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Johnny Can Read, But Can He “Surf”? Harmonizing Copyright Law and Internet Ethics

Simone A. Rose*

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INTRODUCTION

Everybody's gone surfin', surfin' U.S.A. . . .
The Beach Boys¹

Surfing the Internet is the latest wave to hit the nation.² Government, commercial and educational institutions all have web sites where browsers can access digital information on everything from the latest copyright legislation to electronic-saver ("E-Saver"³) airfares. To take advantage of this powerful informational tool, a person needs a computer, modem, and link to the World Wide Web.⁴ For a fee, Internet service providers (ISPs) such as *America Online*,⁵ provide Internet access for home computers. However, when a person is struggling to afford food, shelter, and clothing, amenities such as a home computer (particularly one with Internet access), remain a distant dream. Thus, for the poor and disenfranchised, public libraries and schools offer the only possible opportunity to "surf."

As aptly put by Professor Robert Oakley, Director of

1. THE BEACH BOYS, SURFIN' USA (Capitol Records).

2. Today, we globally refer to the National Information Infrastructure (NII) as the "Internet." See Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure* (visited May 8, 2000) <<http://www.uspto.gov/web/offices/com/doc/ipnii/>> (hereinafter White Paper). This paper uses NII and Internet interchangeably, with most frequent reference to the Internet. The Internet consists of a giant network conglomerate running under a standardized set of protocols called the Internet Protocols. See Needham J. Boddie et al., *A Review of Copyright and the Internet*, 20 CAMPBELL L. REV. 193, 194 (1998). Although funded by private and federal sources, no single entity has control or ownership of the Internet. See *id.* at 196. It comprises over 15,000 individual networks and connects approximately 9.4 million computers. See *id.*

3. This term used by US Airways to market its bargain airfares that are only offered electronically without any printed ticket issuing. See US Airways, *E-Savers* (visited Jan. 29, 2000) <<http://www.usairways.com/travel/fares/esavers.htm>>.

4. The World Wide Web (WWW or "Web") is actually but one part of the Internet, although many people use the terms almost interchangeably. See Boddie *supra* note 2 at 201. The emergence of the Web has, however, put a user-friendly face on the information made available on the Internet by providing integrated multimedia capabilities. See *id.* For example, a Web user can read about a whale, watch a video of the whale, or listen to the whale "speak," all through the same user-friendly interface. An Internet browser transforms the plain text of a file formatted in Hypertext Markup Language (HTML) into a multimedia wonderland. See *id.*

5. See America Online, Inc. (visited Jan. 29, 2000) <<http://www.aol.com>>.

Georgetown University Law Center's library, "[p]ublic access to published information is the principle that has made libraries so important to the ideals of American Democracy."⁶ Similarly, society's moral commitment to public education and universal access to information remain the cornerstone to economic viability.

Americans at all socio-economic levels obtain vital information through public education. Indeed, we all view public libraries as a source of both information and recreation.⁷ These venues are the sole gatekeepers of information resources in poorer communities, where many lack discretionary funds to spend on educational material.

In this era of high technology, children of all income levels need access to both printed and electronic information. Each day, the educational gap widens between children accessing the latest computer technology and children using out-dated computers without Internet capabilities.⁸ The Library Bill of Rights states that "[i]t should be the goal of libraries to develop policies concerning access to electronic resources in light of economic barriers to information access."⁹

Increased government funding to public schools and libraries in low-income areas is one means of upgrading

6. *Prepared Testimony of Prof. Robert L. Oakley, On Behalf of the American Association of Law Libraries Before the House Committee on Commerce Subcommittee on Telecommunications, Trade and Consumer Affairs Regarding Implementation of the December 1996 WIPO Copyright and Phonogram Treaties*, FEDERAL NEWS SERVICE (June 5, 1998) (hereinafter Oakley Testimony).

7. According to the American Library Association, "Nearly 45% of all households visited a public library within the last month. Among households with children under 18 years of age, 61% had visited a library within the last month." ALA Office for Information Technology and Policy, *The 1997 National Survey of U.S. Public Libraries and the Internet: Summary Results November 18, 1997* (visited Dec. 3, 1997) <<http://www.ala.org/oitp/research/plcon97pr.html>>.

8. *See Internet Race Gap Expands Harrisburg Centers Fight the Trend by Adding Computers*, Harrisburg Patriot, July 9, 1999, (available at 1999 WL 5145454 (discussing one city's attempt to narrow the gap).

9. ALA, American Library Association Office for Information Technology Policy, *Access To Electronic Information, Services, and Networks: an Interpretation of the LIBRARY BILL OF RIGHTS*. (visited April 13, 2000) <<http://www.ala.org/alaorg/oif/librarybillofrights.pdf>> (Hereinafter Library Bill of Rights) The Library Bill of Rights is the American Library Association's formal statement on its ethical obligations to make all forms of information accessible to the American public. *See id.*

available educational technology.¹⁰ There remains, however, the legal impediment of handling the intellectual property rights that attach to digital transmissions for education and research. The fair use doctrine of the Copyright Act shields public schools from liability for copying portions of *printed* material for research or teaching.¹¹ Similarly, the first sale doctrine of the Copyright Act enables schools or libraries to obtain hard text and control its future lending.¹² Unfortunately, the Copyright Act is silent concerning protection of public schools and libraries from liability for supplying access to *electronic* transmissions.

This article analyzes how copyright law can be harmonized with the ethics of providing equal access to high technology information in public libraries and schools. Part I establishes that libraries and public schools are presently unable to provide uniform access to high technology information. I argue that lack of funding for copyright licenses and fear of vicarious liability for copyright infringement are key factors that impede increased access to the Internet.

Part II analyzes the existing inadequacies in copyright law

10. The Telecommunications Act of 1996, Pub. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151-173 (1996)) (hereinafter 1996 Act) includes provisions for establishing funding to ensure universal Internet access to health providers, public schools, and libraries. Section 254 of the 1996 Act directs the Federal Communications Commission (FCC) to implement a program to meet Universal Service Goals that includes setting up a program funded by certain ISPs and telecommunications carriers to subsidize telecommunications service to rural health providers, libraries, public schools and certain low income consumers. 47 U.S.C.A. § 254 (West Supp 1997). Interestingly, "universal service" does not include copyright and other licensing fees, but merely refers to "a reimbursement to telephone companies for the difference between the cost of providing service and the amount charged to any one consumer." Arturo Gándara, Essay, *Equity in an Era of Markets: The Case of Universal Service*, 33 WAKE FOREST L. REV. 107, 108 n.4 (1998). Gándara further notes that "[t]o maintain service, for example 'universal service,' to such customers, all Customers are 'taxed.' Thus, the 'taxes' collected are redistributed to those companies that maintain those customers on the network at below cost rates, in order to make those companies whole." *Id.*

On May 8, 1997 the FCC adopted the recommendations of its Federal-State Joint Board and issued its first implementing Order which clarified that only "telecommunications carriers" must contribute to the Universal Fund, although some non-telecommunications carriers may also provide some services (for example, Internet access and inside wiring services). Federal-State Joint Bd. on Universal Serv., Report and Order, 7 Comm. Reg. (P & F) 109 (1997) (hereinafter Universal Serv. Report and Order).

11. See discussion *infra* II.B.

12. See discussion *infra* II.C.

with respect to digital transmissions. The Copyright Act of 1976 (the Act) protects literary, musical, graphic or artistic works which are "fixed in a tangible medium of expression."¹³ Section 106 of the Act outlines a series of exclusive rights granted the copyright holder.¹⁴ These rights include: (1) reproducing the copyright work in copies or phonorecords; (2) preparing derivative works; (3) distributing copies by sale, rental, lease or lending; (4) performing the work publicly;¹⁵ and (5) displaying the work publicly.¹⁶ The Act also contains a series of limitations that balance the public's right to the free dissemination of information against the copyright owner's ability to freely exploit her property. First sale¹⁷ and fair use¹⁸ are two significant limitations that enable public schools and libraries to distribute and copy many forms of copyrighted information.

Libraries obtain their "public lending right" from the first sale doctrine.¹⁹ Section 109 of the Act states that "[n]otwithstanding the provisions of section 106(3) [the distribution right], the owner of a particular copy or phonorecord . . . is entitled, *without the authority of the copyright owner*, to sell, or otherwise dispose of the possession of that copy . . ."²⁰ Thus, once a public library or school lawfully obtains copyrighted material, it may freely distribute or lend this material to the public, without paying royalties to the copyright owners. By design, first sale affects the "distribution right" only.²¹ The remaining exclusive rights such as the "right to reproduce" remain with the copyright holder after the work's transfer and/or sale. As a result, libraries cannot reproduce copyrighted works from their collection

13. See 17 U.S.C. § 102 (1996). Section 102 goes on to clarify that the "tangible medium of expression" includes that "now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device." *Id.*

14. 17 U.S.C. § 106.

15. This provision applies to literary, musical, dramatic and choreographic works. *See id.*

16. *See id.*

17. See 17 U.S.C. § 109 (1996); *see also infra* II.C. Public libraries also derive certain reproduction rights for preservation and research from section 108 of the Act. 17 U.S.C. § 108 (1996).

18. See 17 U.S.C. § 107 (1996); *see also infra* II.B.

19. 17 U.S.C. § 109. See also Jennifer M. Schneck, Note, *Closing the Book on the Public Lending Right*, 63 N.Y.U. L. REV. 878 (1988).

20. 17 U.S.C. § 109(a) (emphasis added).

21. See 17 U.S.C. § 109.

without seeking the benefit of fair use or other statutory limitations.²²

Fair use is a codification of common law, and allows for copying certain portions of copyrighted material for “criticism, comment, news reporting, teaching, scholarship, or research,” without infringing the copyright.²³ Individuals often rely on public libraries and/or schools for educational, research, or scholarship information. Thus, the fair use doctrine remains a powerful tool for providing access to such information.

It is undisputed that the Copyright Act’s exclusive rights and limitations protect copyrightable information contained in hard text.²⁴ Unfortunately, the Act is silent on how its exclusive rights or limitations attach to copyrightable digital transmissions. Because digital transmissions from one computer network to another are arguably “fixed” under section 102,²⁵ the exclusive rights presently enumerated in the Copyright Act probably protect Internet digital transmissions. Similarly, first sale²⁶ and fair use²⁷ must liberally apply to Internet material accessed for education, research, and scholarship. Unfortunately, only a few lobby on behalf of non-profit libraries and schools, as opposed to the large number of big, powerful firms representing the interests of copyright owners.²⁸ Thus, it is no surprise that the “White Paper” issued

22. See 17 U.S.C. 109. Public and school libraries, however, may also rely on section 108’s limited reproduction rights for preservation and other purposes. See U.S.C. 108.

23. See 17 U.S.C. § 107 (1996). In determining whether a use is “fair,” the following factors are considered: (1) the purpose and character of the use; (2) nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the work as a whole; and (4) the effect of use upon the work’s potential market. See *id.*

24. See 17 U.S.C. § 101 (1996) (defining “literary works” including, for example, books, periodicals, and manuscripts).

25. See, e.g., *Advanced Computer Services of Michigan Inc. v. MAI Systems Corp.*, 845 F. Supp. 356, 363 (E.D. Va. 1994) (holding that programs stored only in RAM (random access memory) are “fixed” for purposes of the Act).

26. See 17 U.S.C. § 109.

27. See 17 U.S.C. § 107.

28. See, e.g., the parties appearing at the *Public Hearing on Intellectual Property Issues Involved in the National Information Infrastructure Initiative* (visited Jan. 30, 2000) <http://www.ilt.columbia.edu/text_version/projects/copyright/papers/hearing.html>, including Vice Presidents of such companies as Time Warner, the Motion Picture Association of America, and the Recording Industry Association of America. See also The Digital Future Coalition (visited Jan. 31, 2000) <<http://www.dfc.org/>>.

by President Clinton's Working Group on Intellectual Property states that the ethereal nature of digital transmissions and the ease of undetectable copying²⁹ necessitate amending existing copyright law to ensure adequate protection for *copyright owners*.³⁰ The Digital Millennium Copyright Act of 1998 (DMCA) addresses essential issues raised by the White Paper. Although the DMCA deals extensively with limitations on Internet service provider³¹ liability and the circumvention of technical measures to prevent access to copyrighted works, it fails to resolve the first sale discrepancy and gives lip service to the fair use defense. For example, section 1201 merely notes that "[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title."³²

Part III evaluates sections of the White Paper relating to public schools and libraries. The White Paper proposes amending the Copyright Act to clarify that digital transmissions are both "reproductions" and "distributions."³³ This recommendation abolishes application of first sale to Internet transmissions because that doctrine only limits the copyright owner's distribution right.³⁴ If Internet transmissions

29. White Paper, *supra* note 2, at 12 ("Any two dimensional work can readily be 'digitized'—*i.e.* translated into a digital code (usually a series of zeros and ones). The work can then be stored and used in that digital form. This dramatically increases: the ease and speed with which a work can be reproduced; . . .the ability to manipulate and change the work; and the speed with which copies (authorized and unauthorized) can be 'delivered' to the public.").

30. *Id.* at 211-12.

31. The DMCA refers to ISPs as "Online Service Providers," this article uses the term ISP in order to maintain consistency.

32. Pub. L. No. 105-304, § 1201(c)(3) (1998). Section 1201 also indirectly addresses fair use by delaying the prohibition of Technical Protection Measures ("TPM"; a password or form of encryption used by a copyright holder to restrict access to its materials) for 2 years to allow the Librarian of Congress to evaluate several issues including the prohibition's effect on criticism, comment, news reporting, teaching scholarship and research. *Id.* § 1201(a). Finally, section 512 of the DMCA limits ISP liability and notes that the failure of an ISP to qualify for the DMCA limitations does not bear adversely on the ISP's ability to qualify for other defenses (such as fair use) under the 1976 Copyright Act. *Id.* § 512.

33. Under the Copyright Act, supplying or lending the purchased copy of printed material would trigger the distribution right only, not the right of reproduction. *See generally supra* notes 14-16 and accompanying text.

34. *See* 17 U.S.C. § 108(a). Thus, under the proposed scenario when a library purchases digital transmission rights, allowing others to access this information would still violate the copyright owner's exclusive right of

are both reproductions and distributions, libraries cannot digitally distribute (or provide additional access to) lawfully obtained information, because each "distribution" also infringes the copyright owner's reproduction right.³⁵

Part III also argues that the White Paper presents an unduly narrow interpretation of fair use, which dilutes its effectiveness in research and teaching.³⁶ To avoid potential liability, libraries and public schools must obtain blanket licenses for digital works transmitted on the Internet.³⁷ Digital copyright fees are only one of the five major factors limiting public libraries from providing access to the Internet.³⁸

Part IV argues that society must harmonize its moral and legal obligations to ensure that public schools and libraries remain custodians of *all* information, both digital and printed. Because copyrighted digital transmissions are "property," effective boundary lines must be drawn which balance the public's interest in the free dissemination of information without diluting the economic value of the copyright. To preserve this balance, Congress should stand firm on preserving the first sale and fair use limitations for both digital and printed information. If Congress accepts the White Paper's categorization of Internet transmissions as "reproductions" and "distributions," it should amend the first sale limitation to allow non-infringing transfers of Internet transmissions. One solution is to allow the distribution and copying of digital information as long as the digital transmitter deletes his or her copy. For public schools and libraries, a better solution is enabling them to retain a "single" copy, in order to provide

reproduction.

35. See, e.g., White Paper, *supra* note 2.

36. Although the White Paper does not advocate abolishing fair use for digital transmissions, its legal interpretation of this doctrine is so narrow that it diminishes the doctrine's future effectiveness in digital transmission cases. See, e.g., White Paper, *supra* note 2, at 83-84 ("Fair Use Guidelines for Libraries and Educational Institutions"), 73-82 (discussing case law that conservatively analyzes the four factor test and leading cases in this area); see also Pamela Samuelson, *Legally Speaking, The NII Intellectual Property Report*, COMMUNICATIONS OF THE ACM, Dec. 1994, at 21, 24 ("It would be inaccurate to say the [NII Report] recommends abolishing fair use law. And yet, it takes such a narrow view of existing fair use law and predicts such a dim future for fair use law when works are distributed via the NII that the report might as well recommend its abolition.").

37. See John Carlo Bertot et al., *The 1997 National Survey of U.S. Public Libraries and the Internet* (November 1997).

38. See *id.*

continued access. Notice of potentially infringing uses would be required, similar to notices presently provided by public libraries at copying machines.

Regarding fair use, Congress and courts must reinforce fair use as an equitable doctrine that broadly applies to both digital and printed copyrightable information. They should explicitly reject the White Paper's position that narrows fair use in the digital transmission context. The article concludes that harmonizing copyright law with Internet ethics paves the way for all children to access the Internet, allowing them to become viable contributors to our high-technology environment.

I. LIBRARIES AND PUBLIC SCHOOLS CANNOT PROVIDE UNIFORM ACCESS TO HIGH TECHNOLOGY INFORMATION

John Dixon, a freckle-faced fifth grader at Anderson Elementary, calls himself a computer buff. But he must make do with the school's six-year-old IBM 386 PC's, that are little more than electric typewriters compared with the multi-media machines he wishes the school could afford A computer buff with distinctly better opportunities is Michael Giardina, a sixth-grader at Harker, who uses the latest Apple Power Macintosh at school to manage his own World Wide Web page. He also surfs the Web for information on research topics like deforestation, [and] sends his teachers E-mail with questions about homework³⁹

As of 1995, over 50% of the U.S. work force occupied information-based jobs.⁴⁰ In fact, telecommunications and information are the fastest growing sectors in the U.S. economy.⁴¹ Unfortunately, public schools and libraries are inadequately equipped to provide uniform access to the Internet,⁴² an essential component to success in our global economy.

A. PUBLIC SCHOOLS

President Clinton and the American Library Association share the goal of connecting every public and school library to

39. Gary Andrew Poole, *A New Gulf in American Education, the Digital Divide*, N.Y. Times, Jan. 29, 1996, at D3.

40. White Paper, *supra* note 2, at 10.

41. *See id.*

42. *See supra* note 2.

the Internet by the year 2000.⁴³ Executive Order 12,999 encourages the private sector to work with the federal government to make modern technology a part of every classroom.⁴⁴ For public schools, this is an uphill battle. In 1996, only 3% of the nation's classrooms had Internet connections.⁴⁵ Malcolm Cohen, author of "Labor Shortages," notes that computer illiteracy will leave many children ill prepared for the work force.⁴⁶

As the introductory quote illustrates, children in more affluent school districts have access to high technology both at home and in school.⁴⁷ Children in low-income areas often lack any access to such resources.⁴⁸ Leading educators stress the significance of wide-area networking in schools serving the disadvantaged and inner city populations:

In inner city schools, wide-area networking can particularly help redress the burden of inequitable access to economic and cultural resources that children there suffer New technologies are not merely a good to distribute but a force to employ. In concept, networked multimedia can make the richest, most powerful resources of our culture available to anyone, anywhere, at any time, and in principle this change should have greatest relative value to those who presently have least access to the fullness of our culture. *All children will benefit, but the least advantaged children can benefit the most.*⁴⁹

43. See, e.g., Library Bill of Rights, *supra* note 9 (ALA notes ethical obligation to provide equal access of Internet technology); Technology Act of 1994, 20 U.S.C. §§ 6801-7005 (1994). Following a White House initiative, Congress passed the Act "to support a comprehensive system for the acquisition and use . . . of technology and technology-enhanced curricula . . . and administrative support resources and services to improve the delivery of educational services." 20 U.S.C. § 6812. The purpose of this policy is "to promote the use of technology in education, training, and lifelong learning, including plans for the educational uses of a national information infrastructure." *Id.* § 6831(c)(2)(A).

44. Exec. Order No. 12, 999, 61 Fed. Reg. 17, 277 (1996), *reprinted in* 40 U.S.C. § 484 (Supp. 1996). See also Boddie et al., *supra* note 2, at 209 (noting that Executive Order 12,999 also recommends "providing teachers with the professional development they need to use new technologies effectively; connecting classrooms to the [Internet]; and encouraging the creation of excellent educational software").

45. See Poole, *supra* note 39, at D3.

46. *Id.*

47. See *supra* text accompanying note 39.

48. The Wall Street Journal reported that only 41% of households in the U.S. own a personal computer. Only 1 in 7 of all households in the U.S. have Internet access. See generally Bertot et al., *supra* note 37.

49. Columbia University, Institute for Learning Technologies, *Advanced Media in Education Project*, (visited Nov. 11, 1997) <<http://www.ilt.columbia.edu/ilt/docs/ILTame.html>> (emphasis added).

B. PUBLIC LIBRARIES

Our libraries fare far better than public schools with public Internet access. In 1997, 60% of public libraries offered public Internet access, up from 28% in 1996.⁵⁰ Nonetheless, this access is unevenly distributed. *One in three* public library systems in central city libraries supplied public Internet access, while less than *one in ten* public library systems in rural areas offered this access.⁵¹ The American Library Association (ALA) notes that "while nearly three-fifths of the nation's public library systems offer some type of Internet access, fewer than one in seven have World Wide Web access in their community branch libraries."⁵²

Many individuals lack access to electronic information because of their socio-economic condition.⁵³ Their condition limits them from the necessary infrastructure and technology to take advantage of the Internet as a mode of expression.⁵⁴ The ALA accepts the moral obligation of facilitating the exercise of the right of "Freedom of Expression . . . and the corollary right to receive information . . . regardless of format or technology."⁵⁵ The ALA stresses that these rights extend to

50. See Bertot et al., *supra* note 37. The 1997 survey provided information on U.S. public library infrastructure and costs associated with Internet related services and technology. *See id.* The study surveyed 2,000 of the nation's 8,921 public library systems and was weighted to represent public libraries from diverse population service areas and central, city, suburban and rural locations. *See id.* See also, John Carlo Bertot, *The 1996 National Survey of Public Libraries and the Internet: Progress and Issues*, (visited March 24, 2000) <http://listweb.syr.edu/~mclure/nspl96/NSPL96_T.html> (noting that disparities remain concerning public Internet access: "In comparing the percent of public libraries that provide public access to the Internet from 1994-1996, and projected to 1997, the growth rate is much smaller than the rate that the libraries are obtaining Internet access for the library only. . . . Thus, despite significant gains in overall connectivity, only 50% of the public libraries are projected to be able to provide public access to the Internet by March 1997. The vast majority of the public libraries not providing public access to the Internet serve populations of 99,000 or less").

51. See generally Bertot, *supra* note 37.

52. See ALA Information Policy; 1997 National Survey of U.S. Public Libraries and the Internet (visited April 17, 2000) <<http://www.ala.org/oitp/survey97.html>>.

53. See Library Bill of Rights, *supra* note 9.

54. *See id.*

55. *Id.* (stating that "[l]ibraries and librarians exist to facilitate the exercise of these rights by selecting, producing, providing access to, identifying, retrieving, organizing, providing instruction in the use of, and preserving recorded expression regardless of the format or technology").

minors as well as adults, noting the importance of connecting economically disadvantaged children to the Internet: "At-risk children ages nine to fourteen participate in an Internet skills project through the Hollins-Payson branch of the Enoch Pratt Free Library in Baltimore, MD. The 'Whole New World' program allows children to use electronic information and e-mail to which they might not otherwise have access."⁵⁶ In fact, the Library Bill of Rights states that "[i]t should be the goal of all libraries to develop policies concerning access to electronic resources in light of economic barriers to information access."⁵⁷

As expected, the largest impediment to providing uniform access to the Internet is cost. Approximately \$500 million is spent on information technology, of which \$280 million is allotted to Internet access alone.⁵⁸ Public libraries frequently go outside their operating budgets to obtain funding for Internet access.⁵⁹ This leaves little hope for rural and low-income community branches that have difficulty obtaining corporate and other sponsors.⁶⁰

There is a ray of hope, however. The federal government is committed to alleviating telecommunications costs for public schools and libraries to help ensure universal Internet access. Section 254 of the 1996 Telecommunications Act directs the Federal Communications Commission (FCC) to set up a program funded by ISPs and telecommunications carriers to subsidize telecommunications service to health care providers, libraries, public schools, and low income and rural consumers.⁶¹

56. See Bertot et al., *supra* note 37 (quoting JoAnn G. Mondowney, *Licensed to Learn*, SCH. LIBR. J. January 1996, at 32-34).

57. See Library Bill of Rights, *supra* note 9.

58. See *supra* note 37.

59. Bertot et al., *supra* note 37 (noting that in 1997, \$70 million or nearly 25% of the \$280 million for Internet access for public libraries was provided from sources other than the library's operating budget. For example, Libraries Online!, a Microsoft/ALA joint initiative, has given forty-one library systems \$10.5 million in financial and technical assistance and software. Bill and Melinda Gates also founded the Gates Library Foundation with a \$200 million contribution that was matched by Microsoft).

60. See *id.* (noting lack of available federal and state funds as the second largest hurdle for U.S. Public Libraries and the Internet). The largest cost hurdle is telecommunications costs, including phone line long distance charges and leased line costs for data communications. See *id.*

61. See 47 U.S.C. § 254(b) (West Supp. 1997). There remains great concern and debate over how the FCC should implement the section 254 Order. A Federal-State Joint Board was convened to offer recommendations regarding Universal Service. On May 8, 1997 the FCC adopted many of the Joint Board's recommendations and issued its first of several Orders and

Unfortunately, the FCC mandate narrowly focuses on providing Universal Service in the telecommunications context only. Available funding is limited to subsidies for telecommunications costs and excludes funding for copyright and other intellectual property licensing fees.⁶²

In 1997, the ALA listed digital copyright fees as one of the five top factors affecting public library involvement in providing Internet access.⁶³ Today, the Copyright Act provides little guidance for public libraries and schools concerning how to minimize potential liability or licensing fees under the first sale and/or fair use doctrines.

II. COPYRIGHT LAW INADEQUATELY ADDRESSES DIGITAL TRANSMISSIONS

[L]aws and institutions must go hand and hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered . . . institutions must advance also to keep pace with the times.⁶⁴

decisions. The First Order clarified that only telecommunications carriers must contribute to the Universal Fund, although some non-telecommunications carriers may also provide some services (for example Internet access and inside wiring services). Today, it remains unresolved whether ISPs fall within the definition of "telecommunications carriers" under the Order.

On December 16, 1997 the FCC issued the "Third Universal Service Order on Reconsideration," which included a budget breakdown for the first 6 months of 1998. "That Joint Board recommended, and this Commission adopted, detailed rules to provide universal service support for low-income consumers, for consumers in high-cost areas, and for schools, libraries, and public and non-profit rural health care facilities." Commission Revises Universal Service Collection Amounts For The First Six Months Of 1998 To Better Correspond With Anticipated Demand, CC Docket No. 96-45 (December 16, 1997), *available in* 1997 WL 771033.

FCC Commissioner Harold Furchtgott-Roth dissented from the Third Order; his concerns included questioning the large size of the funds for schools and libraries. *See id.*

62. *See* 47 U.S.C.A. § 254 (West Supp 1997); *see also supra* note 10 and accompanying text.

63. Bertot et al., *supra* note 37. These fees include licensing fees for online databases and copyrighted material. The enumerated five factors in rank order are: (1) Telecommunications fees; (2) availability of federal and state funds; (3) hardware costs; (4) digital copyright fees and (5) availability of in-house computer expertise. *Id.*

64. White Paper, *supra* note 2, at 13 (quoting Inscription at the Jefferson Memorial, Washington, D.C.).

A. COPYRIGHT OVERVIEW

Article I, Section 8, Clause 8 of the Constitution gives Congress the power “[t]o Promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries.”⁶⁵ Clause 8 is the enabling provision for the Copyright Act of 1976 (the Act) that protects certain types of “original works of authorship fixed in any tangible medium of expression.”⁶⁶

Copyright pertains to the literary, musical, graphic or artistic form in which the author expresses intellectual concepts.⁶⁷ Ideas, procedures, processes, systems, methods of operation, concepts, principles or discoveries are not copyrightable.⁶⁸ The typical copyright term is the life of the author plus 70 years.⁶⁹ There is no statutory requirement for an examination before a copyright can be secured; instead, copyright is secured once the work is created and “fixed in any tangible medium of expression.”⁷⁰ Thus, the Act protects original⁷¹ digital transmissions that are “fixed” in a “tangible

65. U.S.CONST. art. I, § 8, cl. 8.

66. 17 U.S.C. § 102(a). In drafting the 1976 Act, Congress made clear its intent to leave “originality” undefined for purposes of the Act. See H.R. REP. NO. 94-1476, at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664. Instead, “original works of authorship” was intended to incorporate without change the standard of originality established by the courts under 1909 Act. See *id.* (“This standard does not include requirements of novelty, ingenuity, or aesthetic merit, and there is no intention to enlarge the standard of copyright protection to require them.”).

67. See 17 U.S.C. § 102(a) (listing the following categories of “works of authorship:” (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic or sculptural works; (6) motion pictures and other audio-visual works; (7) sound recordings; and (8) architectural works).

68. See 17 U.S.C. § 102 (b).

69. See 17 U.S.C. § 302(a).

70. 17 U.S.C. § 102. Federal registration does, however, create a public record of the copyrighted work and gives the copyright owner certain statutory advantages in an infringement action. For example, registration within five years of initial publication establishes prima facie evidence of the validity of the copyright, as well as the facts stated on the copyright certificate. See 17 U.S.C. § 410(c).

71. Originality requires independent creation and includes some degree of “creativity,” which is less than the “novelty” requirement for patent law. See, e.g., *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976); *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991); see also

medium of expression.”

Originality is evaluated under a universal standard for digital and printed works. A work is original if it is a product of independent creation; novelty is not required, but there must be some modicum of creativity.⁷² However, what constitutes “fixation” for digital transmissions is less clear. The Act covers fixation methods “now known or later developed, from which they can be perceived, reproduced, or otherwise communicated either directly or with the aid of a machine or device.”⁷³ Although the Act fails to address digital transmissions, its legislative history indicates that digitization qualifies as “fixation.”⁷⁴ Thus, digital works fixed in material objects such as floppy disks, compact discs (CD’s), CD-ROM’s, and other digital storage devices qualify as “stable forms in which works may be fixed and from which works may be perceived, reproduced or communicated by means of a machine or device.”⁷⁵

Digital transmissions however, are “not fixed by virtue of the transmission alone.”⁷⁶ Live transmissions fail to meet the fixation requirement unless the transmission is simultaneously fixed to a “sufficiently permanent or stable [medium] to permit

H.R. REP. NO. 94-1476 at 5664 (“The phrase ‘original works of authorship,’ which is purposefully left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute. This standard does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them.”).

72. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345-46 (1991) (stating that “[o]riginality is a constitutional requirement” and that “[o]riginal, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”).

73. 17 U.S.C. § 102(a) (1996).

74. *See* H.R. REP. NO. 94-1476 at 52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665-66 (defining fixations to include “words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or other stable form”). As noted by the White Paper, digitization “fits within the House Report’s list of permissible manners of fixation” because a digitized work is “generally recorded (fixed) as a sequence of binary digits (zeros and ones) using media specific encoding.” White Paper, *supra* note 2, at 26.

75. *See* White Paper, *supra* note 2, at 26 (citing *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852, 855 (2d Cir. 1982)) (“[P]utting work in ‘memory devices’ of a computer satisf[ies] the statutory requirement of a ‘copy’ in which the work is ‘fixed.’”).

76. *Id.* at 27.

it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁷⁷ Although electronic transmissions “‘transient’ in nature,” such as a quick screen projection, or “‘captured momentarily in the ‘memory’ of a computer” are not fixed,⁷⁸ courts have determined that electronic network transmissions from one computer to another, residing in random access memory (RAM), are sufficient fixations.⁷⁹

Upon fulfilling the section 102 requirements,⁸⁰ a copyright owner has the following exclusive rights: (1) to reproduce the copyright work in copies or phonorecords; (2) to prepare derivative works based on 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,

77. *Id.* at 28 (citing 17 U.S.C. § 101).

78. *Id.* (citing H.R. REP. NO. 2222, 60TH CONG., 2D SESS, at 53, *reprinted in* 1976 U.S.C.C.A.N 5666-67).

79. *See id.* (citing *Advanced Computer Services of Michigan Inc. v. MAI Systems Corp.*, 845 F. Supp. 356, 363 (E.D. Va. 1994) (concluding that a program stored only in RAM is sufficiently fixed, is confirmed, not refuted, by the argument that it disappears from RAM the instant the computer is turned off; if power remains on (and the work remains in RAM) for only seconds or fractions of a second, the resulting RAM representation of the program arguably would be too ephemeral to be considered “fixed”); *Triad Systems Corp v. Southeastern Express Co.*, 31 U.S.P.Q.2d 1239, 1243 (N.D. Cal. 1994) (stating that “[c]opyright law is not so much concerned with the temporal ‘duration’ of a copy as it is with what the copy does, and what it is capable of doing while it exists. ‘Transitory’ duration is a relative term that must be interpreted and applied in context.”)).

Commentators have challenged whether the courts and the White Paper have reached a correct statutory interpretation in holding that digital copies residing in RAM are “fixed.”

The [White Paper] endorses the conclusion of some relatively recent cases where digital copies “fixed” only in RAM infringe the reproduction right . . . notwithstanding language in the statute and the legislative history indicating Congress intended to limit the scope of the reproduction right to copies that were sufficiently permanent or stable to permit the work to be perceived or reproduced for more than a transitory duration. . . . Proponents of the view that RAM copies infringe copyrights argue 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.) . . . This is a questionable interpretation of current law.

Samuelson, *supra* note 36, at 23.

80. *See supra* note 13 and accompanying text.

lease, or lending; (4) to perform the copyrighted work publicly in the case of literary, musical, dramatic and choreographic works; and (5) to display the copyrighted work publicly.⁸¹

A copyright owner can only enforce her rights against one who has "copied" her work; it is not an infringing act to independently create a previously copyrighted work.⁸² For Internet digital transmissions, an ISP must obtain permission to transmit copyrighted information or face liability for infringement. The infringement may be direct, contributory, or vicarious.⁸³ For example, uploading protected information without the copyright owner's consent constitutes direct infringement.⁸⁴ Inducing others to download or consciously permitting downloading of protected material may be contributory or vicarious infringement.⁸⁵

A critical issue for Internet transmissions is whether they constitute "reproductions,"⁸⁶ "distributions,"⁸⁷ or both. The original electronic file is typically not erased when a copy is transmitted.⁸⁸ Because the original from which the copy is generated remains intact, Internet communications arguably infringe both reproduction and distribution rights.⁸⁹ Indeed, for bulletin board or website operators the query remains whether downloading from a bulletin board or website is a "reproduction" by the Internet user, or merely a "distribution" by the operator.⁹⁰

81. See 17 U.S.C. § 106 (1)-(5) (1996).

82. See 17 U.S.C. § 501.

83. See *id.*

84. See 17 U.S.C. § 501; see also Boddie et al., *supra* note 2, at 234, n.202 (citing *Sega Enterprises Ltd. v. MAPHIA*, 948 F. Supp. 923, 923-33 (N.D. Cal. 1996)).

85. Typically with vicarious infringement, the service provider or system operator exercises control over the activities (such as a bulletin board) and stands to directly profit from the infringing activity. See Boddie et al., *supra* note 2, at 234, n.203 (citing *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) (holding bulletin board operator directly liable for infringement for subscribers uploading digital copies of Playboy magazine)). Commentators correctly assert that the subscribers were the true "direct" infringers, while the bulletin board service (BBS) vicariously infringed the copyright owner's exclusive right to publicly display and distribute its photographs because the BBS did directly profit from this activity.

86. See *supra* notes 14-16 and accompanying text.

87. See *supra* notes 14-16 and accompanying text.

88. See White Paper, *supra* note 2, at 65-66.

89. *Id.* at 66-67; see also *supra* notes 14-16 and accompanying text.

90. See Boddie et al., *supra* note 2, at 226.

B. THE FAIR USE LIMITATION AND LIBRARY EXEMPTION

At first blush, copyright protection appears to upset the constitutionally mandated balance between individualism and public dissemination of information. It grants long-term exclusive rights in creative expression, without a substantive examination process⁹¹ to evaluate whether the creator has “earned” these rights under the statute. Nevertheless, the trade-off for the longer term⁹² is a narrowly defined set of exclusive rights, followed by a series of limitations such as fair use⁹³ and first sale.⁹⁴ These limits set property boundaries that take into account the public’s interest in the free dissemination of information.⁹⁵ Also, because others can still use the ideas or factual information contained in the copyrighted work, there is no stifling of further creative effort during the copyright term.⁹⁶

Fair use is a long-standing judicial doctrine codified in the 1976 Act: “[R]eproduction in copies or phonorecords . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”⁹⁷ The four factors evaluated to determine fair use include (1) the purpose and character of the use including whether the use is

91. Unlike copyrights, to obtain patent or trademark protection an applicant goes through a substantive application and examination process in the Patent and Trademark Office (PTO). Compare 17 U.S.C. § 408-410 with 15 U.S.C. §§ 111, 131. The PTO evaluates whether the relevant statutory patent or trademark requirements have been met. See 37 CFR 53132 (outlining the rules for Patent and Examination procedure).

92. Contrast this time period with that provided under patent rights, which provides only 20 years of an exclusive “right to exclude others from making, using[,] . . . or selling the [claimed] invention.” See 35 U.S.C. § 154(a)(1) (1996). Consequently, the object of the patent is placed in the public domain much earlier than the copyrighted work.

93. See 17 U.S.C. § 107 (1996); see also *supra* note II.B.

94. See 17 U.S.C. § 109 (1996); see also *supra* note II.C.

95. See *e.g.*, Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985); see also Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 349-50 (1991) (opining that the idea/expression dichotomy “assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.” The *Feist* court further states that although it “may seem unfair that much of the fruit of the [author’s] labor may be used by others without compensation, [it is] a constitutional requirement, [and] the means by which copyright advances the progress of science and art.”).

96. See *id.*

97. See 17 U.S.C. § 107.

commercial; (2) the nature of the work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the use's market effect.⁹⁸ The legislative history notes that fair use is evaluated on a case-by-case basis with no single factor being dispositive of fair use.⁹⁹

For non-profit schools, the Act's legislative history includes educational "Guidelines"¹⁰⁰ for determining when copying and distributing printed material qualifies as fair use.¹⁰¹ According to the Guidelines, spontaneous copying for education purposes is fair use, while "copying [cannot] be used to create or to replace or substitute for anthologies, compilations[,] or collective works."¹⁰²

For public libraries, section 108 of the Act outlines instances where they can make and distribute non-infringing single copies of copyrighted works.¹⁰³ It absolves libraries from liability as long as notice is provided and the copying is (1) to preserve and secure unpublished works;¹⁰⁴ (2) to replace a copy that is damaged, deteriorating, lost, or stolen;¹⁰⁵ (3) to reproduce a portion for patrons for private study, scholarship, or research;¹⁰⁶ and (4) to reproduce an entire work for patrons for private study, scholarship, or research.¹⁰⁷ The library must

98. *See id.*

99. *See* H.R. REP. NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679.

100. *See* H.R. REP. NO. 94-1476, at 68 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5681 (hereinafter GUIDELINES). The Guidelines were actually drafted by various interested parties such as publishers and educators, and incorporated by the House because they were deemed to contain "a reasonable interpretation of the minimum standards of fair use." *Id.*

101. *See generally* Princeton University Press v. Michigan Document Services, Inc., 855 F. Supp. 905 (E.D. Mich. 1994) (discussing for profit versus not for profit copying); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991) (holding that for profit copying of educational materials are not excused under fair use).

102. GUIDELINES, *supra* note 100, at §§ I, III(A). Because the Educational Guidelines are not codified, courts disagree on the weight of their applicability in the fair use analysis. *See, e.g.*, cases cited *supra* note 101.

103. 17 U.S.C. § 108. Section 117(h) excludes musical, pictorial, graphic or sculptural works, motion pictures and other AV works from the library's limited right of reproduction.

104. 17 U.S.C. § 108(b) 1996.

105. 17 U.S.C. § 108(c) ("The right . . . applies . . . [if] an unused replacement cannot be obtained at a fair price.").

106. 17 U.S.C. § 108(d).

107. 17 U.S.C. § 108(e).

be open to the public, can make only a single copy, and cannot reap direct or indirect commercial advantage.¹⁰⁸ Section 108(f) bridges the gap between fair use and reproduction by libraries: “[N]othing in this section in any way affects the right of fair use as provided by section 107.”¹⁰⁹

C. THE “FIRST SALE” LIMITATION

Libraries traditionally operated under the first sale doctrine.¹¹⁰ Section 106(3) outlines the copyright owner’s exclusive right of distribution, while section 109(a) limits the distribution right once the copyrighted work is sold.¹¹¹ The first sale limitation applies exclusively to the distribution right.¹¹² Thus, one is not free to copy or create derivative works from the copyrighted work and libraries must look to other limitations such as fair use for guidance in this area.¹¹³ First sale becomes problematic for Internet Communications if one views digital transmissions as triggering both the distribution and reproduction right.¹¹⁴ Because first sale limits the distribution right only, public libraries may still face liability for reproduction of digital transmissions when providing access to the Internet.

The fair use and first sale limitations allow libraries and public schools to provide uniform access to printed material for

108. 17 U.S.C. § 108.

109. 17 U.S.C. §108 (f). This section also notes that contractual obligations supercede the section 108 right to copy or distribute a single copy. *See id.* Thus, section 108 does not absolve libraries from liability for making copies in violation of a shrink-wrap license that may accompany software or other digital works. *See id.* This contractual limitation is not, however, present under section 107’s fair use provisions.

110. *See* 17 U.S.C. §§ 106(3) (1996), 109(a) (1996); *see also supra* II.C. (discussing first sale).

111. *See* 17 U.S.C. § 109(a) (“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 the [copyrighted work].”).

112. *See, e.g.,* *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1344 (9th Cir. 1988). Libraries look to section 108 for reproduction limitations, and section 117(h) which excludes musical, pictorial, graphic or sculptural works, motion pictures, and other audiovisual works from libraries’ limited right to reproduce.

113. *See* 17 U.S.C. §§ 108, 117(h)

114. *See* discussion *supra* notes 14-16 and accompanying text.

educational and research purposes.¹¹⁵ Unfortunately, the Act fails to clarify that these provisions apply to digital transmissions. Because original, "fixed" digital transmissions fall within the Copyright Act's subject matter,¹¹⁶ the fair use and first sale limitations should equally apply to both printed and digital transmissions.¹¹⁷ Nonetheless, the Clinton Administration's Working Group on Intellectual Property views matters differently.

III. THE "WHITE PAPER" RECOMMENDATIONS DISRUPT THE BALANCE BETWEEN THE PROPERTY RIGHTS OF COPYRIGHT OWNERS AND THE DISSEMINATION OF INFORMATION TO THE PUBLIC

The emergence of integrated information technology is dramatically changing, and will continue to change, how people and businesses deal in and with information . . . how works are created, reproduced, distributed, adapted, displayed, performed, owned licensed. . . . This leads, understandably, to a call for adaptation of—or change in—the law.¹¹⁸

Some participants have suggested that the United States is being divided into a nation of information "haves" and "have-nots" and that this could be ameliorated by ensuring that the fair use defense is broadly generous in the [Internet] context. The Working Group rejects the notion that copyright owners should be taxed—apart from all others—to facilitate the legitimate goal of "universal access."¹¹⁹

115. See generally 17 U.S.C. § 108 (library reproduction limitations) and 17 U.S.C. § 109 (First sale).

116. See discussion *supra* note 25 and accompanying text.

117. Today, electronic works owned or purchased by libraries, e.g., CD ROM games or other programs, could be used at library facilities and viewed as "home uses." As such, a single copy can be used by a library patron, so long as no more than one copy of program is used simultaneously. See 17 U.S.C. §§ 109(c), 117(1). If a library wants more than one active copy of an electronic work, the library can arrange for a software "site license," which allows use of more than one active copy at once, or the library can pay a royalty fee for multiple uses via the copyright Clearance Center. See Bertot *supra* note 37. Digital transmissions from the Internet raise unique issues because they are not "electronic works" like a CD ROM or electronic book purchased by the library, but various types of copyrightable and uncopyrightable information being disseminated over a global network.

118. White Paper, *supra* note 2, at 12.

119. *Id.* at 84.

In 1993, President Clinton formed the Working Group on Intellectual Property to evaluate whether rapidly evolving electronic technology mandated a change and/or clarification of intellectual property laws.¹²⁰ In September 1995, the Group published its White Paper, or final report containing analysis of, and recommendations for, changing intellectual property law as it relates to the Internet.¹²¹ The key provisions of the White Paper recommend amending the Act to: (1) clarify that digital transmissions fall within the exclusive distribution right of the copyright owner;¹²² (2) expand the definition of “transmit” in section 101 to include transmissions of reproductions;¹²³ and (3) clarify that digital transmission of copyrighted work into the United States violates the copyright owner’s exclusive importation rights.¹²⁴ In addition, the recommendations abolish the applicability of the first sale limitation to Internet transmissions because digital transmissions become both “reproductions” and “distributions.”¹²⁵

The introductory quotes epitomize the paradox of the White Paper. The White Paper acknowledges that changes in technology drive changes in intellectual property law; yet it gives minimal attention to the constitutionally mandated balance between rewarding copyright owners as an incentive to “create” and fostering dissemination of *all* forms of information to the public.¹²⁶ The White Paper broadly outlines how section 106 exclusive rights granted to a copyrighted owner apply equally to printed material and digital transmissions, while narrowly analyzing the applicability of the fair use and first sale limitations to Internet transmissions.¹²⁷

The White Paper states that “because of the nature of computer-to-computer communications,” most Internet transactions will implicate “the fundamental right to reproduce

120. See White Paper, *supra* note 2, at 1. The Group was chaired by Bruce Lehman, former Commissioner of Patents and Trademarks. See *id.* at 2.

121. See *supra* note 2.

122. See *id.* at 213.

123. See *id.* at 217.

124. See *id.* at 221.

125. As noted previously, first sale only protects future distribution, not copying. See 17 U.S.C. § 109.

126. See *supra* note 123.

127. White Paper, *supra* note 2, at 63-72; see also Samuelson, *supra* note 36 (arguing that White Paper’s recommendations effectively abolish the first sale rule for digital transmissions and presents a “highly constrictive view of the fair use doctrine”).

copyrighted works."¹²⁸ Similarly, considerable time is spent analyzing how uploading and downloading digital information also constitutes "distribution."¹²⁹ The White Paper strongly advocates amending the 1976 Act to clarify that Internet transmissions trigger both the rights of reproduction and distribution.¹³⁰ In sharp contrast, the White Paper evaluates how "fair use" applies to Internet activity, but conservatively applies current law. For example, it narrowly interprets the courts' balancing of the section 107 factors¹³¹ to determine whether a particular use is fair.¹³²

First, in evaluating the use's purpose and character,¹³³ the White Paper clings to the *Sony Corp. of America v. Universal City Studios, Inc.*¹³⁴ presumption that all commercial non-transformative uses are unfair, despite the broader interpretation that this presumption has been limited, if not

128. White Paper, *supra* note 2, at 64-66.

For example, when a computer user accesses a document resident on another computer, the image on the user's screen exists—under contemporary technology—only by virtue of the copy that is reproduced in the user's computer memory. It has long been clear under U.S. law that the placement of copyrighted material into a computer's memory is a reproduction of that material (because the work in memory then may be, in the law's terms, "perceived, reproduced, or . . . communicated. . . with the aid of a machine or device").

Id. at 64-65.

129. *See id.* at 67-69.

130. White Paper, *supra* note 2, at 67-69, 213-17. Specifically section 101 would be amended to include "transmission" in the definition of publication and to add the following: "To 'transmit' a reproduction is to distribute it by any device or process whereby a copy or phonorecord of the work is fixed beyond the place from which it was sent." *Id.* at Appendix 1. Similarly, section 106(3) would then read "to distribute copies of phonorecords of the copyrighted work to the public by sale or other lending, or by transmission." *Id.*

131. *See supra* notes 97-99 and accompanying text.

132. *See* White Paper, *supra* note 2, at 73-84.

133. *See* 17 U.S.C. § 107.

134. 464 U.S. 417 (1984). In *Sony*, the defendants sued Sony Corporation alleging contributory infringement for selling Betamax tapes that enabled home taping of various television programs. *See id.* at 417. As part of its finding that home taping constitutes "fair use" as a non-profit socially beneficial activity, the Court noted that "[i]f the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair." *Id.* at 449. This statement has been interpreted by some courts as creating the ultimate presumption that any commercial use is unfair. *See, e.g.,* Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985); Financial Information, Inc. v. Moody's Investors Service, Inc., 751 F.2d 501 (2d Cir. 1984); Haberman v. Hustler Magazine, Inc., 626 F. Supp. 201 (D. Mass. 1986).

overruled, by *Campbell v. Acuff-Rose Music Inc.*¹³⁵

In *Campbell*, the defendants argued that 2 Live Crew's rap parody "Pretty Woman" infringed Roy Orbison's song "Oh Pretty Woman" and was not a fair use.¹³⁶ In reversing the lower court's finding of unfair use, the Supreme Court criticizes confining the analysis of the first fair use factor to "commercial use" by inflating "a presumption which is ostensibly culled from *Sony*."¹³⁷ It then opines that "the language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor inquiry into its purpose and character."¹³⁸ Arguably, this statement alone overrules the presumption that the first factor turns on commercial versus non-profit use.

Nonetheless, the White Paper attempts to distinguish *Campbell* by arguing that the *Sony* presumption survives as it applies to "non-transformative" uses.¹³⁹ It notes the presumption's inapplicability in cases involving "transformative use,"¹⁴⁰ as opposed to "mere reproduction."¹⁴¹ Ironically, nothing in *Campbell* supports this distinction, particularly in light of the express statements limiting the presumption.¹⁴²

The White Paper goes on to limit fair use for libraries and public schools by stating that "mere reproductions have fared rather badly in court . . . even in [the] educational context."¹⁴³ It fails however, to distinguish that most educational copying

135. 510 U.S. 569 (1994).

136. *See id.* at 573-574.

137. *Id.* at 584.

138. *Id.*

139. White Paper, *supra* note 2, at 76.

140. *Id.* A transformative use occurs when the alleged infringer has taken the copyrighted work and "transformed" it into another medium. For example, in *Campbell*, 2 Live Crew had taken the popular song "Pretty Woman" and transformed it into a "rap parody." *Campbell*, 510 U.S. at 572.

141. White Paper, *supra* note 2, at 76-77.

142. *See, e.g., Campbell*, 510 U.S. at 451; *see also* Samuelson, *supra* note 36 (noting that the White Paper "neglects to mention that this second *Sony* presumption was repudiated by the Supreme Court this spring in *Campbell v. Acuff Rose*") and 17 U.S.C. § 107 (the goal of the limitation is to promote scholarship, research and social and political criticism).

143. White Paper, *supra* note 2, at 77. The drafters cite *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983), *Encyclopaedia Britannica Educational Corp. v. Crooks*, 558 F. Supp. 1247 (W.D.N.Y. 1983), and *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991), to support their proposition.

will pass the fair use analysis if made within the Guidelines and for non-profit purposes.¹⁴⁴

The White Paper adopts a similarly narrow interpretation of how courts might evaluate the nature of the copyrighted work; it posits, without legal or statutory support, that courts might consider whether digital transmissions should be treated differently from printed material by evaluating the nature of the copyrighted work.¹⁴⁵ In fact, the White Paper merely states that courts weigh copying of fiction and unpublished works in the copyright owner's favor, while weighing factual and published works in the defendant's favor.¹⁴⁶ Thus, no legal basis exists for predicting that future courts will weigh digital copying differently from printed copying when evaluating fair use.

Finally, the White Paper concludes its fair use analysis by stating that courts should approach fair use in the Internet context just as they do "traditional" environments.¹⁴⁷ The White Paper then argues that technological means of tracking transactions and licensing will reduce the application and scope of the fair use doctrine in all settings.¹⁴⁸ This statement

144. For a discussion of the Guidelines, see *supra* notes 100-102 and accompanying text. Of the cases cited by the drafters, *supra* note 143, only *Basic Books* involved a defendant who stood to profit from the alleged infringement, and there are a host of other educational settings within the Guidelines where "mere reproduction" qualifies as fair use.

145. White Paper, *supra* note 2, at 78. Arguably, the drafters' bias is reflected in their express reference to printed works as "conventional print or other analog form." *Id.* In the 1980's and 1990's, one can hardly view digital transmissions as "non-conventional." By 1995, Internet activity was certainly approaching a "conventional" means of communication considering the numerous chat-group, bulletin board, and other such activities taken advantage of by the public.

146. *Id.* Note that in the next few pages, the White Paper narrowly predicts that "[c]ommercial uses that involve no 'transformation' by users and harm actual or potential markets will likely always be infringing, while non-profit educational transformative uses will likely often be fair. Between these extremes, courts will have to engage in the same type of fact-intensive analysis that typifies fair use litigation and frustrates those who seek bright lines clearly separating the lawful from the unlawful." (emphasis added). *Id.* at 80.

147. *Id.* at 80. See also *Texaco* at 918.

148. *Id.* at 82. In support of its theory, the White Paper cites *American Geophysical Union v. Texaco*, 60 F.3d 913 (2d Cir. 1995), in which the court stressed the availability of licensing through the Copyright Clearance Center as weighing against multiple copying of magazines by commercial enterprises for research and commercial purposes. *American Geophysical* does not apply to public schools and libraries, however, because they are non-profit

completely ignores the mandate of section 107 to advocate certain unencumbered uses of copyrighted material for purposes of promoting scholarship and research. It reflects the White Paper's failure to effectively balance between the competing interests of protecting copyright property and of furthering education through the free dissemination of information.

The White Paper is not completely insensitive to the constitutionally mandated balance for copyright. It promotes expanding the section 108 library exemption¹⁴⁹ to expressly include digital works and advocates exemptions for the visually impaired.¹⁵⁰ Here, it notes that "nowhere is this balancing [between copyright owners and legitimate needs of users] more apparent than in the exemptions that are intended to permit libraries reasonable use of copyrighted works to serve the legitimate demands of their patrons."¹⁵¹

The White Paper's paradox and true inability to effectuate the requisite balance is revealed, however, when it repudiates a broad application of fair use for Internet transmissions and ignores the effect of abolishing first sale on libraries: "The Working Group rejects the notion that copyright owners should be taxed—apart from all others—to facilitate the legitimate goal of 'universal access' [to the Internet]."¹⁵² Providing universal Internet access embraces the heart of Congress' goal to promote the progress of science and the useful arts.¹⁵³ The White Paper's biggest deficiency is its failure to acknowledge the crucial role of balancing the copyright owner's rights against legitimate needs of users to access *all* forms of information, including digital.¹⁵⁴ This deficiency continues in

institutions devoted to educating the general public.

149. See *supra* notes 103-109 and accompanying text.

150. White Paper, *supra* note 2, at 225-26, A-1, at 3.

151. *Id.* at 225. It is ironic that the White Paper does not use such language in its discussion of fair use or first sale, which are also cornerstone doctrines that ensure the balance and survival of libraries and public schools.

152. *Id.* at 84. Arguably, the White Paper's refusal to acknowledge the balance in its first sale evaluation stems from its recommendations' failure to account for the abolition of first sale under the proposed amendment. It also fails to consider or discuss the balance or even mention the tragic effect of eliminating the balance for public libraries in its legal discussion of first sale. See, e.g., *id.* at 90-95 (discussing first sale).

153. See U.S. CONST. art. I, § 8, cl. 8.

154. See, e.g., *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'").

the new Digital Millennium Copyright Act (DMCA).¹⁵⁵ Although the DMCA resolves key issues of ISP liability and the circumvention of technological protection measures, it completely sidesteps the first sale issue and gives only general references to fair use.

IV. CONGRESS SHOULD EXPRESSLY EXTEND THE FAIR USE AND FIRST SALE DOCTRINES TO ELECTRONIC TRANSMISSIONS PROVIDED BY PUBLIC SCHOOLS AND LIBRARIES

But what about those not so fortunate? What of that portion of the

Interestingly, several organizations and individuals reminded the Working Group that its recommendations must include careful attention to the constitutionally mandated balance. See, e.g., Institute for Learning Technologies Teachers College, *ILT Comments on the Preliminary Report of the IITF Working Group on Intellectual Property Rights*, (visited Jan. 31, 2000) <http://www.ilt.columbia.edu/text_version/projects/copyright/papers/iltdocs/ILTWGIP.html> (“It is important for the final report to extend the public policy in favor of the free dissemination of ideas, which is grounded in both the First Amendment and the intellectual property clause of the Constitution, in relation to the [Internet]. . . . History has shown that each new major communications technology requires a reinterpretation of existing law in order to determine ways in which the basic Constitutional objectives can be reinforced. Therefore, it is reasonable to expect that the final Working Group report will relate its recommendations for changes in the copyright law to these Constitutional Goals.”) *Statement of Robert L. Oakley on Behalf of Several Library and Education Associations before the Working Group on Intellectual Property of the Information Policy Committee of the National Information Infrastructure Task Force* (visited Jan. 31, 2000) <http://www.ilt.columbia.edu/text_version/projects/copyright/papers/oakley2.html> (noting that Librarians and educators have no desire to deprive authors of a reasonable economic benefit for their work, but licensing proposals should also accommodate fair use and library use, as authorized in the act, and stating that “[t]he Copyright Act represents a careful balance between the rights of creators and the rights of users. . . . This means that . . . the rights of copyright owners should be broad enough to provide a fair return on their work, but limited in the public interest so as not to inhibit the use of existing works, especially for research, education, and the creation of new knowledge”) *Testimony of Joseph M. Cosgrove, Esq. Before The Public Hearing On Intellectual Property Issues Involved In The National Information Infrastructure Initiative*, (visited April 13, 2000) <http://www.ilt.columbia.edu/text_version/projects/copyright/papers/hearing.html> (“Contrary to the customary view, the patent and copyright power which the Constitution bestows upon Congress is concerned not primarily with the interest of the artist, author, or creator, but instead protects a broader public right to receive information and ideas. . . . This right to access information has been supported by the Supreme Court at least in the First Amendment context.”).

155. Pub.L. 105-304, 112 Stat. 2860.

public for which the expensive technology necessary to gain a spot on the NII is beyond their reach. . . Shall they be relegated to a lower level of national dialogue and thus lose the opportunity to fully participate in the intellectual activity of our nation?

I suggest to you that while this segment may lack possession of certain technological tools, it possesses something far more important, and that is a constitutional entitlement to be part of any informational feast which government may assist in creating.¹⁵⁶

The nation's libraries and public schools carry out society's moral and ethical obligation to educate children.¹⁵⁷ Broadening existing copyright law to favor copyright owners effectively neutralizes the ability of these institutions to provide equal access of digital information to the economically disadvantaged. This upsets the constitutionally mandated balance between protecting the "property" rights of copyright owners and the dissemination of information to the public.¹⁵⁸

A. COPYRIGHTS ARE PROPERTY

Interestingly, scholars disagree on whether copyrightable "information" is properly defined as "property."¹⁵⁹ To fit the common law property paradigm a law must consider "moral interests" in addition to wealth or efficiency interests.¹⁶⁰

156. See Cosgrove, *supra* note 154. Mr. Cosgrove, a self-proclaimed civil libertarian, further opines that "this constitutional interpretation will most certainly test the validity of any [Internet] legislation which fails to include all segments of society in its attempt to develop the information superhighway."

157. See, e.g., Library Bill of Rights, *supra* note 9; see also *Digital Future Coalition*, (visited Jan. 31, 2000) <<http://www.dfc.org/>>. The Digital Future Coalition (a collaboration of 39 of the nation's leading non-profit educational scholarly, library, and consumer groups "committed to striking an appropriate balance in law and public policy between protecting intellectual property and affording public access to it").

158. See Cosgrove, *supra* note 154.

159. Compare Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement*, 41 STAN. L. REV. 1343 (1989) (arguing that copyright should be viewed as having the same components as tangible property), with Timothy J. Brennan, *Copyright, Property and the Right to Deny*, 68 CHI.-KENT L. REV. 675 (1993) (supporting copyright as property, Brennan takes a conceptually different approach from Gordon by looking at the restrictions placed on tangible property and finding them similar to restrictions placed on copyright. Thus, Brennan argues, enabling copyright to qualify as "property").

Brennan correctly asserts that the restrictions surrounding copyrights help make the case for it qualifying as "property" in a legal sense. Real property carries numerous restrictions such as zoning, which serve to benefit society culturally, socially, and economically. See Brennan at 696.

160. See *id.* at 682 (explaining that real property rights were developed in a

According to Ronald Dworkin, the additional protection of moral rights distinguishes common law from statutory law.¹⁶¹ Common law property includes evaluating fundamental or natural rights. As a legislative enactment, copyright law lacks the "moral status" to gain the attributes of common law property.¹⁶² Other commentators state that a copyright owner's lack of control over copyrighted information negates any property paradigm.¹⁶³ They argue that fair use and other restrictions on copyright owners exclusive rights prevent them from exercising true control.¹⁶⁴ Because the "right to control" is the *sine que non* of property, copyrighted information fails to qualify.¹⁶⁵

Recent commentators distinguish however, that "restrictions" such as fair use and first sale are acceptable limitations that exist to balance rewarding creators against society's moral interests.¹⁶⁶ They note that real property is replete with limitations such as zoning laws, which serve to balance the owner's right to exclude, against society's moral interest in having environmentally and economically-balanced communities.¹⁶⁷ As such, copyrights are properly categorized as intellectual "property."¹⁶⁸

common law regime that focuses on natural and fundamental rights rather than wealth distribution and efficiency).

161. Brennan, *supra* note 159, at 683 (citing RONALD DWORWIN, TAKING RIGHTS SERIOUSLY 82-84 (1977)).

162. *Id.*

163. See e.g., Douglas Y'barbo, *The Heart of the Matter: The Property Right Conferred by Copyright*, 49 MERCER L. REV. 643 (1998) (arguing that ethereal nature of copyright and its numerous restrictions prevent it from qualifying as property, particularly because the "limitations" prevent true control by copyright owners. Y'Barbo distinguishes copyright from patents which, though ethereal, qualify as "property" due to the patentee's true exclusive right to "make, use and sell").

164. *Id.*

165. *Id.* at 645.

166. See Brennan, *supra* note 159.

167. *Id.* at 688-93 (outlining Ronald Dworkin's jurisprudential views which distinguish statutory from common law). Dworkin argues that the legislature dwells on wealth distribution and efficiency claims, while the judiciary in creating common law includes evaluating "moral interests" which may exist apart from the wealth and efficiency. Brennan argues that despite being "statutory," copyright laws' limitations such as fair use, and first sale which consider "moral interests" of fostering education are exactly what enable copyrights to fit the "property" paradigm. Brennan therefore asserts that copyrights qualify as property under both a Lockean and Coasean analysis by virtue of their limitations that serve the "public good." *Id.* at 709-14.

168. See *id.* at 712.

By definition, property is merely a right to exclude.¹⁶⁹ It is “a legally enforceable power to exclude others from using a resource, without need to contract with them.”¹⁷⁰ The series of section 106 exclusive rights contained in the Copyright Act of 1976¹⁷¹ enables copyrighted material to qualify as “property,” particularly because these rights are both assignable and transferable.¹⁷²

Moreover, like patents and trademarks, copyrights squarely fit within the Posnerian property paradigm. They include both the static benefit of preventing overuse of the resource and the dynamic benefit of providing an incentive to create or improve upon existing resources.¹⁷³ The exclusive rights and lengthy term of protection¹⁷⁴ provide a reward and incentive to create copyrightable information. The “boundaries” which prevent overuse of the resource include: (1) copyrights’ fixation and demarcation requirements; (2) section 102’s limited definition of copyrightable subject matter; and (3) the limited set of exclusive rights provided in section 106.¹⁷⁵ Moreover, the Act’s various limitations such as fair use and first sale further define moral “boundaries” which ensure society’s need for the free dissemination of information for education and research.

Although a network of property laws provide incentives to create and acquire real and intangible property, limitations and restrictions on these rights are necessary and essential to economic, cultural, and social development.¹⁷⁶ For example,

169. See, e.g., JESSE DUKEMINIER & JAMES KRIER, PROPERTY 58 (3d ed. 1993).

170. See William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 266 (1987).

171. See *supra* notes 14-16 and accompanying text.

172. Gordon, *supra* note 159, at 1364. In mapping out the components of entitlement structures in tangible property, Gordon emphasizes three rights which an owner of tangible property has: (1) the right to exclude others; (2) power of transfer; and (3) privilege of use. *Id.* at 1378. She looks to the rights created by section 106 as giving owners of copyrights similar rights as are given owners of tangible property. See *id.* at 1366. Because the rights granted by section 106 are “exclusive rights,” the copyright owner is given the rights of exclusion. *Id.* The words “to authorize” in section 106 give the power to transfer, while the words “to do” give the privilege of use. *Id.*

173. See generally Landes & Posner, *supra* note 170.

174. The statutory term of protection is presently the life of the author plus 70 years, or the earlier of 95 years from the year of its first publication or 120 years from the year of its creation. See 17 U.S.C. § 302 (1999 Supp.).

175. See Gordon, *supra* note 159, at 1380-84.

176. See *id.* at 1361-64; see also Brennan, *supra* note 159, at 688 n.47.

zoning laws limiting the exclusive rights of real property owners foster community development, economic growth, and a balanced environment.¹⁷⁷ Similarly, uniform commercial laws limit the use and control of personal property to ensure uniform and balanced economic growth.¹⁷⁸

B. FAIR USE AND FIRST SALE MUST LIBERALLY APPLY TO INTERNET TRANSMISSIONS TO MEET THE CONSTITUTIONALLY MANDATED BALANCE PROTECTING COPYRIGHT "PROPERTY" AND "PROMOTING PROGRESS OF SCIENCE AND THE USEFUL ARTS."¹⁷⁹

Fair use, first sale, and other copyright limitations foster cultural growth¹⁸⁰ and economic development by providing means for educational institutions to provide uniform access to information. Because copyright includes balancing moral interests, it possesses the attributes of common law property and must be evaluated as such.¹⁸¹ Thus, in difficult cases, such as providing uniform access to the Internet, Congress must consider the "moral rights" at stake, rather than limiting its decisions to efficiency and wealth distribution.¹⁸²

Furthermore, as noted in the introductory quote,¹⁸³ the economically disadvantaged have the constitutional right to be

177. See, e.g., Brennan, *supra* note 159, at 697 (analogizing real property limitations to copyright limitations and noting that examples like zoning laws, show that "property can be modified in copyright-like ways without requiring that the objects in question be regarded as something other than property").

178. *Id.*

179. U.S. CONST. art. I, § 8, cl. 8. Under Article I, Section 8, Clause 8 of the U.S. Constitution, copyrightable subject matter is "Science," while patentable subject matter is the "useful Arts." See CHISUM ET AL., PRINCIPLES OF PATENT LAW 17 n.64 (1998).

180. See Brennan, *supra* note 159, at 688-89. Brennan notes:

Copyrighted works—literature, music, films, graphic arts—are, with political, ethnic and religious institutions, the defining components of a culture. Treating these as property essentially means that these defining components, and our culture as a whole, can be owned with the perquisites of buying, selling and excluding. . . . Copyright law reflects these concerns to only a small degree, through the limited "fair use" exemption for educational uses.

181. *Id.* at 713-714

182. By refusing to broadly evaluate fair use in the Internet context to uniform dissemination of information because it would unduly tax copyright, the White Paper ignores its own legislative mandate to place the moral interest paramount to the wealth distribution or efficiency interest.

183. See *supra* text accompanying note 156.

part of the progress of science and the useful arts.¹⁸⁴ Nothing in the Constitution sets economic boundaries limiting this “[p]rogress” to the economically advantaged. Indeed, the next Charles Drew or Bill Gates may presently sit in a classroom in a low-income school district that lacks the resources to access high technology information. True progress of science and the useful arts is hindered if these students are not exposed to “global” digital knowledge via the Internet.¹⁸⁵

The Internet carried over 540 billion packets of information in 1993.¹⁸⁶ By, 1999, over 200 million people were expected to gain Internet access.¹⁸⁷ Because the federal government heavily funds the Internet,¹⁸⁸ any law creating economic barriers to uniform Internet access arguably restrains the fundamental right of “Free Speech.”¹⁸⁹ Copyright law can reward authors

184. Others argue that Article 1, Section 8, Clause 8 is not the only constitutional mandate for uniform information access.

185. Furthermore, because several layers of information can be nested via “hypertext” links on the Internet, individuals unable to access the Internet lack the opportunity to become effective and efficient scholars and researchers.

186. Boddie, *supra* note 2, at 196 (citing 11 COMPUTER LAW 2 (July 1994)).

187. *Id.* at 194 (citing *ACLU v. Reno*, 929 F. Supp. 824, 823 (E.D. Pa. 1996), *aff'd* 117 U.S. 2329 (1997)).

188. The Internet grew out of a network developed by Defense Advanced Research Projects Agency (DARPA). *See id.* at 195. DARPA developed much of the protocols for sending and receiving information as more networks were added. *See id.* The DARPA Internet, which linked defense contractors and university laboratories for defense research ultimately grew into the “Internet,” which today consists of “a confederation of national, regional and local networks running under a standard set of protocols referred to as the Internet Protocols.” *Id.* at 195-96. Five federal agencies presently fund the Internet along with various universities, states, and private companies. *Id.* at 196.

189. Many forms of speech, including political, are transmitted via the Internet. Thus, the government’s role in pricing certain citizens out of this forum and preventing them from having uniform access to give and respond to electronic political speech raises First Amendment concerns. Unfortunately, the Internet is also heavily funded by private entities, thereby making it primarily “private property.” *See id.* While it is clear that citizens have a constitutional guarantee of free speech, “it is a guarantee against abridgment by government, federal or state,” not private corporations or persons. *Hudgens v. NLRB.*, 424 U.S. 507, 511 (1976). Thus, the more “private” the Internet, the weaker the First Amendment argument.

There are, however, Supreme Court cases opining that even private property is not the “absolute dominion of the owner. The more an owner for his [or her] advantage, opens up his [or her] property for use by the public in general, the more do his [or her] rights become circumscribed by the statutory and constitutional rights of those who use it.” *Marsh v. Alabama*, 326 U.S. 501, 506 (1946); *See also id.* at 507 (stating that “the public . . . has an identical interest in the functioning of the community in such manner that the channels

with certain exclusive rights to information placed on the Internet, but cannot enforce these rights to the exclusion of equal access. The Web facilitates global communication. Global communication in turn enhances global knowledge. Having a broad base of technological expertise strengthens the United States both socially and economically. Thus, to remain true to the Constitution, intellectual property law must

of communication remain free"); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("That [the First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is condition of a free society. Surely a command that the government itself shall not impede that free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.").

Despite the persuasive case law language, the Supreme Court expressly held that there is no First Amendment right to access privately owned shopping malls to picket or disseminate political information. *See Hudgens*, 424 U.S. at 519. In *Hudgens*, the Court distinguished the matter before it from that in *Marsh*, wherein the Court held that the First Amendment barred a privately owned municipality from passing statutes which restricted citizens' rights to free speech on the town's sidewalks and other "public" areas. *See Marsh*, 326 U.S. at 514. The *Marsh* Court stated that a company-owned town, like any municipality, should have streets/sidewalks readily available for public discourse. *See id.* at 507-508. The *Hudgens* court found "little resemblance between the shopping center involved in this case and Chickasaw, Alabama. There are no homes, there is no sewage disposal plant, there is not even a post office on this property which the Court now considers the equivalent of a 'town.'" *See Hudgens*, 424 U.S. at 516 (quoting dissent in *Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 330-31 (1968)). Thus, to strengthen a First Amendment position for equal Internet access, one would have to convince the Court that this situation is more analogous to *Marsh* than *Hudgens*. Note, however, that the California Supreme Court has followed the *Marsh/Logan* rationale, holding that citizens have a free speech right under the California Constitution to access privately owned shopping malls to deliver political speech and reasonably exercised petitions. *See, e.g., Robins v. Pruneyard Shopping Center*, 592 P.2d 341, 347 (Cal. 1979), *aff'd* 447 U.S. 74 (1980) ("As a result of advertising and the lure of a congenial environment, 25,000 persons are induced to congregate daily to take advantage of numerous amenities offered by the [shopping center there]. A handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, . . . do not interfere with normal business operations.").

Although the right to free speech is indeed a fundamental right, it was not the basis for establishing our public library and school systems. These institutions are more firmly rooted in society's choice to assume the moral and ethical obligation to educate its masses and to utilize tax dollars to fund these projects. Thus, this article relies less on the First Amendment to support its thesis, and more on the Intellectual Property Clause of the Constitution which clearly states that the limited rights are to be granted to authors and inventors in order to promote progress of the sciences (Copyright) and useful arts (Patents).

harmonize itself with the moral obligation of public schools and libraries to provide uniform access to digital information. As aptly put by Justice O'Connor, "[t]he primary objective of copyright is not to reward the labor of authors, but to promote the Progress of Science and useful Arts."¹⁹⁰

The White Paper gives lip service to the importance of copyright law in enabling libraries and educational institutions to provide equal access to information in order to meet the constitutionally mandated balance. Yet, it blatantly rejects a broad interpretation of fair use to ensure uniform access because this would unduly "tax" copyright owners.¹⁹¹

The White Paper's position is replete with contradictions and fails to consider the acceptable economic and social costs of protecting intellectual property. Landes and Posner identify four costs associated with intellectual property: (1) transfer cost; (2) rent seeking cost—the cost incurred from duplicative creations; (3) protection and enforcement; and (4) social cost of restricting the use of property when it has public good character.¹⁹² They argue that intellectual property rights have particularly high costs that mandate limiting them in ways that other property rights are not limited.¹⁹³

Of all the intellectual property rights, copyright is arguably subject to the greatest restrictions or "limitations" because it protects the widest spectrum of "information."¹⁹⁴ Because much of this information has a "public good" character, e.g., needs to be accessed for research and education purposes, the Act

190. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349 (1991).

191. White Paper, *supra* note 2, at 84. In 1996, Bruce Lehman, Chairman of the Working Group, organized a Conference on Fair Use (CONFU) which on November, 1996 submitted non-legislative guidelines for educators and students who develop multimedia projects using portions of copyrighted works. See <<http://www.uspto.gov/web/offices/dcom/olia/confu/appendix.htm#j>> (visited April 13, 2000). In its final paper, however, CONFU merely parrots the White Paper's mandate that fair use for digital transmissions will be viewed as in "traditional environments." Because CONFU was comprised of members favoring owners' and users' rights, the members were unable to agree on a statement regarding uniform Internet access for educational use, but did draft guidelines for narrow areas such as educational uses of multimedia works and digital images.

192. Landes & Posner, *supra* note 169, at 267.

193. *See id.*

194. *Id.* See also 17 U.S.C. § 102 (noting the broad spectrum of written, audio, visual, and musical works which meet the subject matter requirements of copyright providing they are merely "original" and "fixed in a tangible medium of expression").

correctly includes limits such as fair use and first sale. These limitations enable teachers, researchers, and students to freely access information for purposes of education, research, comment, and criticism. Libraries and public schools are the primary gatekeepers of information. It is therefore crucial that these institutions retain the ability to provide uniform access to both printed and digital material.

C. RECOMMENDATIONS TO CONGRESS AND THE COURTS

Because the White Paper's recommendations abolish first sale and severely narrow fair use, Congress must intervene to maintain the constitutionally mandated balance for digital transmissions. To ensure uniform access to digital transmissions, Congress should reinforce the fair use and first sale limitations. These limitations insulate public schools and libraries from excessive digital licensing fees, thereby enhancing their ability to provide uniform access to digital information.

To maintain the viability of fair use, Congress must reject the White Paper's narrow evaluation that limits the doctrine's applicability to Internet transmissions.¹⁹⁵ To neutralize the White Paper, Congress might consider amending the 1976 Copyright Act to clarify that the four-factor analysis articulated in section 107 is equally applicable to hard text and copyrightable digital transmissions. Unfortunately, the Digital Millennium Copyright Act of 1998 fails to effectively negate the White Paper's narrowing of fair use in the digital context. Instead of addressing section 107 of the Copyright Act directly, the DMCA generally notes that nothing in the Act affects the various statutory defenses, including fair use.¹⁹⁶

195. Unfortunately, it appears that the House and Senate have opposing views regarding the viability of the White Paper. The House version of the DMCA, H.R. 2281, 106th Cong. (1998), provides limited acknowledgement of fair use in the digital context, but needs amending to clarify that section 1201 "Circumvention of Copyright Protection Systems" will not preclude fair use in practice. See Oakley Testimony, *supra* note 6. In sharp contrast, the Senate Version of the Act, S. 2037, 106th Cong. (1998), "lacks any protection for fair use, encryption research and personal privacy." Letter from the American Association of Law Libraries, *Action Alert* (Aug. 28, 1998) (urging constituents to write or fax DMCA Committee members to keep the consumer and personal protections embodied in the core of the House version of the legislation).

196. Section 1201 states that "nothing in this section shall affect rights, remedies limitations, or defenses to copyright infringement, including fair use, under this title." 17 U.S.C. § 1201(c)(3) (1998). In addition, section 512 notes

Maintaining the first sale limitation for digital transmissions is more problematic than fair use.¹⁹⁷ With first sale, a public school or library always retains an additional digital “copy” of transmitted information. Allowing any entity to retain and distribute more copies than initially purchased arguably disrupts the balance between rewarding the copyright owner and universally disseminating information.¹⁹⁸ To this extent, I agree with the White Paper’s analysis that digital transmissions trigger both the reproduction and distribution rights of section 106. Thus, first sale in its present form cannot apply to digital transmissions.

Nonetheless, Professor Pamela Samuelson suggests a worthy compromise. She proposes amending section 109 to include a provision for Internet transmissions that limits the application of the first sale rule to situations in which the digital transmitter did not delete his or her copy.¹⁹⁹ I suggest a friendly amendment to Professor Samuelson’s proposal by distinguishing that public libraries and schools would be allowed to retain a “single” additional copy in order to provide continued access. Notice of potentially infringing uses could be required, similar to the notices presently provided by libraries

that the failure of an ISP to qualify under this section does not bear adversely on the ISP’s ability to qualify for other defenses (such as fair use). *Id.* § 512.

The DMCA does revise the section 108 library exemption for preservation of certain works to reflect the unique nature of digital transmissions. Pub.L.No. 105-304 § 404 Thus, it remains a mystery why Congress chose to ignore updating such crucial limitations such as section 109 first sale and section 107 fair use. See Band, *Comments on the Digital Millenium Copyright Act* (visited November 25, 1998) <<http://www.ala.org/washoff/band.html>> (copy of document on file with author) (noting that section 404 of the DMCA updates section 108 of the 1976 Copyright Act to “allow libraries and archives to take advantage of digital technologies when engaging in specified preservation activities”).

197. Unfortunately, the DMCA is conspicuously silent concerning the White Paper’s abolishing of the first sale limitation for digital transmissions, thereby ignoring the discrepancy that presently exists between the distribution of hard text and digital transmissions.

198. Indeed, this is the premise behind limiting the first sale doctrine to the “distribution right.” See *supra* note 34 and accompanying text.

199. See Samuelson, *supra* note 36. She further notes that:

[E]ven without an abolition of the First Sale Rule, copyright owners can control this kind of potential consumer abuse of copyrighted works by means of the exclusive reproduction right. If the owner of a copy of digitally transmitted work begins transmitting copies of that copy to a thousand of his or her closest friends, that person will be responsible for multiple reproductions of copyrighted works.

Id. at 24.

at copying machines.²⁰⁰

Alternatively, if Congress disagrees with a library exemption for first sale, it could require libraries to temporarily delete their copy to "lend" the information, and require a "check-out" mechanism that allows for reinstating the copy when the patron "returns" (ceases using) the disseminated information.

Finally, if Congress is uncomfortable with carving out numerous exceptions to first sale, it could create a compulsory licensing scheme for Internet transmissions. A royalty tribunal would establish a tiered licensing scheme enabling public schools, libraries, and other non-profit entities to pay lower royalties. This proposal is consistent with the FCC's commitment to subsidizing telecommunications costs for public schools and libraries to ensure universal Internet access.²⁰¹

Copyright owners would retain their incentive to create under the various proposals. To reward copyright owners, licensing schemes remain in place for commercial and non-educational/research uses. Meanwhile, liberally applying first sale and fair use helps public schools and libraries meet their moral and ethical obligation of providing uniform access to Internet technology, while simultaneously promoting "Progress of the Arts and Science." This paradigm harmonizes intellectual property law with Internet ethics.

CONCLUSION

In this high technology era, children of all income levels need access to both printed and electronic information. Although increased government funding is one answer, we must also address how to balance the intellectual property rights that attach to digital transmissions against our moral obligation to educate and disseminate information. Congress and the courts should reject the White Paper's limitation on fair use and stand firm on equitably applying this doctrine to Internet transmissions. Also, Congress must preserve "first sale" for Internet transmissions to allow non-infringing

200. See 17 U.S.C. § 108(f)(1) ("Nothing in this section- (1) Shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises, provided that such equipment displays a notice that the making of a copy may be subject to the copyright law.").

201. See *supra* note 10.

transfers of digital transmissions. Johnny's becoming productive in a high technology environment turns on his ability to not only read printed text, but also to access and manipulate digital information.