Licensing Possibilities*, 3 Voorhees Rep. (Nov. 17, 1995) (noting that the settlement does not help "those who want to know where blame belongs when things go wrong").

225. Andrew Blum, *Online Music Copyright Case Settled*, Natl. L. J. B1 (Jan. 8, 1996). Arguably, the settlement agreement muddied the waters: CompuServe agreed to pay over \$500,000 to the NMPA, while at the same time admitting no liability on the issue of copyright infringement. Marilyn A. Gillen, *CompuServe, Music Publishers Reach Deal: Online Service to Have Music Activities Licensed*, Billboard (Nov. 18, 1995).

BBS.²²⁶ This arrangement benefits the music publishers by providing an additional source of revenue for their copyrights.²²⁷ Second, CompuServe, for its part, benefits from increased certainty in its operations.²²⁸ Of greatest importance, CompuServe benefits from certainty on the issue of liability, as the agreement establishes the rights and responsibilities of all parties for the future.²²⁹ Because the agreement establishes certainty in the licensing procedures, CompuServe will be able to continue to offer the service to its subscribers.²³⁰

The *Frank Music* litigation provides a valuable demonstration of the benefits that can be obtained by encouraging contractual behavior through the use of strict liability. Strict liability destroys the head-in-the-sand defense on one hand, and drives sysops, the predominant actors and profit makers in the BBS industry, to the bargaining table on the other. Strict liability frees all parties from the litigation costs of determining who is liable and in what capacity. In the process, it provides incentives for sysops to seek contractual arrangements with the subscribers who use their BBSs, and the artists and publishers who provide the content for them.

Had all parties understood prior to the *Frank Music* litigation that a universal standard of strict liability applied, CompuServe and the music publishers would have saved two years' worth of legal fees. CompuServe would have had no reason to defend the suit if it had known that it was strictly liable. Taking this argument a step further, had strict liability been firmly rooted at the time, CompuServe arguably would not have allowed its infringing behavior to take place. Before even instituting the MIDI Music BBS,

226. *Who Has To Do What: Understanding the Frank Music Agreement*, 3 Voorhees Rep. (Nov. 17, 1995) (outlining the details of the settlement agreement).

227. As the NMPA's counsel Alan Shulman stated: "Publishers want to license, they don't want to litigate." *What's the Score?*, 3 Voorhees Rep. (cited in note 224).

228. *Id.* (quoting Jeffrey Cunard, CompuServe's counsel, stating that one of the primary benefits of the agreement is that "[i]t brings some certainty to the process" for CompuServe and its subscribers).

229. See *Who Has To Do What*, 3 Voorhees Rep. (cited in note 226). The agreement spells out exactly what actions CompuServe must take to avoid resuming its position as a copyright defendant in litigation with the music publishers. *Id.* In order to avoid future litigation, CompuServe will be required to (1) require the managers of the BBS to obtain licenses prior to allowing subscribers to download protected songs, (2) require managers to agree in writing to adhere to the settlement agreement and take steps to prevent infringement, (3) use its reasonable best efforts to ensure compliance with the agreement, and (4) guarantee payment of royalties to be paid by managers. *Id.*

230. *What's the Score?*, 3 Voorhees Rep. (cited in note 224) (quoting Jeffrey Cunard, noting that the agreement benefits CompuServe by "free[ing] up subscribers to do what they thought they were always entitled to").

CompuServe would have developed numerous precautions to prevent the uploading and storage of infringing material. It might have obtained representation and indemnification agreements from its subscribers. In addition, it probably would have negotiated a licensing arrangement with music publishers in advance. At the very least, if the potential for strict liability had been certain, CompuServe would not have allowed such cavalier operation of the BBS.

The settlement agreement did in fact establish an actual knowledge standard as the trigger for any future liability on CompuServe's part.²³¹ Thus, the agreement itself erects what amounts to a contributory liability standard, similar to that announced by *Netcom*.²³² The *Frank Music* settlement, however, is superior to *Netcom* in one critical respect. In the case of the settlement agreement, CompuServe bargained for the liability standard it wanted.²³³ It had to ensure protection, licensing, and royalty payments for copyright owners in exchange for the reduced liability standard.²³⁴ Such contracting around liability is precisely the type of behavior that the legal system should promote. As the foregoing analysis suggests, a policy of strict liability, by providing a powerful default rule, will most effectively encourage such behavior on the part of sysops.

For the foregoing reasons, *Netcom's* adoption of a contributory liability standard for sysops seems unpersuasive. Such an approach departs significantly from existing law, and its widespread adoption would cause a dramatic disruption of the rights of copyright owners. Moreover, the Copyright Act, the House Report, and a public policy favoring contractual resolution of liability issues all suggest that the strict liability regime currently in place should be maintained for sysops.

231. Blum, Natl. L. J. B1 (cited in note 225). CompuServe counsel Bruce P. Keller noted that:

the settlement is good for the online service providers because it is a settlement that incorporates the concept that no online providers can be liable for alleged instances of copyright infringement by its various subscribers without some level of actual knowledge of the allegations of infringement.

Id.

232. See notes 184-87 and accompanying text.

233. *What's the Score?*, 3 Vorhees Rep. (cited in note 224) ("The music publishers and CompuServe concluded that the case was too important to be decided by the judicial process when a commercial solution made more sense").

234. Matthew Goldstein, *Accord Ends On-Line Suit Over Music: Computer Firm, Publisher Settle Royalties Dispute*, N.Y. L. J. 1 (Nov. 8, 1995) ("Licensing really does seem to be the wave of the future").

V. CONCLUSION

Copyright law at its core concerns a balancing of interests. In the context of the on-line industry, a balance must be struck between the public at large, copyright owners, and sysops. This Note argues that our current Copyright Act and the surrounding doctrine already strike the appropriate balance.

Notwithstanding the ability of existing law to resolve copyright issues in the on-line context, the uncertainty surrounding judicial application of the Copyright Act in this area has led to calls for a recalibration of the copyright balance. On one side, the under-protectionist group of commentators argues for a legal interpretation that enhances the rights of sysops over the rights of copyright owners.²³⁵ On the other hand, the over-protectionist group calls for an interpretation that increases the rights of copyright owners at the expense of the public.²³⁶ Detailed analysis of the Copyright Act, however, illustrates that neither of these approaches can be justified. On the contrary, the Copyright Act suggests that while individual browsing members of the public should not be held liable for copyright infringement, sysops should be held to a standard of strict liability. Only in this way are the rights of copyright owners and the public best served.

In addition to the Act itself, prudence dictates that the best approach is to maintain the current legal regime and to focus on market solutions to the difficult problems at hand. The strict liability regime will best serve these policy objectives. Only under a standard of strict liability will sysops have the incentive to perfect measures designed to prevent copyright infringement. Furthermore, strict liability will promote a market approach to problem solving as sysops contract around liability issues in negotiations with their users and the copyright owners whose works they disseminate.

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235. See notes 14-18 and accompanying text.

236. See notes 19-22 and accompanying text.

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