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Leslislating in the Face of New Technology: Copyright Laws for the Digital Age

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Abstract

This Note discusses the agendas and proposals of different countries with respect to copyright regulation in the digital age. Part I discusses the present state of copyright law in the United States, the United Kingdom, and the European Community. Part I also examines laws that have developed in response to new technology. Part II considers the varying commentaries and proposals addressing the promulgation of copyright law for digital technology. Part III argues that the United States, the United Kingdom, and the European Community should take their existing copyright concepts and expand them to fit with digital technology. In addition, Part III maintains that lawmakers should consider copyright infringement liability standards which are based on an OSP's knowledge of and ability to control infringing works appearing on online services. Finally, this Note concludes that promulgation of copyright laws relating to the Internet is crucial to the growth of online services and a necessary prerequisite to a global information infrastructure.

LEGISLATING IN THE FACE OF NEW TECHNOLOGY: COPYRIGHT LAWS FOR THE DIGITAL AGE

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Property law has, to be sure, undergone constant change Its enduring mix of old and new, rife with uneasy tensions, reflects more than an institution that has evolved over centuries and across cultures; it reflects as well two often conflicting objectives — promoting stability and accomodating change — that property systems must serve.¹

INTRODUCTION

Computer technology has advanced to a point where individuals on opposite sides of the world may instantaneously exchange information.² By accessing online services³ and the Internet⁴ through accounts with online service providers⁵

* J.D. Candidate, 1998, Fordham University. This Note is dedicated to my parents for all their love and support throughout my years as a student.

1. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY xxxiii (3d ed. 1993).

2. See NICHOLAS BARAN, INSIDE THE INFORMATION SUPERHIGHWAY 16 (1995) (explaining scope and availability of services through one's computer); Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* 8 (1995) [hereinafter *White Paper*] (discussing benefits of new technology). The President of the United States, Bill Clinton, formed the Information Infrastructure Task Force ("Task Force") in 1993 to develop the U.S. plan for a National Information Infrastructure. *Id.* at 1. The former U.S. Secretary of Commerce, Ronald H. Brown, chaired the Task Force, which consists of representatives from federal organizations that are instrumental in the development of information services. *Id.*

3. See BARAN, *supra* note 2, at 21-31 (explaining online services). Commercial online services, like America Online ("AOL") and CompuServe, utilize a centralized computer system or a number of closely linked systems to serve subscribers. *Id.* at 22. An online service is not a global network. *Id.* An online service, however, may provide a user with access to the Internet. John Carmichael, Comment, *In Support of The White Paper: Why Online Service Providers Should Not Receive Immunity From Traditional Notions of Vicarious and Contributory Liability for Copyright Infringement*, 16 LOY. L.A. ENT. L.J. 759 n.3 (1996). Online services offer a variety of features, including access to newspapers, magazines, financial reports, sports information, and shopping services. BARAN, *supra* note 2, at 23. In addition, users of online services may participate in discussions with other subscribers. *Id.*

4. See BARAN, *supra* note 2, at 37-38 (describing Internet). In the late 1960s, U.S. military researchers first developed the concept of the Internet when they attempted to link computers from different areas of the United States. *Id.* at 38. The Internet evolved from this idea into a "large and very free-form association of independent networks and computer systems . . ." *Id.* at 37-38. Today, through a mere telephone connection, a computer user can access the Internet and freely move through its world-

("OSPs"), individuals may use computers to obtain journals, articles, world news, and even transfer funds in their bank accounts.⁶ The acts of uploading⁷ and downloading⁸ further this exchange of information.⁹ This heightened access to information, which can marketably improve one's quality of life,¹⁰ also creates a potential for abuse of intellectual property rights.¹¹ Bulletin board service¹² ("BBS"), online service, and Internet subscribers have used the new technology by illegally placing, without the copyright owner's authorization, copyrighted materi-

wide collection of networks and systems. FT LAW & TAX, INTERNET LAW AND REGULATION 1 (Graham J.H. Smith ed., 1996) [hereinafter INTERNET LAW]. Because of the relative ease of obtaining information from computer systems all over the world, the Internet is becoming a major medium of communication with an estimated 20 million users. BARAN, *supra* note 2, at 36-37.

5. See Cynthia L. Counts & C. Amanda Martin, *Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues in this New Frontier*, 59 ALB. L. REV. 1083, 1115 (1996) (stating that online service providers are content providers and access providers whose customers use Internet); see also Kenneth D. Suzan, Comment, *Tapping to the Beat of a Digital Drummer: Fine Tuning U.S. Copyright Law for Music Distribution on the Internet*, 59 ALB. L. REV. 789, 808 (1995) (stating that AOL, Prodigy, and CompuServe are online service providers).

6. BARAN, *supra* note 2, at 28. Computer users get "online" by connecting their computers to a computer network via telephone lines. *Id.* at 18. Users may connect to online services that furnish access to information databases that contain the texts of thousands of newspapers, magazines, and journals. *Id.* at 28.

7. *Id.* at 18. Uploading is the process by which a user takes files from her computer and transfers them to another computer system for access by other subscribers. *Id.*

8. *Id.* Users may download programs and files from the online services. *Id.* Downloading is the process of obtaining information from another computer and transferring it to one's own computer. *Id.*

9. *Id.*

10. See *White Paper*, *supra* note 2, at 8-9 (stating that users of new information services will better their lives through heightened access to entertainment, arts and humanities, education, and political information).

11. See *id.* at 10 (highlighting risks to intellectual property rights when works are placed on electronic information systems); see also CRAIG JOYCE ET AL., COPYRIGHT LAW 1 (3d ed. 1994) (defining intellectual property as "products of the mind" which are protected by law).

12. See BARAN, *supra* note 2, at 19 (discussing bulletin board services). Computer owners possessing the essential communications software and hardware may operate a bulletin board service ("BBS"). *Id.* BBSs are used for electronic posting of announcements and correspondence between users. *Id.* A BBS's capacity for information is that of the computer host. *Id.* Subscribers to a BBS access the system through a computer telephone modem. *Id.* BBS operators charge users a fee for access to the system which allows users to either upload or download information. *Id.* BBSs operate on a smaller scale than online services, which may consist of hundreds of BBSs. *Id.* at 23. See also *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1554 (M.D. Fla. 1993) (explaining operation of BBS).

als online for other users to download.¹³ The users, by uploading and downloading unauthorized materials, are denying copyright owners just compensation for public access to their works.¹⁴

The Internet is a worldwide entity,¹⁵ and, as such, copyright infringement on this system is an international problem.¹⁶ Accordingly, governments are considering the prospect of reaching international accord on the protection of intellectual property.¹⁷ The exclusive right to digital transmissions¹⁸ of copyrighted works and the distribution of copyrighted works were among the issues that nations considered at the December 1996 meeting of the World Intellectual Property Organization¹⁹ ("WIPO").²⁰

13. See *Religious Tech. Ctr. v. NetCom Online Computer Servs., Inc.*, 907 F. Supp. 1361, 1365-66 (N.D. Cal. 1995) (discussing unauthorized placement of copyrighted materials onto BBS and Internet); *Sega Enters., Ltd. v. MAPHIA*, 857 F. Supp. 679, 683 (N.D. Cal. 1994) (explaining that subscribers, without permission, uploaded and downloaded protected programs); *Playboy*, 839 F. Supp. at 1554 (outlining illegal activities by subscribers to BBS).

14. See BARAN, *supra* note 2, at 144 (stating that authors are concerned with getting just rewards for their efforts when their works appear on information networks).

15. See INTERNET LAW, *supra* note 4, at 1 (acknowledging that Internet, with networks all over world, has undefinable boundaries).

16. See *White Paper*, *supra* note 2, at 130 (noting that international rules for protection of intellectual property must be promulgated in order to ensure successful development of worldwide information superhighway).

17. See BNA Inc., *Meeting Looks at Intellectual Property Protection in Western Hemisphere*, 52 PAT., TRADEMARK & COPYRIGHT J. 392, 395 (1996) (outlining U.S. commitment to reaching international agreements with respect to intellectual property rights in face of technological advances); Commission of the European Communities, *Follow-Up to the Green Paper on Copyright and Related Rights in the Information Society*, COM(96) 586 Final at 29-30 (Nov. 1996) [hereinafter *Green Paper Follow-Up*] (stating that United States, European Community, Japan, Canada, and Australia are examining international harmonization of copyright legislation regarding new technology).

18. See BARAN, *supra* note 2, at 17 (defining digital information as information transmitted in digital form so that computers may be able to receive it). A unique feature of digital transmissions enables an individual who receives the data to communicate a response to the sender. *Id.*

19. See JOYCE ET AL., *supra* note 11, at 1007 (explaining that World Intellectual Property Organization ("WIPO") functions as Secretariat of Berne Convention and other international intellectual property agreements).

20. Peter H. Lewis, *160 Nations Meet to Weigh Revision of Copyright Law*, N.Y. TIMES, Dec. 2, 1996, at A1. 160 nations gathered, in Geneva, Switzerland, from December 2 to 20, 1996, to discuss rights obtained by copyright in an age when protected works may be digitized and distributed over worldwide computer networks. *Id.* As a result of the conference, two treaties were developed with general provisions encompassing the distribution of works over the Internet. Seth Scheisel, *Global Agreement Reached to Widen Law on Copyright*, N.Y. TIMES, Dec. 21, 1996, at A1; see World Intellectual Property Organization Copyright Treaty, *adopted by Diplomatic Conference on December 20, 1996*

Commentators question whether the United States is prematurely considering international legislation regarding copyright infringement on the Internet.²¹ Those in favor of postponing international deliberation on the issue argue that lawmakers in the United States have not yet completed legislation on the subject.²² While Congress has not yet finalized intellectual property legislation relating to the Internet and digital technology,²³ proponents of international deliberations maintain that considering the issues in an international forum is a worthwhile endeavor.²⁴ Moreover, in order to ensure the success of the information superhighway,²⁵ legal practitioners contend that legislators need to address the guidelines for international intellectual property protection at the outset of the information superhighway's development.²⁶

<<http://www.wipo.org/eng/diplconf/distrib/94dc.htm>> [hereinafter WIPO Copyright Treaty] (outlining provisions for protection of literary and artistic works in light of new technology); World Intellectual Property Organization Performances and Phonograms Treaty, adopted by Diplomatic Conference on December 20, 1996 <<http://www.wipo.org/eng/diplconf/distrib/95dc.htm>> [hereinafter WIPO Performances and Phonograms Treaty] (detailing protection of performers, producers of phonograms, and broadcasting organizations in face of technological advancements). The treaties represent the most critical changes in copyright law seen in the past 25 years and the increased protection offered by their provisions will encourage creators to disseminate their works over the Internet. Scheisel, *supra*, at A1.

21. BNA Inc., *Panel Sees Examples of Online Copyright Infringement, Asks Who Should Be Liable*, 52 PAT., TRADEMARK & COPYRIGHT J. 35, 38 (1996). The Digital Future Coalition ("DFC"), comprised of educators, school boards, academicians, libraries, and consumer advocates, asserted that "the [Clinton] administration's Digital Agenda is premature for WIPO consideration before the conclusion of Congressional action" on the question of intellectual property rights in the digital environment. *Id.*

22. BNA Inc., *supra* note 17, at 394-95. For opposing viewpoints on the issue of copyright infringement liability of online service providers, compare Carmichael, *supra* note 3, at 787 (arguing in favor of certain U.S. common law liability standards) with Nivia Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345, 407 (1995) (stating that imposition of liability will thwart advancement of new information services).

23. BNA, Inc., *supra* note 21, at 35.

24. See BNA, Inc., *supra* note 17, at 392 (discussing comments that consideration of digital agenda by WIPO is not premature). Though advocating debate for an international digital agenda, one scholar stated that it is not the proper time to "lock ourselves into a particular legal regime either nationally or internationally." *Id.*

25. See BARAN, *supra* note 2, at xiii (stating that information highway is quickly evolving technology). The Information superhighway, with the Internet as one of its foundations, is still in the early stages of development. *Id.*

26. See *White Paper*, *supra* note 2, at 130 (noting that at February 1995 G-7 Ministerial Meeting on Global Information Infrastructure, Ministers spoke in favor of early consideration of intellectual property issues in order to insure adequate development

This Note discusses the agendas and proposals of different countries with respect to copyright regulation in the digital age. Part I discusses the present state of copyright law in the United States, the United Kingdom, and the European Community. Part I also examines laws that have developed in response to new technology. Part II considers the varying commentaries and proposals addressing the promulgation of copyright law for digital technology. Part III argues that the United States, the United Kingdom, and the European Community should take their existing copyright concepts and expand them to fit with digital technology. In addition, Part III maintains that lawmakers should consider copyright infringement liability standards which are based on an OSP's knowledge of and ability to control infringing works appearing on online services. Finally, this Note concludes that promulgation of copyright laws relating to the Internet is crucial to the growth of online services and a necessary prerequisite to a global information infrastructure.

I. *COPYRIGHT LAW IN THE UNITED STATES, THE UNITED KINGDOM, AND THE EUROPEAN COMMUNITY*

Copyright law gives individuals commercially valuable rights in their creations.²⁷ Copyright legislators from all over the world have always confronted a common problem of maintaining such rights in the face of new technologies for reproduction and distribution of works.²⁸ The United States, the United Kingdom, and the European Community have all developed systems of copyright that have grown with technological advances.²⁹

of information superhighway); *see also* INTERNET LAW, *supra* note 4, at 21 (explaining that European Commission, in Green Paper entitled "Copyright and Related Rights in the Information Society," proposed harmonization of intellectual property laws to insure full development of information superhighway in Europe).

27. *See* JOYCE ET AL., *supra* note 11, at 2 (explaining that copyright law gives copyright owners right to use and authorize use of copyrighted works).

28. *See id.* at 1 (stating that copyright law is form of legal adaptation to new technologies of reproduction and dissemination of human expression); PETER GROVES, COPYRIGHT AND DESIGNS LAW 1 (1991) (explaining that technological changes constantly distort legislative framework of copyright law).

29. *See, e.g.*, Green Paper Follow-Up, *supra* note 17, COM (96) 586 Final at 4 (stating that European Community has developed copyright legislation in response to changing technology).

A. Copyright Philosophies

Countries that embrace the economic rationale for copyright law, like the United States and the United Kingdom,³⁰ base copyright legislation on an individual's economic incentive to create copyrightable works.³¹ A number of countries³² recognize, in addition to economic rights, creators' moral rights in their works.³³ Moral rights, which are based on authors' rights to control the moral character of their works,³⁴ provide creators with additional controls over their materials which economic rights do not offer.³⁵

1. Economic Model of Copyright Law

In order to financially reward and stimulate creators to develop works, copyright law grants them property rights³⁶ in their creations.³⁷ The property rights, however, limit public access to the copyrighted materials³⁸ and may deprive the public of the benefits associated with dissemination of copyrighted works.³⁹ Consequently, the central problem legislators face when promulgating economic-based copyright law is finding a balance between the copyright holder's incentive to create and the public's right to access the copyrighted works.⁴⁰

30. See A. Michael Warnecke, Note, *The Art of Applying the Fair Use Doctrine: The Postmodern-Art Challenge to the Copyright Law*, 13 REV. LITIG. 685, 697 (1994) (stating that U.S. Constitution sets forth language mandating that copyright laws be structured to provide creators with economic rewards for their works); GROVES, *supra* note 28, at 1 (stating that U.K. copyright law exists to address economic problem of providing individuals with incentives to create).

31. Warnecke, *supra* note 30, at 697.

32. See JOYCE ET AL., *supra* note 11, at 610 (explaining that several countries recognize moral rights); Dan Rosen, *Artists' Moral Rights: A European Evolution, An American Revolution*, 2 CARDOZO ARTS & ENT. L.J. 155, 156 (discussing development of moral rights in France, Italy, and Germany).

33. Christine L. Chinni, *Droit D'auteur Versus the Economics of Copyright: Implications for American Law of Accession to the Berne Convention*, 14 W. NEW ENG. L. REV. 145, 149 (1992).

34. JOYCE ET AL., *supra* note 11, at 610.

35. *Id.*

36. See, e.g., 17 U.S.C. § 106 (1997) (illustrating U.S. copyright statute's grant to creators of exclusive property rights in copyrighted work).

37. Warnecke, *supra* note 30, at 698.

38. JOYCE ET AL., *supra* note 11, at 18.

39. *Id.*

40. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).

In the face of technological advances, legislators analyze copyright law to assure that it continues to maintain a balance between public access to works and the economic incentives for authors to create.⁴¹ From its beginnings, the law of copyright had to respond to changes in technology.⁴² The Internet, like the printing press, represents another technological advance which the law must address.⁴³

2. Moral Rights Model of Copyright Law

A country's recognition of moral rights leads to a copyright system that is more protective of authors than Anglo-American systems.⁴⁴ Unlike copyright law that is premised solely on the economic rights of an artist, a moral rights regime allows creators to retain certain rights in their creations even after they have transferred ownership of their economic rights to others.⁴⁵ Moral rights address the inalienable and natural rights of artists that are related to their characters and may supersede economic interests in the work.⁴⁶ Some examples of moral rights include

41. See *White Paper*, *supra* note 2, at 7, 14 (stating that copyright law has to respond to new technologies and maintain existing balance between incentive to create and dissemination of works); GROVES, *supra* note 28, at 1 (explaining that legislation needs to accommodate technological changes to maintain proper tradeoff between public access to works and incentive to create).

42. See JOYCE ET AL., *supra* note 11, at 1 (stating that idea of responding to new technologies in reproduction and distribution of expression was present in sixteenth century). In England, in 1476, William Caxton advanced the method of using the printing press for large-scale publishing of books. *Id.* at 6. In 1534, the Crown, fearing advancement of radical religious and political philosophies, issued a royal decree requiring individuals to obtain a license and official censor approval before publishing. *Id.* This decree led to a publishing monopoly by the Stationer's Company, a group that upheld the Crown's agenda. *Id.* The monopoly ended in 1694 and, in 1710, Parliament passed the first copyright act, the Statute of Anne, 8 Anne, c. 19, which inevitably reduced the publishers' power and instead implemented protection based on the authors' rights. *Id.*

43. See *White Paper*, *supra* note 2, at 12-13 (stating that new information age requires consideration of changes and adaptations to present copyright law); GROVES, *supra* note 28, at 1 (explaining that rise of computer age has already caused changes in copyright law). The advent of the personal computer resulted in the creation of law regarding copyright protection of software and computer databases. *Id.*; see, e.g., *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 702 (2d Cir. 1994) (stating that literal elements of computer programs are protectable by copyright law).

44. Chinni, *supra* note 33, at 149.

45. JOYCE ET AL., *supra* note 11, at 610.

46. *Id.*

the right of paternity,⁴⁷ the right of integrity,⁴⁸ and the disclosure⁴⁹ right.⁵⁰ The personal nature of these rights may prevent a work from completely entering the public domain because a creator may forbid individuals from using the work in a manner inconsistent with the creator's moral philosophy.⁵¹

The Berne Convention for the Protection of Literary and Artistic Works⁵² ("Berne Convention"), provides for moral rights in Article 6bis⁵³ and requires all signatories to protect moral rights in their domestic laws.⁵⁴ The United States, a member of the Berne Convention, does not explicitly recognize moral rights.⁵⁵ U.S. lawmakers have, however, addressed moral rights

47. See *White Paper*, *supra* note 2, at 145 (explaining right of paternity as right to be named as author of work).

48. See Rosen, *supra* note 32, at 161 (describing right of integrity as artists' right to prevent distortion or alteration of their creations).

49. See JOYCE ET AL., *supra* note 11, at 611 (defining right of disclosure as right to specify conditions of presentation of work to public).

50. Rosen, *supra* note 32, at 158-63.

51. Chinni, *supra* note 33, at 156.

52. Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris 1971, Cmnd 5002, at 3 [hereinafter Berne Convention]. See JOYCE ET AL., *supra* note 11, at 984 (discussing Berne Convention). The Berne Convention is a multilateral copyright convention that was first established in 1886 in Berne, Switzerland. *Id.* The Paris Act of 1971 revised the current treaty. *Id.* at 984-85.

53. Berne Convention, *supra* note 52, art. 6bis, at 6-7. Article 6bis provides:

- (1) Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or any other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.
- (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.
- (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Id.

54. JOYCE ET AL., *supra* note 11, at 611.

55. *Id.*; see *White Paper*, *supra* note 2, at 145-46 (explaining that when United States joined Berne Convention, Congress determined that existing remedies under statutory and common law provided *de facto* moral rights protection).

in U.S. federal and state legislation.⁵⁶

B. *U.S. Copyright Law*

The U.S. Constitution states that Congress, in order to promote the advancement of intellectual creations, has the power to provide authors⁵⁷ with exclusive rights over their works.⁵⁸ The U.S. Supreme Court has interpreted this Constitutional provision as requiring a grant of valuable rights to authors so that authors may be induced to create and share their works with the public.⁵⁹ Congress has attempted to apply the Constitutional requirements by passing federal copyright acts in 1790,⁶⁰ 1909,⁶¹ and 1976.⁶²

1. Copyright Doctrine

The Copyright Act of 1976⁶³ ("Act of 1976") is the latest major Congressional effort to codify copyright law in the United States.⁶⁴ In order to foster an incentive to create⁶⁵ intellectual property, the Act of 1976 gives copyright owners certain com-

56. See *White Paper*, *supra* note 2, at 146 (explaining that legislators have provided for protection of moral rights in both federal and state laws).

57. See *Goldstein v. California*, 412 U.S. 546, 561 (1973) (maintaining that authors are "originators" who may produce "any physical rendering of the fruits of creative intellectual or aesthetic labor.").

58. U.S. CONST. art I, § 8, cl. 8. Article I, section 8, clause 8 states that Congress shall have the power to "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." *Id.*

59. See *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30, 36 (1939) (stating that copyright is "intended definitely to grant valuable, enforceable rights to authors . . . to afford greater encouragement to the production of literary works of lasting benefit to the world.").

60. See JOYCE ET AL., *supra* note 11, at 10 (stating that first U.S. copyright act, passed in 1790, gave authors right to capitalize on maps, charts, and books).

61. See *id.* (explaining that after revisions in 1831 and 1870 to act of 1790, Copyright Act of 1909 ("1909 Act") expanded scope of copyright protection in United States by further defining subject matter protected, rights and remedies).

62. See *id.* at 11 (stating that in 1955, Congress, finding provisions of 1909 Act to be unworkable, authorized copyright law revision project which finally resulted in Copyright Act of 1976).

63. Copyright Act of 1976, as amended, 17 U.S.C. §§ 101-810 (1997) [hereinafter Act of 1976].

64. See JOYCE ET AL., *supra* note 11, at 12-13 (explaining effect of Act of 1976).

65. See Carmichael, *supra* note 3, at 765 (stating that Congress granted limited monopoly rights to authors in order to give future authors incentive to produce new works); see also *Playboy*, 839 F. Supp. at 1555 (maintaining that Act of 1976 gives copyright holders control over almost all activities of conceivable commercial value).

mercially valuable rights over their works.⁶⁶ In addition, individuals who violate a copyright owner's statutorily granted rights are liable for copyright infringement.⁶⁷

Congress granted copyright owners the exclusive rights to reproduce,⁶⁸ prepare a derivative work of,⁶⁹ distribute,⁷⁰ perform,⁷¹ display,⁷² and in the case of sound recordings, perform by means of a digital transmission,⁷³ their copyrighted material.⁷⁴ Individuals infringe a copyright if they perform or authorize another to perform any of the above activities without the copyright holder's consent.⁷⁵ In order to establish copyright infringement, a plaintiff must prove ownership of a copyright in the work at issue⁷⁶ and the defendant's copying of that protected expression.⁷⁷ A copyright owner may establish proof of owner-

66. 17 U.S.C. § 106 (1997). A copyright owner has the exclusive right: (1) to reproduce the copyrighted work in copies . . . ; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies . . . of the copyrighted work to the public . . . ; (4) . . . to perform the copyrighted work publicly; (5) . . . to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id.

67. 17 U.S.C. 501(a) (1997). See *White Paper*, *supra* note 2, at 100 (explaining individual's liability arising from infringement of copyright owner's exclusive rights).

68. 17 U.S.C. § 106(1) (1997).

69. 17 U.S.C. § 106(2) (1997).

70. 17 U.S.C. § 106(3) (1997). The distribution right encompasses publication of copyrighted works. See 17 U.S.C. § 101 (1997) (defining "publication" as "distribution of copies . . . of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending."). The Act of 1976 further states, "[a] public performance or display of a work does not of itself constitute publication." *Id.*; see *White Paper*, *supra* note 2, at 215 (stating that courts' interpretations of publication offer guidance as to what constitutes distribution to public).

71. 17 U.S.C. § 106(4) (1997).

72. 17 U.S.C. § 106(5) (1997).

73. 17 U.S.C. § 106(6) (1997). The provision granting an exclusive right to copyright holders to publicly perform sound recordings by means of a digital audio transmission is an outgrowth of the Digital Performance Right and Sound Recordings Act of 1995 ("Sound Recordings Act"). See H.R. 1506, 104th Cong., 1st Sess. (1995) (illustrating text of bill introduced April 7, 1995).

74. 17 U.S.C. § 106(1)-(6) (1997).

75. 17 U.S.C. § 501(a) (1997).

76. See 17 U.S.C. § 201(d) (1997) (stating that copyright ownership gives individuals right to exploit copyrighted work, sue others for infringement, and license acquired rights in whole or in part).

77. *Religious Tech.*, 907 F. Supp. at 1366-67; *Sega*, 857 F. Supp. at 686; *Playboy*, 839 F. Supp. at 1556; see MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.01 (1996) (explaining plaintiff's burden of proving ownership and copying in order to establish infringement).

ship by service upon the court of certificates of copyright registration.⁷⁸ When there is a lack of direct evidence of copying in infringement cases,⁷⁹ a plaintiff must circumstantially prove copying by showing that a defendant had access to the copyrighted work⁸⁰ along with evidence of substantial similarity⁸¹ between the copyrighted expression and the allegedly infringing material.⁸²

2. Infringement Standards Applied to OSPs

In recent cases addressing OSP liability for copyright infringement, district courts easily found ownership and copying of the copyrighted works.⁸³ The courts, however, labored more on the question of the violation of the copyright owner's exclusive rights and applied different standards of infringement to the defendants in each case.⁸⁴ The varying approaches of the courts reflect the U.S. copyright law's different liability standards for

78. See, e.g., *Sega*, 857 F. Supp. at 686 (finding that presentation of registration certificates amounts to *prima facie* evidence of plaintiff's copyright ownership in video game programs); *Playboy*, 839 F. Supp. at 1556 (holding that copyright registration certificate constituted *prima facie* evidence of ownership). Owners of a copyright register their claims by depositing an application, a fee, and copies of their work with the U.S. Copyright Office. 17 U.S.C. § 408 (1997). The *Playboy* court explained that the burden shifts to the defendant after plaintiff submits *prima facie* evidence of ownership in the form of such copyright registration. *Playboy*, 839 F. Supp. at 1556.

79. See *JOYCE ET AL.*, *supra* note 11, at 692 (stating that direct evidence of infringement is almost always not available).

80. Compare *Schwartz v. Universal Pictures Co.*, 85 F. Supp. 270, 271 (S.D. Cal. 1945) (stating that access occurs when alleged infringer "saw the first person's work") with *Smith v. Little, Brown & Co.*, 245 F. Supp. 451, 458 (S.D.N.Y. 1965) (inferring access through defendant's "opportunity to see" original work).

81. See *NIMMER & NIMMER*, *supra* note 77, at § 13.03[A] (explaining substantial similarity).

It is clear that slight or trivial similarities are not substantial and are therefore non-infringing. But it is equally clear that two works may not be literally identical and yet, for purposes of copyright infringement, may be found substantially similar. The problem, then, is one of line drawing. Somewhere between the one extreme of no similarity and the other of complete and literal similarity lies the line marking off the boundaries of "substantial similarity."

Id. (footnotes omitted).

82. *JOYCE ET AL.*, *supra* note 11, at 692-93.

83. See, e.g., *Religious Tech.*, 907 F. Supp. at 1367 (showing simple conclusion of ownership and copying of copyrighted material); *Sega*, 857 F. Supp. at 686 (illustrating court's finding of ownership and copying); *Playboy*, 839 F. Supp. at 1556 (explaining court's determination of ownership of copyright and copying of protected works).

84. Compare *Religious Tech.*, 907 F. Supp. at 1381 (supporting plaintiff's theory of contributory infringement, but rejecting claims of direct and vicarious infringement) with *Sega*, 857 F. Supp. at 688 (stating that plaintiff established likelihood of success on

direct,⁸⁵ contributory,⁸⁶ and vicarious⁸⁷ infringement.⁸⁸

a. Direct Infringement

Individuals directly commit copyright infringement when they violate any of the exclusive rights of the copyright owner enumerated in section 106 of the Act of 1976.⁸⁹ The court in *Playboy Enterprises, Inc. v. Frena*⁹⁰ relied on the standard of direct copyright infringement⁹¹ to hold the defendant OSP liable.⁹² The defendant in *Playboy* operated a computer BBS.⁹³ The plaintiff maintained and the defendant admitted that the BBS displayed and made 170 computerized images of Playboy Enterprises, Inc.'s ("Playboy") copyrighted photographs available for users to download.⁹⁴ The plaintiff's infringement claim was based on BBS users downloading of copies of the photographs to their personal computers without Playboy's authorization.⁹⁵

merits for its claims of direct and contributory infringement) and *Playboy*, 839 F. Supp. at 1559 (relying solely on direct infringement to hold defendant liable).

85. See 17 U.S.C. § 501(a) (1997) (stating that individuals are directly liable for copyright infringement when they violate exclusive rights of copyright owners).

86. INTERNET LAW, *supra* note 4, at 13.

87. See *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963) (outlining that defendants may be liable for vicarious infringement if they are able to control conduct of infringers and obtain direct financial benefit from infringing activities).

88. See *White Paper*, *supra* note 2, at 115 (stating that U.S. copyright law allows courts to find defendants directly, contributorily, or vicariously liable for copyright infringement).

89. 17 U.S.C. § 501(a) (1997); see *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 437 n.18 (1984) (distinguishing actions of direct infringer from those of third party infringer).

90. 839 F. Supp. 1552 (M.D. Fla. 1993).

91. See *Religious Tech.*, 907 F. Supp. at 1373 (explaining that direct infringer personally commits violation of one of exclusive statutory rights granted to copyright holder). The court distinguished direct infringement from contributory and vicarious standards of liability where third persons violate the exclusive rights of the copyright owner. *Id.*

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

93. *Id.* at 1554.

94. *Id.* The defendant admitted that his customers downloaded each of the 170 images. *Id.* The defendant, however, contended that he never uploaded the images onto the BBS. *Id.*

95. *Id.* The court in *Mai Systems Corp. v. Peak Computer, Inc.*, held, "copying for purposes of copyright law occurs when a computer program is transferred from a permanent storage device to a computer's RAM [random access memory]." 991 F.2d 511, 518 (9th Cir. 1993). A computer's RAM temporarily records data and loses it when a user turns the computer off. See *Apple Computer, Inc. v. Formula Int'l Inc.*, 594 F. Supp. 617, 622 (C.D. Cal. 1984) (discussing transient properties of RAM). In contrast to

The court maintained that the defendant violated the plaintiff's exclusive right to distribute the works to the public.⁹⁶ The court held that it was enough that the defendant supplied a service that stored infringing copies of the work⁹⁷ and that the defendant was still liable even though he did not make the copies himself.⁹⁸ The court also determined that the defendant infringed on Playboy's right to display its work.⁹⁹ The court broadly construed the display right and stated that unauthorized transmission of a work over a computer system is a violation of the privilege to display one's work.¹⁰⁰ Moreover, the court noted that the display, which only BBS subscribers viewed, was sufficiently public to warrant a holding of infringement.¹⁰¹

RAM, a computer's read-only memory ("ROM") permanently stores files without losing them after the an individual turns the power off. A. BRUCE CARLSON & DAVID G. GISSER, *ELECTRICAL ENGINEERING: CONCEPTS AND APPLICATIONS* 615 (2d ed. 1990). Downloading enables people to obtain files and initially store them in the computer's RAM or transfer them for permanent storage in the computer's ROM. See generally, BARAN, *supra* note 2, at 18 (explaining that downloading lets user store information on her computer). Under the reasoning in *Mai Systems*, because subscribers transferred the downloaded photographs in *Playboy*, in the least, to their RAM, they copied the photographs for purposes of the Act of 1976. 991 F.2d at 519. Moreover, the court in *Religious Technology* held that a subscriber made copies when he uploaded files and "fixed" the files on BBS storage devices. 907 F. Supp. at 1368. The Act of 1976 requires that copyrighted works be "fixed in any tangible medium of expression, 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." 17 U.S.C. § 102 (1988). Fixation occurs when the work is in a form in which it is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101. The *Religious Technology* court held that uploaded files that remained on a bulletin board system for a maximum of eleven days satisfied the fixation requirement. 907 F. Supp. at 1368.

96. *Playboy*, 839 F. Supp. at 1556; see 17 U.S.C. § 106 (1997) (outlining exclusive rights of copyright owner).

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

98. *Id.* The court went on to hold that a court may find copyright infringement even though the defendant may have been unaware of the infringing activity. *Id.* at 1559. The court noted, "[i]ntent or knowledge is not an element of infringement, and thus even an innocent infringer is liable for infringement." *Id.*

99. *Id.* at 1557; see 17 U.S.C. § 106 (1997) (listing rights exclusively held by copyright owner).

100. *Playboy*, 839 F. Supp. at 1556-57. The court stated that the display right covers "the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system." *Id.* at 1556 (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. § 64 (1976)).

101. *Playboy*, 839 F. Supp. at 1557. A display is public if it occurs "where a substantial number of persons outside of a normal circle of family and its social acquaintances

In *Sega Enterprises, Ltd. v. MAPHIA*,¹⁰² the plaintiff, a video game manufacturer, sued the defendant, a BBS operator, for copyright infringement of the plaintiff's video games.¹⁰³ The plaintiff's video games were available, without the plaintiff's authorization, on the defendant's BBS for users to download.¹⁰⁴ The court, in issuing a preliminary injunction¹⁰⁵ enjoining the defendant from using the BBS for unauthorized copying of the plaintiff's video games,¹⁰⁶ found that defendant's operation of the BBS constituted *prima facie* direct infringement.¹⁰⁷

In *Religious Technology Center v. NetCom Online Communications Services, Inc.*,¹⁰⁸ the plaintiffs claimed that the defendant, NetCom Online Communications Services, Inc. ("NetCom"), an Internet access provider,¹⁰⁹ should be liable for a BBS user's copyright infringement.¹¹⁰ Prior to commencement of suit, the plaintiffs informed NetCom of the presence of the copyrighted works on the BBS, but NetCom failed to remove any of the materials.¹¹¹ Following NetCom's refusal to eliminate the infringing works from the BBS, the plaintiffs sued NetCom on the theory of direct liability.¹¹²

The court addressed whether NetCom should be directly li-

is gathered." *NIMMER & NIMMER*, *supra* note 77, at § 8.14[C] (1996). The court concluded that the viewing audience of BBS users satisfied the above criteria. *Playboy*, 839 F. Supp. at 1557.

102. 857 F. Supp. 679 (M.D. Cal. 1994).

103. *Sega*, 857 F. Supp. at 681-83.

104. *Id.* at 683. The court stated that an unlimited number of customers could have downloaded an uploaded game appearing on the bulletin board. *Id.*

105. Fed. R. Civ. P. 65.

106. *Sega*, 857 F. Supp. at 690.

107. *Id.* at 686.

108. 907 F. Supp. 1361 (N.D. Cal. 1995).

109. *See id.* at 1365 (stating that defendant's service provides BBS users with access to Internet).

110. *Id.* In *Religious Technology*, the plaintiffs own copyrights in certain works of L. Ron Hubbard, the founder of the Church of Scientology. *Id.* The plaintiffs complained that a BBS subscriber posted, without authorization, the copyrighted materials on the Internet. *Id.* at 1365-66. The plaintiffs not only sued the subscriber, but also sued the Internet access provider because it supplied the subscriber with a connection to the Internet and the means to post the copyrighted works. *Id.* at 1366.

111. *Id.* at 1366. When asked to halt any future infringement, NetCom maintained that they could not possibly prescreen bulletin board postings and refused to remove from their service subscribers suspected of infringement. *Id.* NetCom stated, however, that a technically reworked system may screen postings from specific persons. *Id.* at 1368. The court learned that NetCom has suspended accounts of users who had commercial software in their posted files. *Id.*

112. *Id.* at 1367.

able for infringement because they operated a service which temporarily stored uploaded copies of the plaintiff's copyrighted works.¹¹³ Unlike the court in *Playboy*, the *Religious Technology* court held that the defendant BBS operator did not directly infringe on the plaintiffs' exclusive rights to publicly distribute or display their copyrighted works.¹¹⁴ The court found that the defendant, by operating a service which automatically made copies of uploaded files, did not cause the works to be publicly distributed and displayed.¹¹⁵

b. Contributory Infringement

A contributory infringer aids a direct infringer by personally inducing or causing the infringement or by supplying the materials required for the infringement to take place.¹¹⁶ In both instances, the defendant must have knowledge of the infringing activity to be held liable.¹¹⁷ The *Sega* court raised the issue of the defendant's contributory infringement.¹¹⁸ The *Sega* court held that the defendant's provision of the BBS amounted to contributory infringement even though the defendant did not know exactly when subscribers downloaded the games from the BBS.¹¹⁹

In *Religious Technology*, the court denied NetCom's motion for summary judgment¹²⁰ and determined that the plaintiffs presented a genuine issue of fact¹²¹ regarding the contributory

113. *Id.* at 1367-68. The court stated that NetCom "did not take any affirmative action that directly resulted in copying plaintiffs' works other than by installing and maintaining a system whereby software automatically forwards messages received from subscribers . . . and temporarily stores copies on its system." *Id.* at 1368.

114. *See Religious Tech.*, 907 F. Supp. at 1372 (stating "[t]he court is not entirely convinced that mere possession of a digital copy on a BBS that is accessible to some members of the public constitutes direct infringement by the BBS operator.").

115. *Id.* The court commented, "[a]lthough copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party." *Id.* at 1370; *see White Paper*, *supra* note 2, at 101 (addressing strict liability aspect of infringement). Courts find infringement without referring to the intent of the infringer. *Id.*

116. *See Carmichael*, *supra* note 3, at 784 (explaining role of contributory infringer); *Sega*, 857 F. Supp. at 686 (discussing elements of contributory infringement).

117. *Sega*, 857 F. Supp. at 686.

118. *Id.* at 686-87.

119. *Id.*

120. *See Religious Tech.*, 907 F. Supp. at 1366 (explaining that court decided to treat NetCom's motion to dismiss as one for summary judgment).

121. *See id.* (stating that court may grant summary judgment in favor of NetCom if it finds no genuine issue as to any material fact); *see also* Fed. R. Civ. P. 56(c) (enumerating summary judgment standard).

infringement claim.¹²² The court in *Religious Technology* found a genuine dispute of fact regarding NetCom's knowledge of and substantial participation in the infringing activity.¹²³ The *Religious Technology* court, however, pointed out that NetCom was not contributorily liable for any infringement that occurred before they received notice of the infringing activity from the plaintiffs.¹²⁴

When analyzing the question of knowledge of infringing activity by an OSP for a finding of contributory infringement, U.S. courts have required more than a suspicion of infringement.¹²⁵ For example, in *Sega*, the court found that the OSP's encouragement of use of the service for downloading copyrighted video games constituted knowledge.¹²⁶ In addition, in *Religious Technology*, the court determined that the OSP did not know of infringement until after the plaintiff notified the OSP of the infringing activity.¹²⁷ In both cases, the defendants possessed more than adequate information to reasonably conclude that infringement did or would take place.¹²⁸

c. Vicarious Liability

The *Religious Technology* court granted summary judgment in favor of NetCom with respect to whether NetCom was vicariously liable for the infringement.¹²⁹ The court applied the standard of vicarious liability which states that a defendant must be

122. *Religious Tech.*, 907 F. Supp. at 1375.

123. *Id.* at 1374-75. The *Religious Technology* court stated that because the plaintiffs notified the defendant of the presence of infringing materials on the bulletin board, NetCom arguably knew or should have known of infringing activity. *Id.* at 1374. NetCom's failure to correct the situation after learning of possible infringement, indicated substantial participation and a possible finding of contributory infringement. *Id.* at 1375.

124. *Id.* at 1374. Prior to receiving notice of the infringing activity from the plaintiffs, NetCom was not aware of the infringement. *Id.*

125. *See id.* at 1374 (stating that defendants' lack of knowledge is reasonable where they are unable to verify infringement claim); *Sega*, 857 F. Supp. at 686-87 (citing defendant's direction and encouragement of infringement as satisfying contributory infringement requirement).

126. 857 F. Supp. at 687.

127. 907 F. Supp. at 1374.

128. *See id.* at 1366 (explaining that plaintiffs contacted defendants regarding infringing works appearing on Internet); *Sega*, 857 F. Supp. at 687 (concluding that plaintiffs have shown "strong likelihood of success on the merits" regarding contributory infringement claim).

129. *Religious Technology*, 907 F. Supp. at 1377.

capable of controlling the conduct of the infringer and receive a direct financial reward as a result of the infringement.¹³⁰ The court found a genuine issue of fact with regard to whether NetCom had the right and ability to control the subscriber's infringing acts.¹³¹ The court did not find a genuine issue of fact, however, regarding the claim that NetCom received direct financial benefit from the infringement.¹³² The court reasoned that NetCom's fixed subscriber fee is not a financial benefit that stems from the infringing activity.¹³³

C. U.K. Copyright Law

U.K. copyright law, like U.S. copyright legislation,¹³⁴ attempts to encourage creation of intellectual works by granting

130. *Id.* at 1375. The court stated, "a defendant is [vicariously liable] for the actions of a primary infringer where the defendant (1) has the right and ability to control the infringer's acts and (2) receives a direct financial benefit from the infringement." *Id.* The court, in *Shapiro*, enumerating the vicarious liability standard, stated:

When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials, even in the absence of actual knowledge that the copyright monopoly is being impaired, the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.

316 F.2d at 307; see NIMMER & NIMMER, *supra* note 77, at § 12.04[A][1] (stating that defendant does not need to know of infringing activity to be found vicariously liable).

131. *Religious Tech.*, 907 F. Supp. at 1376. NetCom's subscriber agreement requires that, in the event of an infringement, its subscribers be subject to remedial action by the service. *Id.* at 1375. NetCom explicitly prohibits copyright infringement and requires user indemnification for damage to third parties. *Id.* at 1376. NetCom, however, argued that they were not able to screen the large number of postings. *Id.* Conversely, the plaintiffs contended, and NetCom admitted, that if NetCom had modified their software, they would have had the ability to monitor incoming postings. *Id.*; see *id.* at 1368 (discussing NetCom's admission regarding possibility of reprogramming system to prescreen certain postings). The court found the plaintiffs' evidence persuasive and, accordingly, found a genuine issue of fact with respect to NetCom's control over the subscribers. *Id.* at 1376.

132. *Id.* at 1377.

133. *Id.* The court found that NetCom charges a fixed fee to subscribers and receives no direct financial benefit from the infringing postings. *Id.* The court cited arguments which analogized NetCom's situation to that of a landlord who is not liable for infringement on his premises. *Id.* at 1376; see Kelly Tickle, Comment, *The Vicarious Liability of Electronic Bulletin Board Operators for the Copyright Infringement Occurring on Their Bulletin Boards*, 80 IOWA L. REV. 391, 415 (1995) (stating that BBS operators are landlords who lease space on computer systems).

134. See *Mazer v. Stein*, 347 U.S. 210, 219 (1954) (stating "[t]he economic philosophy behind [U.S. copyright law] is the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare through the talents of authors and inventors.").

individuals exclusive rights over their creative endeavors.¹³⁵ U.K. copyright law of the eighteenth century gave authors the exclusive right to print books.¹³⁶ With the passage of time, legislators increased the scope of protection¹³⁷ and created laws to address technological advances.¹³⁸ The latest major effort to confront new technology came in 1988 with the promulgation of the Copyright, Designs, and Patents Act ("1988 Act").¹³⁹

1. The Restricted Acts

Like the U.S. legislation on copyrights, the 1988 Act has provisions concerning the exclusive rights of the copyright owner.¹⁴⁰ The 1988 Act, unlike U.S. legislation, addresses storage of copyrighted material on a computer.¹⁴¹ Under the provisions of the 1988 Act, storage of a copyrighted work on a computer amounts to copying.¹⁴² In addition, the 1988 Act defines a

135. See GROVES, *supra* note 28, at 1 (discussing importance of maintaining incentive to create copyrightable works).

136. INTERNET LAW, *supra* note 4, at 13; see JOYCE ET AL., *supra* note 11, at 6 (discussing U.K. copyright legislation in eighteenth century).

137. INTERNET LAW, *supra* note 4, at 13.

138. See GROVES, *supra* note 28, at 1 (acknowledging that advent of personal computer has forced copyright law to address computer software and databases).

139. Copyright, Designs, and Patents Act, 1988, ch. 48 (Eng.) in HALSBURY'S STATUTES FOURTH EDITION 337 (Butterworths 1991) [hereinafter 1988 Act]; see PETER STONE, COPYRIGHT LAW IN THE UNITED KINGDOM AND THE EUROPEAN COMMUNITY 3 (1990) (discussing history of British copyright legislation).

140. 1988 Act, *supra* note 139, § 16(1)(a)-(e), at 355. Section 16(1)(a)-(e) state:

(1) The owner of the copyright in a work has . . . the exclusive right to do the following acts in the United Kingdom: (a) to copy the work; (b) to issue copies of the work to the public; (c) to perform, show, or play the work in public; (d) to broadcast the work or include it in a cable program service; and (e) to make an adaptation of the work or do any of the above in relation to an adaptation.

Id.; see 17 U.S.C. § 106 (1997) (outlining exclusive rights of copyright owner in United States under Act of 1976).

141. 1988 Act, *supra* note 139, § 17(2), at 357; compare GROVES, *supra* note 28, at 55 (stating that 1988 Act addresses storage of work on computer) and INTERNET LAW, *supra* note 4, at 16 (discussing added provision for computer copying in 1988 Act) with *Mai Systems*, 991 F.2d at 518 (asserting common law conclusion that storage on computer's RAM constitutes copying for purposes of Act of 1976).

142. 1988 Act, *supra* note 139, § 17(2), at 357. The legislative history of the 1988 Act helps to clarify the treatment of computer programs. GROVES, *supra* note 28, at 55. "[I]t will be made clear that the rights given to copyright owners over reproduction extend to copying by fixing a work on [sic] any medium from which the work can in principle be reproduced." 1986 White Paper on *Intellectual Property and Innovation*, Cmnd 9712, ¶ 9.5. Accordingly, under the 1988 Act, "copying includes storing the work in any medium by electronic means[, where] electronic [is defined as] actuated by

temporary or incidental reproduction made on a computer as copying.¹⁴³

2. Infringement Standards

Under U.K. law, individuals commit copyright infringement if they, without the copyright owner's consent, violate any of the exclusive rights granted by the 1988 Act.¹⁴⁴ Such acts constitute primary infringement.¹⁴⁵ In addition, the 1988 Act categorizes certain activities which encompass dealing with infringing copies as secondary infringement.¹⁴⁶ Moreover, the U.K. legislators also included provisions for vicarious liability in the 1988 Act.¹⁴⁷

a. Primary Infringement

In the United Kingdom, individuals primarily infringe copyright when they, without the license of the copyright owner, copy,¹⁴⁸ distribute,¹⁴⁹ perform,¹⁵⁰ broadcast,¹⁵¹ or prepare an adaptation of¹⁵² a copyrighted work or authorize another to perform those acts.¹⁵³ Like the U.S. District Courts in *Playboy*¹⁵⁴ and

electric, magnetic, electro-magnetic, electro-chemical, or electro-mechanical energy." INTERNET LAW, *supra* note 4, at 16.

143. 1988 Act, *supra* note 139, § 17, at 357; GROVES, *supra* note 28, at 56. A provision defining incidental or temporary reproductions as copies impacts the question of Internet copyright infringement. INTERNET LAW, *supra* note 4, at 16. Following the scheme of the 1988 Act, "an unauthorized copy made temporarily in RAM while accessing a copyright[ed] work on the Internet would be an infringement." *Id.*

144. 1988 Act, *supra* note 139, § 16(2), at 355.

145. INTERNET LAW, *supra* note 4, at 16.

146. 1988 Act, *supra* note 139, §§ 22-26, at 360-64; *see* GROVES, *supra* note 28, at 65 (defining secondary infringement under broad category of "dealing"); STONE, *supra* note 139, at 48 (explaining secondary infringement).

147. *See* 1988 Act, *supra* note 139, § 16(2), at 355 (stating "[c]opyright in a work is infringed by a person who without the license of the copyright owner . . . authorizes another to [engage in primary infringement].").

148. 1988 Act, *supra* note 139, § 16(1)(a), at 355.

149. *Id.* § 16(1)(b), at 355.

150. *Id.* § 16(1)(c), at 355.

151. *Id.* § 16(1)(d), at 355.

152. *Id.* § 16(1)(e), at 355.

153. *Id.* § 16(2), at 355. Section 16(2) states, "[c]opyright in a work is infringed by a person who without the license of the copyright owner does, or authorizes another to do, any of the acts restricted by the copyright." *Id.* An individual who violates a restricted act is a primary infringer. STONE, *supra* note 139, at 41. The concept of primary infringement is essentially identical to the U.S. standard of direct infringement. *See White Paper supra* note 2, at 100 (defining infringer as one who without authorization violates exclusive rights set out in Act of 1976). Like U.S. law, knowledge is not an element of primary infringement. *Compare* GROVES, *supra* note 28, at 54 (stating that

Sega,¹⁵⁵ U.K. courts might find an OSP liable for primary infringement.¹⁵⁶ In *Playboy*, a U.S. court found that the OSP violated the plaintiff's rights to publicly distribute and display the copyrighted material.¹⁵⁷ Some U.K. legal practitioners speculated that a U.K. court, under the 1988 Act, might find an OSP directly liable for issuing unauthorized copies of the work to the public and showing or playing the work in public.¹⁵⁸ These commentators contemplated that a U.K. court might be more apt to find direct infringement because the 1988 Act stipulates that copying includes storing a work in any medium by electronic means¹⁵⁹ and materials are generally stored on an Internet host's computer before downloading occurs.¹⁶⁰

b. Secondary Infringement

The acts of secondary infringement include importation of infringing copies,¹⁶¹ possessing or dealing with an infringing copy,¹⁶² providing the means for making infringing copies,¹⁶³ permitting the use of premises for infringing performance,¹⁶⁴ and providing the apparatus for infringing performance.¹⁶⁵ The

knowledge is not element of infringement) *with White Paper supra* note 2, at 101 (stating that court may find infringement without considering state of mind of infringer).

154. 839 F. Supp. at 1559.

155. 857 F. Supp. at 686.

156. *See* INTERNET LAW, *supra* note 4, at 19 (speculating about policies of U.K. courts).

157. 839 F. Supp. at 1556; *see supra* notes 96-101 and accompanying text (discussing holding in *Playboy* case).

158. INTERNET LAW, *supra* note 4, at 19.

159. *See* 1988 Act, *supra* note 139, § 17(2), at 357 (outlining provision for storing work by electronic means).

160. INTERNET LAW, *supra* note 4, at 19. Because of the absence of case law on Internet copyright issues, legal scholars may only predict the policy approaches of U.K. courts. *Id.*

161. 1988 Act, *supra* note 139, § 22, at 360.

162. *Id.* § 23, at 361. The 1988 Act includes possession in the course of business under "possessing or dealing with an infringing copy." *Id.* § 23(a), at 361. The 1988 Act defines business as any trade or profession. *Id.* § 178, at 473; *see* GROVES, *supra* note 28, at 66 (discussing possessing or dealing in 1988 Act).

163. 1988 Act, *supra* note 139, § 24, at 362. Individuals may be liable for "providing the means for infringement" if they "let for hire . . . an article . . . designed or adapted for making copies of [a] work." *Id.* § 24(1)(d), at 362. Under that same category, a person may also be liable for unauthorized transmission of a work by means of a telecommunication system, such as telephone lines. *Id.* § 24(2), at 362; *see* GROVES, *supra* note 28, at 67-68 (defining in detail provisions of Section 24 of 1988 Act).

164. 1988 Act, *supra* note 139, § 25, at 363.

165. *Id.* § 26, at 363-64.

1988 Act requires that the secondary infringer know of the infringing activity.¹⁶⁶ The U.K. courts' interpretation of the knowledge requirement parallels that of the U.S. courts,¹⁶⁷ in that the U.K. courts maintain that knowledge includes a reasonable belief that the infringing activity has taken or will take place.¹⁶⁸ Accordingly, the court in *L.A. Gear, Inc. v. HI-TEC Sports, plc.* held that knowledge is present when a reasonable man's interpretation of known facts would result in more than a mere suspicion of infringement.¹⁶⁹

c. Vicarious Infringement

The House of Lords construed the concept of vicarious infringement in *CBS Songs v. Amstrad Consumer Electronics*¹⁷⁰ to ap-

166. See 1988 Act, *supra* note 139, §§ 22-26, at 360-64 (illustrating knowledge requirement for categories of secondary infringement). Under the Copyright Act of 1956 ("1956 Act"), the copyright owner needed to show that the secondary infringer "knew he was dealing with infringing copies . . ." GROVES, *supra* note 28, at 65; see Copyright Act, 1956, 4 & 5 Eliz. 2, ch. 74, § 5 (Eng.) [hereinafter 1956 Act] (outlining knowledge requirement). The 1988 Act reduced the copyright owner's burden of proving knowledge of infringing activity. GROVES, *supra* note 28, at 65. Under the 1988 Act, the copyright owner need only prove that the suspected infringer "knows or has reason to believe that infringement has taken, or would take, place." *Id.*

In *L.A. Gear, Inc. v. HI-TEC Sports, plc.*, the court distinguished the knowledge requirements under the 1956 and 1988 Acts by addressing the addition of the words "reason to believe" in the 1988 Act. [1992] F.S.R. 121, 129 (C.A.) (Eng.). The court stated that the 1956 Act attributed knowledge to a defendant when the defendant was aware of facts that led him to conclude that "it would be obvious that something was an infringing copy . . ." *Id.* In contrast, the court found that "reason to believe," under the 1988 Act, "involve[s] the concept of knowledge of facts from which a reasonable man would arrive at the relevant belief." *Id.* The court went on to hold, "[f]acts from which a reasonable man might suspect the relevant conclusion cannot be enough." *Id.*; see *Hutchison Personal Communications Ltd. v. Hook Advertising Ltd.*, [1995] F.S.R. 365, 379 (Ch.) (Eng.) (holding that merely putting defendants on notice of disputed facts was not sufficient to give defendant's reason to believe that they were dealing with infringing copies); see also *Religious Tech.*, 907 F. Supp. at 1374-75 (discussing that, in United States, notice of possible infringing activity given to defendants was enough to hold defendants to knowledge of infringement).

167. Compare *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (holding that courts may find defendants contributorily liable if they have reason to know that infringing activity is taking place) with *L.A. Gear* [1992] F.S.R. at 129 (implementing standard that copyright owner must prove that infringer "knows or has reason to believe that infringement has taken, or would take place").

168. GROVES, *supra* note 28, at 65.

169. See *L.A. Gear*, [1992] F.S.R. at 129 (stating "[f]acts from which a reasonable man might suspect the relevant conclusion cannot be enough.>").

170. [1988] 2 W.L.R. 1191, [1988] 2 All E.R. 484 (H.L.) (Eng.).

ply to those individuals who intentionally authorize a third person to commit infringement.¹⁷¹ In addition, the House of Lords stated that in order to be subject to vicarious liability, an individual granting the authority must be in a position to control the grantee's actions.¹⁷²

D. EC Copyright Law

Legal scholars contend that the European Community, in order to advance a single market economy, must concern itself with harmonization of copyright law.¹⁷³ The objectives of the European Community are furthered when Member States promulgate national copyright laws that are consistent with a common market.¹⁷⁴ As such, the European Community encourages little variance of copyright legislation between individual Member States.¹⁷⁵

1. The Goal of a Common Market

The European Community presently consists of fifteen Member States.¹⁷⁶ Each Member State has national laws relating to copyright.¹⁷⁷ EC law, however, affects the laws of the Member States and may supersede national legislation.¹⁷⁸ In the event of

171. *Id.* at 1203, [1988] 2 All E.R. at 493. The court defined authorizing as "purport[ing] to grant a third person the right to do the relevant act, whether the intention is that the grantee should do the act on his own account or on account of the grantor" *Id.* Prior to the House of Lords decision in *CBS Songs*, some U.K. courts viewed authorization more broadly. STONE, *supra* note 139, at 56. In *Performing Right Society, Ltd. v. Cyril Theatrical Syndicate, Ltd.*, the court stated that authorization may be inferred "from acts which fall short of being direct or positive; . . . indifference, exhibited by acts of commission or omission, may reach a degree from which authorization or permission may be inferred." [1924] 1 K.B. 1, 9 (C.A.) (Eng.); see STONE, *supra* note 139, at 56 (discussing different interpretations of meaning of authorizing).

172. *CBS Songs*, [1988] 2 W.L.R. at 1203, [1988] 2 All E.R. at 493.

173. Herman Cohen Jehoram & Ben Smulders, *The Law of the European Community and Copyright*, in INTERNATIONAL COPYRIGHT LAW AND PRACTICE EC-i, EC-67 (Melville B. Nimmer & Paul Edward Geller eds., 1996).

174. Thomas C. Vinje, *Harmonising Intellectual Property Laws in the European Union: Past, Present and Future*, [1995] 8 Eur. Intell. Prop. Rev. 361, 377.

175. *Id.* at 361.

176. Jehoram & Smulders, *supra* note 173, at EC-7. The six original members of the European Community were Belgium, France, Germany, Italy, Luxembourg, and the Netherlands. *Id.* They were later joined by Denmark, Ireland, the United Kingdom, Greece, Spain, Portugal, Sweden, Finland, and Austria joined at later dates. *Id.* at EC-7-8.

177. *Id.* at EC-7.

178. *Id.* In certain cases, courts must look to EC law before determining the actual

certain conflicts,¹⁷⁹ the Treaty Establishing the European Community¹⁸⁰ ("EC Treaty") and laws arising from its provisions will prevail over national legislation.¹⁸¹

Article 2 of EC Treaty sets out the overall aim of the European Community as the achievement of a common market.¹⁸² Subsequent provisions of the EC Treaty outline specific mandates designed to insure implementation of the common market.¹⁸³ Article 3(h) requires that Member State laws aid in the maintenance of the common market.¹⁸⁴ In addition, Articles 30 through 36 prohibit restrictions on imports of Member State goods in order to insure free movement of goods throughout the European Community.¹⁸⁵

effect of Member State legislation. *Id.* EC initiatives in the field of copyright impact the development of national copyright laws on many points. *Id.*

179. *See id.* at EC-16 (explaining that EC law is controlling in event of conflict with national intellectual property laws).

180. Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 537 [hereinafter EC Treaty], incorporating *changes made by Treaty on European Union*, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], as *amended by Single European Act*, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in *TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES* (EC Off'l Pub. Off. 1987).

181. *See* Jehoram & Smulders, *supra* note 173, at EC-16. EC law is "supranational," which means that it is binding on Member States and courts must apply EC law directly to claims in national forums. *Id.*; *see* *Costa v. ENEL*, Case 6/64, [1964] 3 C.M.L.R. 425, 443-44 (confirming direct binding effect of Community law).

182. EC Treaty, *supra* note 180, art. 2, [1992] 1 C.M.L.R. at 588. Article 2 states: The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies of activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among member-States.

Id.

183. Jehoram & Smulders, *supra* note 173, at EC-17.

184. EC Treaty, *supra* note 180, art. 3(h), [1992] 1 C.M.L.R. at 589. Article 3(h) calls for "the approximation of laws of member-States to the extent required for the functioning of a common market." *Id.* art. 3(h), [1992] 1 C.M.L.R. at 589; *see* Jehoram & Smulders, *supra* note 173, at EC-18 (discussing provisions in EC Treaty which aid in development of common market).

185. EC Treaty, *supra* note 180, arts. 30-36, [1992] 1 C.M.L.R. at 602-05; *see* Jehoram & Smulders, *supra* note 173, at EC-17 (discussing Articles of EC Treaty which address prohibitions on imports). The provisions of Articles 30 through 36 follow from Article 3's specific objectives of "eliminat[ing], as between member-States, customs du-

The European Court of Justice¹⁸⁶ ("ECJ") has held that the provisions and objectives set forth in the EC Treaty are applicable to copyright.¹⁸⁷ The ECJ incorporated intellectual property into Article 36¹⁸⁸ of the EC Treaty.¹⁸⁹ As a result of this incorporation, in order to insure a common market, the Council of Ministers¹⁹⁰ ("Council") may institute legislation, including directives,¹⁹¹ that harmonize copyright law among Member States.¹⁹²

ties and quantitative restrictions on the import and export of goods, and all other measures having equivalent effect," and of providing for a market "characterized by the abolition, as between member-States, of obstacles to the freedom of movement for persons, services, and capital." EC Treaty, *supra* note 180, art. 3(a),(c) [1992] 1 C.M.L.R. at 588; see Jehoram & Smulders, *supra* note 173, at EC-17 (explaining subsequent Articles of EC Treaty implementing broad aims of Article 3).

186. See EC Treaty, *supra* note 180, art. 164, [1992] 1 C.M.L.R. at 684 (outlining role of ECJ). Article 164 states, "[t]he Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed." *Id.*; see also Jehoram & Smulders, *supra* note 173, at EC-14 (stating that ECJ, located in Luxembourg, determines proper application of Community law).

187. *Coditel v. S.A. Cine Vog Films*, Case 62/79, [1980] E.C.R. 881, 894.

188. EC Treaty, *supra* note 180, art. 36, [1992] 1 C.M.L.R. at 605. Article 36 reads, "the provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on the grounds of . . . the protection of industrial and commercial property." *Id.*

189. *Coditel*, [1980] E.C.R. at 894; see Jehoram & Smulders, *supra* note 173, at EC-20 (describing that in *Coditel*, ECJ, in paraphrase of Article 36, replaced term "industrial and commercial property" with "intellectual property"). In *Membran/K-Tel*, the court enunciated the EC Treaty's applicability to copyright by stating, "there is no reason, according to the Court of Justice, to make a distinction between copyright and other industrial and commercial property rights." *Musik-Vertrieb Membran GmbH and K-tel International v. GEMA*, Joined Cases 55/80 and 57/80, [1982] 1 C.M.L.R. 630, 634, at ¶ 4.

190. See Jehoram & Smulders, *supra* note 173, at EC-11 (explaining Council of Ministers). The EC Council or Council of Ministers is comprised of representatives from the Member States and adopts most of the legislation for the European Community. *Id.*

191. See *id.* at EC-12 (stating that directive is piece of legislation requiring Member States to tailor their national laws to implement directive's provisions in order to create uniformity of law among Member States). Examples of directives in the field of copyright include, the Directive on the Legal Protection of Computer Programs ("Software Directive"), the Directive on the Rental Right, the Lending Right, and on Certain Rights Related to Copyright ("Rental Rights Directive"), the Directive on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission ("Satellite Broadcasting Directive"), and the Directive on the Legal Protection of Databases ("Database Directive"). See Council Directive No. 91/250/EEC, O.J. L 122/42 (1991) [hereinafter Software Directive] (providing copyright protection for computer programs); Council Directive No. 92/100/EEC, O.J. L 346/61 (1992) [hereinafter Rental Rights Directive] (laying out copyright holder's exclusive right to rent or lend protected material); Council Directive No. 93/83/EEC, O.J. L 248/15 (1993) [hereinafter Satellite Broadcasting Directive] (outlining guidelines for rights in satellite broadcasts); Council Directive No. 96/

2. Harmonization of Copyright Law

Legal scholars have argued that differences among Member States regarding the scope and modes of protection generated by copyright laws tend to thwart the advancement of the EC common market objective.¹⁹³ Varying levels of copyright protection from Member State to Member State cause uncertainties in trade and business transactions,¹⁹⁴ resulting in a depressed market for intellectual property.¹⁹⁵ In contrast, consistent copyright legislation among Member States fosters a strong business climate and encourages trade.¹⁹⁶ As a result, the European Community has encouraged community-wide harmonization of copyright laws.¹⁹⁷ Recent harmonization has occurred as a result of the emergence of new technologies and is evidenced by the Software,¹⁹⁸ Rental Rights,¹⁹⁹ Satellite Broadcasting,²⁰⁰ and Database²⁰¹ directives.²⁰²

a. Software Directive

The Software Directive provides protection for computer

9/EC, O.J. L 77/20 (1996) [hereinafter Database Directive] (detailing rights acquired by ownership of copyright in database).

192. Jehoram & Smulders, *supra* note 173, at EC-20.

193. *Id.* at EC-67.

194. Benjamin R. Kuhn, Note, *A Dilemma in Cyberspace and Beyond: Copyright Law for Intellectual Property Distributed over the Information Superhighways of Today and Tomorrow*, 10 *TEMPLE INT'L & COMP. L.J.* 171, 202 (1996).

195. *Id.*

196. Vinje, *supra* note 174, at 377.

197. Kuhn, *supra* note 194, at 202; Vinje, *supra* note 174, at 361. The drafters of the EC Treaty, anticipating a need for consistent legislation between the Member States, included a specific provision ordering the Council to provide for uniform laws when differences are hindering the overall aims of the European Community. EC Treaty, *supra* note 180, art. 100, [1992] 1 C.M.L.R. at 633; see Jehoram & Smulders, *supra* note 173, at EC-67 (discussing reasoning behind Article 100 of EC Treaty).

198. Software Directive, *supra* note 191, O.J. L 122/42 (1991).

199. Rental Rights Directive, *supra* note 191, O.J. L 346/61 (1992).

200. Satellite Broadcasting Directive, *supra* note 191, O.J. L 248/15 (1993).

201. Database Directive, *supra* note 191, O.J. L 77/20 (1996); see BARAN, *supra* note 2, at 28 (discussing on-line databases). "On-line databases are simply collections of various types of data (including text, but by no means limited to text). These databases reside in computers with on-line connectivity, either through a direct-dial connection, a commercial on-line service, or the Internet." *Id.* Subject matter included in databases includes periodicals, legal and medical information, airline schedules, and financial reports. *Id.* at 28-29.

202. See Kuhn, *supra* note 194, at 202 (stating that technological advancements have created need for copyright protection on international level).

programs by enumerating a series of restricted acts that an individual may not perform without authorization by a copyright owner.²⁰³ In addition, the Software Directive requires enforcement of the rights secured by a copyright holder.²⁰⁴ One legal expert contends that the Software Directive is arguably one of the more important accomplishments of EC intellectual property legislation²⁰⁵ because it illustrates the intent of the European Community to increase intellectual property protection²⁰⁶ and to develop international standards of copyright law.²⁰⁷

b. Rental Rights Directive

Under Article 2 of the Rental Rights Directive,²⁰⁸ the exclusive right to rent²⁰⁹ or lend²¹⁰ copyrighted material belongs to an

203. Software Directive, *supra* note 191, art. 4, O.J. L 122/42, at 44 (1991). Restricted acts under Article 4 of the Software Directive are those acts which the copyright holder has the "right to do or authorize." *Id.* Article 4(a) labels "the permanent or temporary reproduction of a computer program" as a restricted act and states that when "loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorization by the rightholder." *Id.* Further restricted acts under Article 4(b) and (c) include "translation, adaptation, arrangement[,] . . . any other alteration of a computer program, and the reproduction results thereof [and] . . . any form of distribution to the public, including the rental, of the original computer program or of copies thereof." *Id.* The Council adopted the Software Directive on May 14, 1991 and gave Member States until January 1, 1993 to comply with the Software Directive's terms. *Id.* arts. 10-11, O.J. L 122/42, at 46 (1991); Jehoram & Smulders, *supra* note 173, at EC-71. Only the United Kingdom, Denmark, and Italy were able to meet the January 1, 1993 deadline. Vinje, *supra* note 174, at 364. Since that time, however, all Member States have finalized legislation consistent with the Software Directive. *Id.*

204. Vinje, *supra* note 174, at 364. Article 7 of the Software Directive calls for appropriate remedies for "putting into circulation a copy of a computer program [and] possess[ing] for commercial purposes . . . a copy of a computer program." Software Directive, *supra* note 191, art. 7, O.J. L 122/42, at 45 (1991). In both cases, the infringer must "know, or have reason to believe, that it is an infringing copy." *Id.*

205. See Vinje, *supra* note 174, at 361-63 (stating that Software Directive is critical piece of intellectual property legislation in European Community).

206. *Id.* at 363.

207. Kuhn, *supra* note 194, at 203.

208. Rental Rights Directive, *supra* note 191, O.J. L 346/61 (1992). The Council adopted the Rental Rights Directive on November 19, 1992, and the Member State implementation deadline was July 1, 1994. *Id.* arts. 15(1), 16, O.J. L 346/61, at 66 (1992); Jehoram & Smulders, *supra* note 173, at EC-74. Six Member States, Belgium, Greece, France, Italy, Austria, and Sweden, have set forth legislation in accordance with the aims of the Directive. Vinje, *supra* note 174, at 370.

209. See Rental Rights Directive, *supra* note 191, art. 1, O.J. L 346/61, at 63 (1992) (defining rental as "making available for use, for a limited period of time and for direct or indirect economic or commercial advantage.").

210. See *id.* art. 1, O.J. L 346/61, at 63 (1992) (defining lending as "making avail-

author, performer, phonogram producer, or film producer.²¹¹ The Rental Rights Directive, in order to insure the effectiveness of the rental and lending rights, requires Member States to provide exclusive rights of fixation, reproduction, communication to the public, and distribution of copyrighted works.²¹²

c. Satellite Broadcasting Directive

The Council offered the Satellite Broadcasting Directive²¹³ to allow free movement of television programming throughout the European Community.²¹⁴ The Satellite Broadcasting Directive requires that broadcasters acquire their rights in a transmission from the Member State where the broadcaster introduces the satellite signals.²¹⁵ This requirement eliminates the confu-

able for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public.”).

211. *Id.* art. 2, O.J. L 346/61, at 63 (1992). Article 2(1) states:

The exclusive right to authorize or prohibit rental and lending shall belong to the author in respect of the original and copies of his work, to the performer in respect of fixations of his performance, to the phonogram producer in respect of his phonograms, and to the producer of the first fixation of a film in respect of the original and copies of his film. For the purposes of this Directive, the term film shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.

Id.

212. *Id.* arts. 6-9, O.J. L 346/61, at 64 (1992); see Vinje, *supra* note 174, at 370 (stating effective rental and lending rights are contingent on harmonization of exclusive rights of fixation, reproduction, public broadcast, and distribution for performers, producers, and broadcasters among Member States).

213. Satellite Broadcasting Directive, *supra* note 191, O.J. L 248/15 (1993). The Council adopted the Satellite Broadcasting Directive on September 27, 1993 with an implementation date of January 1, 1995. *Id.* arts. 14(1), 15, O.J. L 248/15, at 21 (1993); Jehoram & Smulders, *supra* note 173, at EC-77. As of 1995, none of the Member States have finalized conforming legislation. Vinje, *supra* note 174, at 370.

214. Kuhn, *supra* note 194, at 206.

215. Satellite Broadcasting Directive, *supra* note 191, art. 1(2), O.J. L 248/15, at 19 (1993). Article 1(2)(a) and (b) state:

(a) For the purpose of this Directive, communication to the public by satellite means the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public (b) The act of communication to the public occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced

Id.; see Kuhn, *supra* note 194, at 206 (explaining point of insertion theory); Vinje, *supra* note 174, at 370 (stating that broadcasters obtain rights only in Member State where signal originates).

sion created by the application of various national laws to one broadcast.²¹⁶ Under the Satellite Broadcasting Directive, broadcasters will no longer have to negotiate for copyright royalties in every Member State receiving the broadcast.²¹⁷

d. Database Directive

The Database Directive²¹⁸ provides the owner of a database with the exclusive rights of reproduction, translation, adaptation, distribution, and communication to the public of the database.²¹⁹ The Database Directive conditions the above rights on the originality²²⁰ of the database, which authors satisfy if the selection and arrangement of the contents reflects their intellectual creations.²²¹ In addition, the Database Directive also offers a *sui generis* right²²² prohibiting unauthorized extraction for

216. See Satellite Broadcasting Directive, *supra* note 191, Recital 14, O.J. L 248/15, at 16 (1993) (stating that definition detailing where act of communication takes place "is necessary to avoid the cumulative application of several national laws to one single act of broadcasting.").

217. Vinje, *supra* note 174, at 370.

218. Database Directive, *supra* note 191, O.J. L 77/20 (1996). The Council adopted the Database Directive on March 11, 1996 with a deadline for Member State implementation of January 1, 1998. *Id.* arts. 16(1), 17, O.J. L 77/20, at 27-28 (1996).

219. *Id.* art. 5, O.J. L 77/20, at 25 (1996). Article 5 states:

[T]he author of a database shall have the exclusive right to carry out or authorize: (a) temporary or permanent reproduction by any means and in any form, in whole or in part; (b) translation, adaptation, arrangement and any other alteration; (c) any form of distribution to the public of the database or of copies thereof . . . (d) any communication, display or performance to the public

Id.

220. See JOYCE ET AL., *supra* note 11, at 27 (explaining that originality requires that copyrighted material be author's own work, not copied from another work).

221. Database Directive, *supra* note 191, art. 3, O.J. L 77/20, at 25 (1996); see Vinje, *supra* note 174, at 366 (explaining selection and arrangement standard of originality). The European Commission, by requiring selection and arrangement, has adopted a similar approach to the U.S. Supreme Court's determination in *Feist*. *Id.*; see *Feist Publications, Inc. v. Rural Telephone Serv. Inc.*, 499 U.S. 340, 350-51 (1991) (holding that Court must look to author's selection and arrangement of material in compilation of data when measuring originality).

222. See Jehoram & Smulders, *supra* note 173, at EC-86-88 (explaining *sui generis* right as protecting not results of originality or creativity, but author's investment of time, effort, and financial resources in creating database); see also Vinje, *supra* note 174, at 366 (explaining *sui generis* protection). The U.S. Supreme Court, in *Feist*, rejected the equivalent of the *sui generis* right, "sweat of the brow" protection. *Feist*, 499 U.S. at 354. The court stated, "[t]o accord copyright protection on [the] basis [of sweat of the brow] alone distorts basic copyright principles in that it creates a monopoly in public domain materials without the necessary justification of protecting and encouraging the

commercial purposes of the contents of the database, which is available regardless of the originality of the database.²²³

II. DETERMINING SCOPE OF OSP LIABILITY FOR COPYRIGHT INFRINGEMENT

Governments around the world face the challenge of establishing the legislative groundwork for international intellectual property protection in the new information society.²²⁴ The Task Force, in the White Paper, maintains that the use of interactive digital information networks is expanding²²⁵ and that U.S. legislators must define the scope of copyright protection of works in digital form.²²⁶ U.K. legal scholars also maintain that legislators much reach conclusions regarding copyright law in the face of Internet technology.²²⁷ Similarly, legal experts in the European Community stress the importance of ascertaining the boundaries of protection in the digital age.²²⁸

A. Reconciling the Scope of Exclusive Rights with the Internet

Representatives at the December 1996 meeting of the WIPO attempted to determine the scope of exclusive rights for the digital environment.²²⁹ The signatories, consistent with theories that the European Community and the Task Force espoused,²³⁰

creation of 'writings' by 'authors.'" *Id.* (quoting NIMMER & NIMMER, *supra* note 77, at § 3.04).

223. Database Directive, *supra* note 191, art. 7, O.J. L 77/20, at 25-26 (1996). Article 7(1) states:

Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

Id. art. 7(1), O.J. L 77/20, at 25 (1996).

224. *White Paper*, *supra* note 2, at 148.

225. *Id.*

226. *Id.* at 148.

227. INTERNET LAW, *supra* note 4, at 13.

228. Commission of the European Communities, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Illegal and Harmful Content on the Internet, COM (96) 487 Final at 4-5 (Oct. 1996) [hereinafter Internet Communication].

229. Lewis, *supra* note 20, at A1.

230. See Green Paper Follow-Up, *supra* note 17, COM (96) 586 Final at 8 (recommending that legislators apply existing copyright concepts to digital technology); *White*

applied traditional copyright concepts to new technologies.²³¹ Though WIPO drafters favored expansion of conventional copyright principles to conform with computerized reproduction and dissemination, some legal scholars maintain that legislators should develop new exclusive rights to address Internet communications.²³²

1. U.S. Proposals: White Paper and Commentary

The Task Force proposed that Congress amend the exclusive right to distribute copyrighted works to the public²³³ to include a provision that recognizes that copyright owners also have the exclusive right to distribute copies of their works to the public by transmissions over high-speed communications systems.²³⁴ In addition, the Task Force defined transmission to apply to individuals using a device or process to distribute reproductions.²³⁵ The Task Force's definition encompasses reproductions which are fixed after a transmission.²³⁶ The Task Force maintained that the proposal does not create a new right, but instead, in response to technological advancements, recognizes that the distribution right addresses transmissions.²³⁷

In contrast, one legal commentator adopted the view that the traditional idea of distribution is obsolete in the world of digital dissemination.²³⁸ This individual set forth the concept of

Paper, *supra* note 2, at 212 (stating that legislators need only amend Act of 1976 to deal with technological advances).

231. See WIPO Copyright Treaty, *supra* note 20, pmbl. (stating need to "clarify the interpretation of existing rules in order to provide adequate solutions to questions raised by new . . . technological developments.").

232. See Elkin-Koren, *supra* note 22, at 387 (arguing that traditional distribution right is not adequate to address online technology); see also Simon Olswang, *Accessright: An Evolutionary Path for Copyright into the Digital Era?*, [1995] 5 EUR. INTELL. PROP. REV. 215, 217 (advocating exclusive right to control access to works online).

233. 17 U.S.C. § 106(3) (1997).

234. *White Paper*, *supra* note 2, at 213. The proposed law would state that a copyright owner has the exclusive right "to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, by rental, lease, or lending, or by transmission." *Id.* at app. 2 (emphasis in original). The Task Force also decided that Congress should amend the definition of publication to recognize that individuals may publish their works through distribution to the public by transmission. *Id.* at 219.

235. *Id.* at 217 n.543. "[T]o transmit a reproduction is to distribute it by any device or process whereby a copy . . . of the work is fixed beyond the place from which it was sent." *Id.*

236. *Id.*

237. *Id.* at 213-14.

238. Elkin-Koren, *supra* note 22, at 387.

defining distribution in terms of providing access to information.²³⁹ The commentator determined that if lawmakers replaced the distribution right with a right to restrict access, they would upset the balance of power between the public and providers of information.²⁴⁰ The author postulated that, under an access defined regime, artists and OSPs would be able to exercise more control over dissemination of works.²⁴¹ The writer illustrated this fact by explaining that, with an access right, an OSP would have the power to restrict access to online information, but individuals, under the present distribution system, are unable to restrict access to printed books once consumers have the physical copies in their possession.²⁴²

2. EC Proposals: Legislation Based on Existing Copyright Principles

The European Commission²⁴³ ("Commission") fosters the view that the development of the Information Society²⁴⁴ in the European Community is contingent on the existence of a Single Market for new products and services.²⁴⁵ The Commission believes that the European Community must provide for consistent

239. *Id.*; see Olswang, *supra* note 232, at 217 (advocating digital age system which grants creators' right to control access to their works). One legal scholar from the United Kingdom stated that the present copyright concepts are becoming "arcane and artificial." *Id.* at 215. This legal commentator stated that a regime premised on copyright owners' rights to control access would require that accused infringers prove that they knew that the copyright owner authorized access to a downloaded copy. *Id.* at 217. Therefore, the right of access caters to the digital era by taking the burden of proving knowledge away from the copyright holder and placing it on the possessor of the infringing copy. *Id.* at 218.

240. Elkin-Koren, *supra* note 22, at 389.

241. *Id.* at 388-89.

242. *Id.* at 389.

243. See Jehoram & Smulders, *supra* note 173, at EC-13 (explaining role of European Commission). The Commission is the "guardian" of the EC Treaty, and is responsible for carrying out its objectives. *Id.* The Commission proposes legislation and most articles in the EC Treaty require the Council of Ministers to act on the Commission's proposals. *Id.* The physical make-up of the Commission consists of two Commissioners from France, Germany, Italy, Spain, and the United Kingdom, and one Commissioner from each of the remaining Member States. *Id.*

244. See Green Paper Follow-Up, *supra* note 17, COM (96) 586 Final at 4 (explaining that Information Society relates to EC information infrastructure and intellectual property laws governing products and services in the European Community).

245. *Id.*

Member State responses to new technologies.²⁴⁶ Moreover, the Commission states that the European Community must ensure uniform opportunity for creators to market and exploit their works in the highly technical environment.²⁴⁷

The Council has responded to the changing technology by adopting copyright directives.²⁴⁸ The Commission believes that the Council needs to continue its response to technical advancements and has advocated further harmonization of copyright law to deal with Internet technology.²⁴⁹ The Commission further states that legal and regulatory certainty regarding Internet services is an absolute prerequisite to the development of a strong EC market based on the new technology.²⁵⁰

The Commission maintains that the traditionally high level of intellectual property protection in the European Community must continue even in the face of technological developments.²⁵¹ In order to accomplish this task, the Commission postulates that lawmakers must meet the needs of the new market without changing existing copyright concepts.²⁵² As such, the Commission recommends only minor changes to EC copyright regulations to accommodate the advancements in information services.²⁵³

246. *Id.* The Commission fears that inconsistent national laws relating to new technology will thwart the development of the Single Market. *Id.*

247. *Id.*

248. See *supra* note 191 and accompanying text (outlining Software, Rental Rights, Satellite Broadcasting and Database Directives in field of copyright law).

249. Green Paper Follow-Up, *supra* note 17, COM (96) 586 Final at 8; see Internet Communication, *supra* note 228, at 4 (stating that divergent Member State responses to question of regulation of Internet services may lead to re-fragmentation of Single Market); see also Kuhn, *supra* note 194, at 202 (stating that new technologies create need for international copyright regulation).

250. Internet Communication, *supra* note 228, at 4-5; see Vinje, *supra* note 174, at 377 (stating that increased harmonization of copyright legislation results in more attractive market for intellectual property).

251. Green-Paper Follow-Up, *supra* note 17, COM (96) 586 Final at 8; see Vinje, *supra* note 174, at 361 (stating intellectual property harmonization plan favors rightsholders). EC institutions are attempting to harmonize intellectual property legislation, while strengthening it at the same time. *Id.* In addition, Directorate-General XV ("DG XV"), a branch of the Commission primarily responsible for proposing intellectual property law, espouses a broad view of intellectual property protection and is in favor of applying traditional principles of protection to new technologies. *Id.*

252. Green Paper Follow-Up, *supra* note 17, COM (96) 586 Final at 8.

253. *Id.*

a. Reproduction Right

Presently, all Member States provide some sort of exclusive reproduction right²⁵⁴ of copyrighted material, but the national provisions differ in scope and limitations of the reproduction right.²⁵⁵ Furthermore, the international reproduction right, that the Berne Convention sets forth, is subject to broad interpretation.²⁵⁶ The question facing the Commission is how to determine the extent to which electronic reproductions on the Internet are violations of the exclusive reproduction right.²⁵⁷ The Commission recognizes that a variety of computerized processes may constitute reproduction²⁵⁸ and, as such, wishes to eliminate

254. See, e.g., French Intellectual Property Code, Law No. 92-597 of July 1, 1992 [hereinafter French IP Code], art. L.122-3 (defining reproduction right). The French IP Code provides:

Reproduction shall consist of a material fixation of a work by any and all methods that allow it to be communicated to the public in an indirect fashion. It can be accomplished, notably, by printing, drawing, engraving, photographing, casting, and all processes of the graphic and plastic arts, or by mechanical, cinematographic, or magnetic recording.

Id.

255. Green Paper Follow-Up, *supra* note 17, COM (96) 586 Final at 9.

256. *Id.* Article 9 of the Berne Convention, setting forth the reproduction right, states:

1. Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.
2. It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.
3. Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

Berne Convention, *supra* note 52, art. 9, at 8.

257. Green Paper Follow-Up, *supra* note 17, COM (96) 586 Final at 9.

258. *Id.* The Commission, exploring the reproduction right in light of advances in technology, states:

In the Information Society . . . traditional forms of reproduction . . . coexist with a multitude of new forms of reproducing works . . . such as scanning of a printed work, or loading and/or storing of digitized material in a computer memory Reproduction may also arise from incidental and ephemeral acts which occur from normal use of an electronic system, for instance, when transmitting material over . . . the Internet. The question has arisen how far such new acts of reproduction are covered by the traditional reproduction right

Id.

As a result of an agreement reached at the December 1996 meeting of WIPO, in Geneva, Switzerland, representatives from 160 countries clarified the scope of the reproduction right to a limited extent. Scheisel, *supra* note 20, at A1. The WIPO Per-

present uncertainty within the European Community regarding the scope of the electronic reproduction right.²⁵⁹ The Commission cites the importance of this clarification for preventing adverse effects on the growth of the Single Market.²⁶⁰

b. Right of Communication to the Public

The Commission appreciates the nature of digital technology and understands that potential users of on-line services have a myriad of information at their fingertips.²⁶¹ The potential users of on-line services represent members of the public, and, as such, electronic transmissions, over such mediums as the Internet, encompass more than private communication.²⁶² The Commission, therefore, seeks to define the on-demand receipt of digital information in terms of a right of communication to the public.²⁶³

performances and Phonograms Treaty states in article 7, “[p]erformers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form.” WIPO Performances and Phonograms Treaty, *supra* note 20, art. 7. Similarly, article 11 states, “[p]roducers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their phonograms in any manner or form.” *Id.* art 11. The WIPO delegates further developed the reproduction right by stating:

The reproduction right, as set out in Article 9 of the Berne Convention . . . fully appl[ies] in the digital environment, in particular for the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

Agreed Statements Concerning the WIPO Copyright Treaty, *adopted by* the Diplomatic Conference on Dec. 20, 1996, art. 1(4) <<http://www.wipo.org/eng/diplconf/distrib/96dc.htm>> [hereinafter Agreed Statements Concerning WIPO Copyright Treaty]; *see* Agreed Statements Concerning the WIPO Performances and Phonograms Treaty, *adopted by* the Diplomatic Conference on Dec. 20, 1996, arts. 7, 11 <<http://www.wipo.org/eng/diplconf/distrib/96dc.htm>> [hereinafter Agreed Statements Concerning WIPO Performances and Phonograms Treaty] (outlining application of reproduction right of performances and phonograms in digital environment); *see also* Scheisel, *supra* note 20, at A1 (stating that drafters of agreement refused to treat “temporary computer copies automatically created to view graphics and other information from the Internet” as violation of reproduction right).

259. Green-Paper Follow-Up, *supra* note 17, COM (96) 586 Final at 11.

260. *Id.* at 10.

261. *Id.* at 12. A consumer using a personal computer is able to access, at any given time, electronic transmissions of texts, software, phonograms, and databases. *Id.*; *see* BARAN, *supra* note 2, at 23-25 (discussing availability of electronic information on-line).

262. Green-Paper Follow-Up, *supra* note 17, COM (96) 586 Final at 12.

263. *Id.* Articles 11, 11bis, and 11ter of the Berne Convention provide for the right of communication to the public. Berne Convention, *supra* note 52, arts. 11-11ter,

The present law of the European Community does not provide an exclusive right to on-demand transmissions²⁶⁴ and most of the Member States favor inclusion of such transmissions under a broad right of communication to the public.²⁶⁵ The Member States maintain that the additional right of communication to the public will safeguard privileges that the reproduction right does not reach.²⁶⁶ The Commission, therefore, is advocating the harmonization of the communication right, with little deviance from the traditional communication right outlined in the Berne Convention.²⁶⁷

c. Distribution Right

The right of distribution gives creators the right to control dissemination of their works.²⁶⁸ Rightsholders, however, may exhaust their distribution rights once they consent to public circulation of their works.²⁶⁹ All Member States recognize a right of distribution,²⁷⁰ and some of the copyright directives²⁷¹ have par-

at 9-10. Article 11bis(1)(ii) reads, "[a]uthors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public by wire" *Id.* art. 11bis, at 9. Article 11ter(1)(ii) reads, "[a]uthors of literary works shall enjoy the exclusive right of authorizing any communication to the public of the recitation of their works." *Id.* art. 11ter, at 10.

The WIPO Copyright Treaty sets forth, in Article 8, the Right of Communication to the Public which addresses on-demand transmissions. WIPO Copyright Treaty, *supra* note 20, art. 8. Article 8 states:

authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

Id.

264. Green Paper Follow-Up, *supra* note 17, COM (96) 586 Final at 14.

265. *Id.*

266. *Id.* at 13.

267. *Id.* at 14. The Commission favors keeping the present definition of public and does not wish to redefine the term for the digital environment. *Id.*

268. *Id.* at 17.

269. Green Paper Follow-Up, *supra* note 17, COM (96) 586 Final at 17.

270. *Id.* The distribution rights differ in scope and limitations among Member States. *Id.*

271. See, e.g., Rental Rights Directive, *supra* note 191, art. 9, O.J. L 346/61, at 64 (1992) (outlining distribution right). Article 9 states:

1. Member States shall provide for performers, . . . phonogram producers, . . . producers of the first fixations in their films, . . . broadcasting organizations, the exclusive right to make available [their works], including copies thereof,

tially harmonized the distribution right.²⁷² The Commission proposes complete harmonization of the distribution right for all types of copyrighted works.²⁷³ In addition, the Commission asserts that the distribution right should not be exhausted with respect to online services.²⁷⁴ The Commission maintains that a lack of exhaustion of the distribution right regarding online services is consistent with the ECJ's holding in *Coditel v. S.A. Cine Vog Films*,²⁷⁵ which stated that courts should not apply the exhaustion principle to the provision of services with a Community element.²⁷⁶

3. WIPO Treaties

The WIPO Copyright²⁷⁷ and the WIPO Performances and Phonograms²⁷⁸ Treaties offer international responses to concerns about copyright law in the digital age.²⁷⁹ The WIPO Copyright Treaty set forth provisions outlining a creator's exclusive right to control communications to the public that enable individuals to access the creator's works at a time and place chosen by the accessing individual.²⁸⁰ In agreed statements concerning the WIPO Copyright Treaty, the drafters concluded that the provision of facilities for making a communication does not amount to a violation of the communication right.²⁸¹

The WIPO Performances and Phonograms Treaty outlined

to the public by sale or otherwise, hereafter referred to as the distribution right.

2. The distribution right shall not be exhausted within the Community in respect of an object as referred to in paragraph 1, except where the first sale in the Community of that object is made by the rightholder or with his consent.

Id.; see also Software Directive, *supra* note 191, art. 4(c), O.J. L 122/42, at 44 (1991) (enumerating distribution right).

272. Green Paper Follow-Up, *supra* note 17, COM (96) 586 Final at 17-18.

273. *Id.* at 19.

274. *Id.*

275. *Id.*; see *Coditel*, [1980] E.C.R. at 887 (explaining application of exhaustion principle).

276. See *Coditel*, [1980] E.C.R. at 887 (holding that in order for court not to apply exhaustion principle, provision of services must contain Community element).

277. WIPO Copyright Treaty, *supra* note 20.

278. WIPO Performances and Phonograms Treaty, *supra* note 20.

279. West's Legal News Staff, *WIPO Press Release No. 106*, WLN, Jan. 16, 1997, at 1 [hereinafter *Press Release 106*].

280. WIPO Copyright Treaty, *supra* note 20, art. 8; see *supra* note 263 and accompanying text (discussing WIPO Copyright Treaty and conclusions regarding right of communication to public).

281. *Press Release 106*, *supra* note 279, at 1; see *Agreed Statements Concerning the*

provisions for the scope of artists' rights to authorize reproductions of their works²⁸² and specified that storage of a performance or phonogram in digital form constitutes a reproduction.²⁸³ Members of the online industry, who sought liberal copyright laws,²⁸⁴ praised the treaties.²⁸⁵ The online industry was pleased that drafters decided to exclude, from the WIPO Performances and Phonograms Treaty, language labelling temporary, transient, or incidental copies made on a computer as reproductions.²⁸⁶

B. *Reconciling Standards of Infringement with the Internet*

Lawmakers in the United States, the United Kingdom, and the European Community have not finalized legislation regarding copyright infringement liability standards for OSPs.²⁸⁷ In the United States, the Task Force argued in favor of applying conventional liability standards to OSPs.²⁸⁸ Some U.S. legal commentators opposed the position of the Task Force and advocated limiting OSP liability to contributory or vicarious infringement standards.²⁸⁹ In the United Kingdom, legal specialists have predicted that U.K. courts will apply known copyright liability principles to OSPs²⁹⁰ and that the policy concerns of each court will determine the scope of such application.²⁹¹ In the Euro-

WIPO Copyright Treaty, *supra* note 258, art. 8 (stating that provision of facilities to make communication is not itself communication).

282. WIPO Performances and Phonograms Treaty, *supra* note 20, arts. 7,11; *see supra* note 258 and accompanying text (discussing reproduction right set forth in treaty).

283. Agreed Statements Concerning WIPO Performances and Phonograms Treaty, *supra* note 258, arts. 7, 11.

284. West's Legal News Staff, *Copyright Liberals Claim Victory on Recent WIPO Treaty Decisions in Geneva*, WLN, Dec. 27, 1996, at 1 [hereinafter *Copyright Liberals*].

285. *Id.*

286. *Id.*; *see* Scheisel, *supra* note 20, at A1 (discussing exclusion of language from definition of reproduction).

287. *See* BNA, Inc., *supra* note 17, at 394-95 (explaining unsettled U.S. legislation regarding OSP liability); INTERNET LAW, *supra* note 4, at 19 (stating that U.K. courts have not addressed OSP liability); Internet Communication, *supra* note 228, at 13 (acknowledging that lawmakers in European Community need to legislate on issue of OSP liability).

288. *See White Paper*, *supra* note 2, at 114-24 (advocating application of current standards of copyright infringement liability to OSPs).

289. *See, e.g.,* Carmichael, *supra* note 3, at 787 (arguing in favor of contributory and vicarious liability standards for OSPs).

290. INTERNET LAW, *supra* note 4, at xii.

291. *Id.* at 19.

pean Community, the Commission has stated that legislators should impose liability on OSPs who directly place infringing works online.²⁹² The Commission, however, has not yet determined the proper standard for OSP liability when third parties upload infringing works.²⁹³

1. U.S. Proposals: White Paper and Commentary

Those in favor of limiting the liability of OSPs argue that monitoring the OSPs will restrict access to information and prevent the advancement of digital technology.²⁹⁴ The Task Force, however, fostered strong positions in favor of only minor modifications to the present system of copyright.²⁹⁵ Furthermore, the Task Force postulated that, because OSPs are in the best position to monitor infringing activities on their services,²⁹⁶ it is premature for legislators to hold OSPs to lower standards of liability.²⁹⁷

a. Limiting Liability

Estimates indicate that trillions of bits²⁹⁸ of information travel through computer networks each day.²⁹⁹ Providers of large online services cannot keep up with the high volume of messages and files that users are uploading to their systems.³⁰⁰ Accordingly, an OSP's main argument against liability is the impossibility of detecting infringing materials on its networks.³⁰¹

Proponents of reduced liability contend that a legal requirement for increased bulletin board monitoring will cause BBS op-

292. Internet Communication, *supra* note 228, at 13.

293. *Id.*

294. See Elkin-Koren, *supra* note 22, at 407 (stating "imposing liability perpetuates the pre-digitized distribution structures and prevents BBSs from . . . becoming a mecca of social participation and decentralization of power."); see also *White Paper*, *supra* note 2, at 115-16 (presenting arguments against OSP liability).

295. See *White Paper*, *supra* note 2, at 114-124 (arguing against reducing liability of OSP).

296. *Id.* at 117.

297. See *id.* at 122 (stating "the Working Group believes it is, at best, premature to reduce the liability of any type of service provider in the NII environment.").

298. See BARAN, *supra* note 2, at 232 (defining bit as one unit of digital information). Eight bits constitute a byte. *Id.*

299. *White Paper*, *supra* note 2, at 116.

300. *Id.*

301. *Id.* at 115-16; see *Religious Tech.*, 907 F. Supp. at 1376 (illustrating Internet access provider's argument that it is impossible to screen large number of postings).

erators to either limit the types of materials posted or totally refrain from running an online service.³⁰² These advocates maintain that copyright policy does not justify the results of increased liability because heightened liability will restrict public access to information.³⁰³ Furthermore, this view holds that laws should only enforce the copyright owner's rights to the extent that protection advances the dissemination of information.³⁰⁴

Some legal opinions foster the view that lawmakers should premise OSP liability on the contributory or vicarious liability standards, and not on a theory of direct infringement.³⁰⁵ An OSP generally does not upload or download the copyrighted material onto the service.³⁰⁶ An OSP's lack of direct participation in file transfers makes it difficult to prove direct infringement.³⁰⁷ Conversely, under the contributory and vicarious standards, an individual does not have to physically participate in the violation of a copyright owner's exclusive rights for a court to hold that individual liable.³⁰⁸ Thus, the opinions set forth that these crite-

302. *White Paper*, *supra* note 2, at 116; Elkin-Koren, *supra* note 22, at 406. In order to decrease the cost of monitoring, online services might choose to post only materials which they own or have a license to use. *Id.* In addition, OSPs predict that if the laws expose them to liability for infringement, they will terminate their businesses, and cause the eventual destruction of information superhighway. *White Paper*, *supra* note 2, at 116. Similarly, the risk of liability, might discourage people from entering the online host business in the first place. Elkin-Koren, *supra* note 22, at 406.

303. Elkin-Koren, *supra* note 22, at 408.

304. *Id.* The economic approach to copyright law is premised on a system which insures an author's incentive to create by granting him exclusive rights to his creations. JOYCE ET AL., *supra* note 11, at 18-20. Such rights, however, limit the public's access to the works. *Id.* at 18-19. The central problem lawmakers face is achieving a balance in copyright law which maintains the author's incentive to produce new works without unduly limiting dissemination to the public. Landes & Posner, *supra* note 40, at 326. The balance becomes distorted by new technology. GROVES, *supra* note 28, at 1. OSPs and commentators fear that overregulation of the Internet will unfairly tip the scales in favor of copyright owners and restrict the potential of online services to distribute information to the public. Elkin-Koren, *supra* note 22, at 406-08; *White Paper*, *supra* note 2, at 115-16.

305. See, e.g., Carmichael, *supra* note 3, at 787 (advocating contributory and vicarious standards of liability); *Religious Tech.*, 907 F. Supp. at 1381 (holding that service provider may not be directly or vicariously liable, but may be contributorily liable).

306. See BARAN, *supra* note 2, at 19 (stating that individuals use BBSs for posting announcements and messages among subscribers); see also *Playboy*, 839 F. Supp. at 1554 (citing service provider's contention that he never uploaded infringing images onto BBS); *Religious Tech.*, 907 F. Supp. at 1368 (stating that, other than maintaining online service, OSP failed to take any affirmative actions to make infringing reproductions).

307. See *Religious Tech.*, 907 F. Supp. at 1368-72 (discussing arguments against finding direct liability of OSP).

308. See Carmichael, *supra* note 3, at 784 (discussing criteria for contributory in-

ria are more applicable to the OSP.³⁰⁹

Courts and legal commentators have adopted different interpretations regarding the use of the vicarious and contributory liability standards.³¹⁰ For example, the court in *Religious Technology* stated that the subscriber fee did not amount to direct financial benefit under the vicarious liability standard.³¹¹ This point of view conflicts with a broader view of financial benefit.³¹² The Task Force in the White Paper stated that online service providers have a business relationship with their subscribers.³¹³ This affiliation between the OSP and users may be the basis for a judgment of an OSP's financial benefit.³¹⁴ OSPs may financially benefit from infringement because the prospect of uploading and downloading infringing works induces users to pay for online access.³¹⁵

One legal commentator also introduced important questions regarding the contributory liability of the OSP.³¹⁶ In *Sony Corp. of America v. Universal City Studios, Inc.*,³¹⁷ the U.S. Supreme Court held that selling copying equipment does not constitute contributory infringement if a consumer of the product can substantially use the product in non-infringing capacities.³¹⁸ Analo-

fringement); *Sega*, 857 F. Supp. at 686-87 (explaining defendant's role in infringing activities); *Shapiro*, 316 F.2d at 307 (explaining requirements for court to find individual vicariously liable).

309. See Carmichael, *supra* note 3, at 768 (distinguishing direct infringement of BBS user from infringement by OSP). "The infringement analysis takes on a different character when the defendant does not actually copy the plaintiff's protected work, but rather provides a forum or an opportunity within which infringement takes place." *Id.* Courts should, therefore, consider applying both contributory and vicarious standards of liability to OSPs. *Id.* at 787.

310. Compare *Sega*, 857 F. Supp. at 687 (finding contributory infringement by OSP) with Carmichael, *supra* note 3, at 785-86 (pondering courts' inability to find contributory infringement due to substantial non-infringing uses of online service); *Religious Tech.*, 907 F. Supp. at 1377 (precluding possibility of vicarious liability because court did not conclude that defendant received direct financial benefit) with Carmichael, *supra* note 3, at 773 (suggesting that OSPs may receive direct financial benefit from users).

311. See *Religious Tech.*, 907 F. Supp. at 1377 (explaining that fixed fee for access to online service does not constitute direct financial benefit).

312. See Carmichael, *supra* note 3, at 772-77 (supporting broad construction of financial benefit).

313. *White Paper*, *supra* note 2, at 117.

314. Carmichael, *supra* note 3, at 773.

315. *Id.*

316. See *id.* at 784-86 (stating "[c]ourts should rarely, if ever, apply the contributory infringement doctrine to online service providers.").

317. 464 U.S. 417 (1984).

318. *Id.* at 442. The Court in *Sony* found that the manufacturer's sale of videotape

gizing the sale of copying equipment to the provision of an on-line service, the commentator hypothesized that the non-infringing uses³¹⁹ of an online service might disqualify the OSP from contributory liability.³²⁰ Thus far, however, the courts have found that the legitimate uses of an online service have not immunized OSP's from contributory liability for copyright infringement.³²¹

b. Maintaining Current Standards of Liability

The Task Force acknowledged that OSPs play an important role in increasing dissemination of works and developing the information superhighway, but asserted that a reduced liability standard for OSPs would substantially decrease the rights of copyright owners.³²² The Task Force addressed the argument concerning the difficulty of screening uploaded files for infringing works.³²³ Indeed, the Task Force conceded the virtual impossibility of contemporaneous review of transmitted materials.³²⁴ The Task Force stated, however, that distributors of books, records, and photographs experience similar levels of difficulty when prescreening their products,³²⁵ but they, nevertheless, may be held strictly liable for infringement.³²⁶

The Task Force also maintained that OSPs are in the best position to halt infringement and that, as such, policy favors holding the OSP liable.³²⁷ The OSPs have the ability to interact

recorders to the general public did not amount to contributory infringement of copyrights in television programs. *Id.* at 456.

319. See *BARAN*, *supra* note 2, at 23-25 (explaining vast array of online services); Carmichael, *supra* note 3, at 786 (illustrating potential non-infringing uses of online service).

320. Carmichael, *supra* note 3, at 785-86.

321. See *Religious Tech.*, 907 F. Supp. at 1374-75 (holding that defendant's liability for contributory infringement is contingent on defendant's notice of infringing postings); *Sega*, 857 F. Supp. at 686-87 (applying contributory infringement standard to defendant).

322. *White Paper*, *supra* note 2, at 117.

323. *Id.* at 116.

324. *Id.*

325. See *id.* (stating that sellers of books, records, and computer programs cannot analyze all books, records, or computer programs that they market).

326. *White Paper*, *supra* note 2, at 116. The Task Force added that OSPs, like other businesses, incur expenses of doing business and need to develop ways to reduce liability costs. *Id.* at 118.

327. *Id.* at 117. When notified of possible infringing activity on their service, the OSPs are capable of taking necessary action to remedy the situation, and thereby re-

with the subscribers and influence their activity with marketplace tools.³²⁸ The Task Force asserted that the prospect of liability may encourage OSPs to develop insurance plans, indemnification and warranty agreements, subscriber education programs, and technological innovations to track files.³²⁹

2. U.K. Commentary

Thus far, U.K. courts have not addressed copyright infringement liability of OSPs.³³⁰ Legal specialists have speculated that because U.K. law has specific provisions addressing electronic copying,³³¹ the probability is high that U.K. courts will hold Internet hosts liable for copyright infringement.³³² One legal practitioner advanced infringement theories based on vicarious liability, issuing copies to the public, and showing or playing the work in public.³³³

duce their liability for damages to those for innocent infringement. *Id.* at 116-117; *see id.* at 125 (explaining that court may find innocent infringement when defendant proves that he had no knowledge that activity violated copyright holder's rights); 17 U.S.C. § 504(c)(2) (1997) (stating "where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted infringement of copyright, the court . . . may reduce the award of statutory damages to a sum of not less than \$200"). The Task Force also addressed the Congressional determination that the innocent infringer provision allows "protect[ion] against unwarranted liability in cases of occasional or isolated innocent infringement" *White Paper*, *supra* note 2, at 119 (quoting H.R. No. 1476, 94th Cong., 2d Sess. 159-60 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5775-76).

328. *White Paper*, *supra* note 2, at 123.

329. *Id.* The Task Force believes that if the law does not hold service providers accountable for infringement, the copyright owners will suffer because the OSPs will not have the incentive to implement new ideas to curb infringing activity on their systems. *Id.* Evidence of technological innovations to track infringing activity has already surfaced. *See Religious Tech.*, 907 F. Supp. at 1376 (discussing screening of uploaded files). In *Religious Technology*, a computer expert asserted that "with an easy software modification [the Internet access provider] could identify postings that contain particular words or come from particular individuals," thereby allowing the OSP to detect infringing files based on their content or the individual who performed the uploading. *Id.*

330. *See INTERNET LAW*, *supra* note 4, at 19 (explaining state of U.K. case law regarding Internet activities).

331. *See 1988 Act*, *supra* note 139, § 17, at 357 (providing specific provisions regarding electronic copying).

332. *See INTERNET LAW*, *supra* note 4, at 19 (explaining that courts might view storage of copyrighted material on Internet host's computer as copying and hold OSPs liable even if subscriber posted work); *see also* John Kavanagh, *Watch Out For Those Web Site Saboteurs*, *TIMES* (London), Sept. 11, 1996, at 13 (analogizing physical circulation of copies posted on actual bulletin boards to downloading copies from web pages).

333. *INTERNET LAW*, *supra* note 4, at 19. With regard to vicarious liability, Internet

Because U.K. copyright law extends farther than U.S. law with a specific provision including reproduction by electronic means in the definition of copying, legal practitioners argue that it is more likely that the United Kingdom will be in favor of imposing liability on an OSP.³³⁴ Indeed, U.K. scholars have noted that suggestions of eliminating law on the Internet are products of wishful thinking rather than rational analysis.³³⁵ The more appropriate question for U.K. lawmakers is based on the applicability of present legislation to the information age and not on whether limitations are necessary.³³⁶ Much like the Task Force in the White Paper,³³⁷ U.K. practitioners appear to be in favor of applying known laws to deal with Internet technology.³³⁸ Legal experts opined that lawmakers need only make minor changes in U.K. copyright law to address the advances of the digital age.³³⁹

The lack of case law relating to Internet infringement has led to speculative ideas about the application of U.K. copyright law to the newly developed technology.³⁴⁰ Accordingly, decisions regarding the application of one form of liability over another to OSPs will rest largely on the policy concerns of U.K. courts.³⁴¹ Indeed, policy will also control the decisions relating

hosts who cause works to be available for downloading may be susceptible to allegations of authorizing infringement even if they do not know or have reason to believe that the material is violating an individual's copyright. *Id.*

334. See *supra* note 332 and accompanying text (discussing high probability of Internet host liability in United Kingdom); see also 1988 Act, *supra* note 139, § 17(2), at 357 (providing provision for electronic copying).

335. See INTERNET LAW, *supra* note 4, at xi (stating that laws of each jurisdiction apply to Internet). One commentator states, "the pan-political nature of the Internet may in fact render it vulnerable rather than immune to the laws of jurisdictions around the world." *Id.*

336. See *id.* at xii (stating "[u]nless and until the existing law is found wanting there should be a presumption against further legislation.").

337. See *White Paper*, *supra* note 2, at 116-24 (explaining Task Force's position in favor of application of current liability standards to OSPs).

338. See Kavanagh, *supra* note 332, at 13 (illustrating point of view of U.K. legal experts that only minor changes in copyright law are needed to adapt to Internet technology).

339. See Kavanagh, *supra* note 332, at 13 (stating that Stephen Digby, head of intellectual property group at Withers Solicitors and Intellectual Property Rights Chairman for Eurim parliamentary lobbying group, said that "current framework [of copyright law] does not need drastic overhaul to accommodate the information society.").

340. See INTERNET LAW, *supra* note 4, at xi (discussing some uncertainties about applying copyright law to Internet).

341. See *id.* at 19 (stating "[i]t remains to be seen whether a U.K. court would take

to how international organizations will handle copyright law on the Internet.³⁴²

3. EC Commentary

The Commission recognizes the need for the European Community to develop clear rules that govern liability of OSPs.³⁴³ The Commission believes that OSPs, who directly upload infringing material onto the Internet, should be liable for copyright infringement.³⁴⁴ The Commission, however, is not settled on the scope of an OSP's liability when third parties upload infringing works.³⁴⁵

The Commission discussed legislation requiring OSPs, upon learning that infringing material is present on their service, to take proper steps to remove the illegal files.³⁴⁶ As an alternative, the Commission contemplated the effect of laws requiring OSPs to block access to infringing files instead of removing them.³⁴⁷ Finally, the Commission advocated self-regulation of online services and encouraged legislation implementing the use of hotlines whereby members of the public may inform OSPs of the presence of copyright violations on an online service.³⁴⁸ The Commission postulated that self-regulation by Internet users is essential for the decentralized Internet environment and proposed that legislators consider self-regulation on an international level.³⁴⁹

One legal commentator supported the holding of the court in *Religious Technology*³⁵⁰ and stated that courts should only im-

a similar public policy approach to that adopted by the court in [*Religious Technology*] and refuse to find direct infringement for automatic copying occurring during storage and onward transmission of infringing material resulting from a third party's actions").

342. See *White Paper*, *supra* note 2, at 130-55 (discussing various international concerns about achieving goals of copyright law under different legal regimes).

343. Internet Communication, *supra* note 228, at 25.

344. *Id.* at 13.

345. *Id.* The Commission recommends that lawmakers consider the question of OSP liability in light of the European Community's goal of maintaining a common market. Green Paper Follow-Up, *supra* note 17, COM (96) 586 Final at 24.

346. Internet Communication, *supra* note 228, at 14.

347. *Id.*

348. *Id.* at 13, 25.

349. *Id.* at 14.

350. See *Religious Tech.*, 907 F. Supp. at 1375 (holding that OSP who knew of infringing postings may be contributorily liable for copyright infringement).

pose liability on OSPs when they know that infringing works are on their services and they do nothing to stop the dissemination of such material.³⁵¹ The author stated that a high standard of liability would thwart the growth of computerized information services.³⁵² That commentator stated that OSPs are not technically able to police copyright infringement on the Internet and argued in favor of decreased liability to reflect the state of technology.³⁵³

III. *LEGISLATORS MUST TAILOR COPYRIGHT LAWS TO FIT WITH ONLINE TECHNOLOGY*

Lawmakers for the twenty-first century need to draft copyright laws to address issues created by the growth of online services.³⁵⁴ First, legislators should look to traditional copyright principles to ascertain the scope of exclusive rights for the digital age. Second, in order to ensure further development of computerized information services, courts need to apply contributory and vicarious infringement standards to OSPs.

A. *Lawmakers Must Base the Exclusive Rights of a Copyright Owner in a Digital Environment on Conventional Copyright Concepts*

Legislators need not prematurely revamp the system of copyright if traditional copyright concepts may properly insure adequate protection of intellectual property in the information age. Legislators may be open to ideas regarding the creation of new exclusive rights, but at the same time, lawmakers must respect classic copyright principles that have endured for centuries.³⁵⁵ In support of this proposition, the Task Force in the White Paper and the Commission determined that legislators need only expand the existing exclusive rights of copyright own-

351. Maurits Dolmans & Annette Schild, *Copyrights and the Internet: A European's Perspective* 13 (Apr. 1996).

352. *Id.* at 14.

353. *Id.*

354. *See supra* notes 2-6 and accompanying text (discussing growth of online services).

355. *See supra* note 42 and accompanying text (discussing England's first copyright act, passed in 1710, which addressed authors' rights).

ers.³⁵⁶ Moreover, the members of WIPO signed two treaties³⁵⁷ that incorporated traditional exclusive rights into legislation addressing new technologies.³⁵⁸

Because the traditional reproduction right³⁵⁹ is broad enough to encompass the transmission of works over online services,³⁶⁰ legislators may conveniently apply the present right of reproduction to the new technology. The drafters of the WIPO Copyright and Performances and Phonograms Treaties followed the above reasoning when they expanded the definition of reproduction to include the storage of protected works in digital form.³⁶¹ Indeed, the drafters of the WIPO Copyright Treaty expressly stated that the reproduction right set out in the Berne Convention applies in the digital environment.³⁶² The signatories of the treaties, using the conventional reproduction right as a foundation, simply established boundaries regarding the scope of the right.³⁶³ Similarly, the delegates of WIPO tailored the existing right of communication to the public³⁶⁴ to fit the online environment.³⁶⁵

In the face of digitization, lawmakers may, in large part, premise copyright laws on traditional notions, but they should also be open to suggestions that will improve the distribution of rights. The replacement of the exclusive right of distribution with an exclusive right to control access³⁶⁶ to copyrighted works

356. See *White Paper*, *supra* note 2, at 17 (stating that lawmakers need only fine tune existing copyright law to address technological advances).

357. See *supra* note 20 and accompanying text (explaining that international representatives drafted WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty at WIPO's December 1996 diplomatic conference in Geneva, Switzerland).

358. See *supra* notes 258, 263 (outlining WIPO's application of existing exclusive reproduction and communication to public rights to new technology).

359. See *supra* note 256 and accompanying text (outlining reproduction right in Berne Convention).

360. See *Green Paper Follow-Up*, *supra* note 17, COM (96) 586 Final at 9 (discussing possibility of broad interpretation of reproduction right).

361. See *supra* note 258 and accompanying text (explaining WIPO's application of reproduction right to works in digital form).

362. See *supra* note 258 and accompanying text (discussing expansion of Berne reproduction right).

363. See *supra* note 286 and accompanying text (discussing limitations on scope of reproduction right).

364. See *supra* note 263 and accompanying text (outlining communication to public right set out in Berne Convention).

365. See *supra* note 263 (showing similarities between right of communication to public set out in Berne Convention and WIPO Copyright Treaty).

366. See *supra* note 239 (describing right to control access to online works).

represents such an improvement. Although the Task Force and the Commission recommended that legislators apply the classic distribution right to the new technology,³⁶⁷ some legal authors contend that legislation, granting copyright owners the right to control access to their works, is more suitable for the online environment.³⁶⁸ A right of access appears to be more appropriate for the online environment, which is ultimately premised on a computer user's ability to gain admittance to information.³⁶⁹ The right of distribution arguably forces individuals to wrongly conceptualize online services as physical distributors of copyrighted matter, instead of access providers to data files.³⁷⁰ Legislators may, therefore, contemplate a slight deviation from existing copyright concepts and consider a right of access as an alternative to the distribution right.

B. OSP Liability Based on Contributory and Vicarious Infringement Standards Is Best Suited for the Online Environment

Legislators must find the optimum point of balance between the incentive to create and the dissemination of material on the Internet.³⁷¹ Lawmakers may do so by limiting the application of the direct³⁷² infringement standard and instead promoting theories of contributory³⁷³ and vicarious³⁷⁴ liability of the OSP. Indeed, recommending the above standards will not only maintain equilibrium between the incentive and dissemination, but will also assure proper advancement of technology without

367. See *supra* note 234 and accompanying text (discussing Task Force's proposed amendments to U.S. distribution right); Green Paper Follow-Up, *supra* note 17, COM (96) 586 Final at 19 (stating that legislators should apply distribution right to online services).

368. See *supra* notes 238-39 and accompanying text (advocating creation of right to control access to copyrighted works for digital environment).

369. See *supra* notes 3-8 and accompanying text (describing nature of online services and possible access to various forms of information).

370. See Olswang, *supra* note 232, at 217 (stating that legal regimes must move away from physical concepts when works exist primarily in non-physical forms).

371. See *supra* notes 37-40 and accompanying text (discussing competing considerations of incentive to create and dissemination of works and their effect on copyright legislation).

372. See *supra* notes 89, 153 and accompanying text (explaining doctrine of direct or primary infringement).

373. See *supra* notes 116-17, 161-66 and accompanying text (outlining requirements for contributory or secondary infringement).

374. See *supra* notes 130, 171-72 and accompanying text (discussing aspects of vicarious infringement).

thwarting the growth of the Information Superhighway.³⁷⁵

1. Primary or Direct Liability of the OSP: Not Consistent with the Spirit of Copyright Law

Because knowledge by the OSP of the infringing activity is not material to a determination of direct infringement,³⁷⁶ a direct liability standard is manifestly unreasonable. A direct criterion would unfairly subject OSPs to liability for infringement that they could not prevent because the high volume of files moved through an online service makes it impossible for OSPs to monitor infringement on a system.³⁷⁷ Moreover, the fear of liability generated from the application of a primary or direct infringement rule will unduly limit the spectrum of services available on the Internet.³⁷⁸ A direct infringement standard will restrict public access to works and thwart advancement of digital technology.

Furthermore, the OSPs are not committing direct infringement. Indeed, the subscribers to the online service are committing direct infringement when they download or upload infringing material to or from their computers.³⁷⁹ Generally, OSPs only maintain and operate online services that automatically store and forward the users' messages.³⁸⁰

Because of the many online users that choose to remain anonymous and the extreme difficulty of identifying infringers,³⁸¹ it is not unreasonable to target OSPs for indemnification. Indeed, the Task Force in the White Paper stated that OSPs are

375. See *supra* note 302 and accompanying text (stressing importance of using new computerized methods to disseminate information).

376. See *White Paper supra* note 2, at 115 (explaining lack of knowledge requirement for direct infringement under U.S. law); GROVES, *supra* note 28, at 54 (illustrating that under U.K. law, knowledge is not element of primary infringement).

377. See *supra* notes 299-300 and accompanying text (describing arguments citing OSP's difficulty in tracking files on online service).

378. See *supra* notes 302, 352 and accompanying text (discussing how increased liability might hurt growth of online services).

379. See Carmichael, *supra* note 3, at 767 (maintaining that subscribers, by uploading and downloading copyrighted materials, are committing acts of direct infringement).

380. See, e.g., *Religious Tech.*, 907 F. Supp. at 1367-68 (discussing OSP's role of operating service which automatically makes copies of subscribers' uploaded files).

381. See *White Paper, supra* note 2, at 117 (illustrating that OSPs may be only individuals able to identify infringing subscribers).

in the best position to prevent infringement.³⁸² Regulations, however, should not subject OSPs to liability based on a standard requiring direct violation of a copyright holder's exclusive rights. In support of this proposition, the *Religious Technology* court refused to find an OSP liable under the direct criteria, arguing that the OSP did not cause the infringement.³⁸³ Moreover, the Commission stated that the direct liability standard need only apply to individuals who personally upload infringing material onto the Internet.³⁸⁴ The Commission, however, acknowledged that the question of OSP liability, when third parties upload infringing works, is more difficult to answer.³⁸⁵

Though the U.K. legislature provided for electronic copying in the 1988 Act,³⁸⁶ the better alternative is to rely on the principles of secondary infringement. U.K. lawmakers created the electronic copying provision of the 1988 Act to deal largely with the problem of incidental copies made of computer programs.³⁸⁷ In contrast, to specifically address digital transfer of files, the U.K. legislature introduced the secondary infringement provision dealing with transmission of works by electronic means.³⁸⁸ In addition, commentators have suggested that U.K. courts might apply the reasoning in *Religious Technology* and refuse to find direct infringement.³⁸⁹

2. The Contributory (Secondary) and Vicarious Standards: The Better Approach to OSP Liability

The less stringent standards of contributory or vicarious infringement better serve the goals of copyright law while still allowing a finding of liability for defendants like those found in *Playboy* and *Sega*.³⁹⁰ The U.S. district courts in *Playboy* and *Sega*

382. *See id.* (stating that best policy is to hold OSP liable).

383. *Religious Tech.*, 907 F. Supp. at 1372.

384. Internet Communication, *supra* note 228, at 13.

385. *Id.*

386. *See supra* notes 159-60 and accompanying text (discussing application of U.K. provision for electronic copying to Internet).

387. *See GROVES, supra* note 28, at 56-57 (explaining underlying premises of electronic copying provision).

388. *See id.* at 68 (stating "[t]he purpose of the additional subsection is to cover the situation where a work is transmitted in digital form via a telecommunications system with a view to its being received and stored at the other end.").

389. INTERNET LAW, *supra* note 4, at 19.

390. *See Dolmans & Schild, supra* note 351, at 14 (arguing that court would undoubtedly find defendants in *Playboy* and *Sega* liable under lesser standard).

found the defendants liable for direct infringement³⁹¹ when a contributory or vicarious infringement standard would have sufficed. The courts did not have to apply the law in such extreme fashion.

a. Contributory or Secondary Infringement

Because the technology has not advanced to a stage where OSPs are capable of tracking possible infringement on their services,³⁹² a low threshold of liability that does not require knowledge of infringing activity would unfairly compel the OSPs to provide protection beyond their means. In contrast, the knowledge requirement for contributory or secondary infringement helps insure that OSPs will not be subject to liability for acts that they could not prevent. In support of this proposition, a commentator in the European Community argued that courts should impose liability on OSPs only when the OSPs have actual notice that infringement is occurring on their service and refuse to take corrective action.³⁹³ The legal scholar reaffirmed the holding in *Religious Technology*³⁹⁴ and argued that increased liability would thwart the growth of computerized information services.³⁹⁵

A direct liability law will more than likely retard the growth of the Internet by causing OSPs to limit services or, even worse, avoid running online systems.³⁹⁶ In contrast, the Task Force in the White Paper argued that a high standard of liability is necessary to the development of technology that will help monitor works on the Internet.³⁹⁷ The Task Force theorized that maintaining the direct standard will spark OSPs to develop technology and marketplace tools that will reduce their liability.³⁹⁸ A

391. *Playboy*, 839 F. Supp. at 1559; *Sega*, 859 F. Supp. at 687.

392. See Dolmans & Schild, *supra* note 351, at 14 (discussing present state of technology regarding ability to monitor copyright infringement on online service).

393. See *supra* note 351 and accompanying text (discussing role of notice in ascertaining OSP liability).

394. See *Religious Tech.*, 907 F. Supp. at 1375 (holding that court may impose liability on OSPs who had notice of infringing works on their services).

395. See *supra* notes 352-53 and accompanying text (arguing that liability standard, which does not take into account OSPs' capabilities to track infringement, will hinder growth of online services).

396. See *supra* note 302 and accompanying text (explaining possible limitations of online service when heightened liability exists).

397. *White Paper*, *supra* note 2, at 123.

398. *Id.*

better view, however, is that a strict standard of liability is not needed to inspire new technology. In support of this argument, legal commentators stated that market demands for access fees will be the driving forces that cause the development of technology to monitor a subscriber's use.³⁹⁹ Therefore, with market forces in place, the need for a strict liability standard is no longer obvious.

In addition, those afraid of reducing liability must also understand that knowledge under the contributory and secondary standards is open to interpretation by the courts. Both the U.K. and U.S. courts, for example, employ a malleable test of knowledge of infringing activity, allowing broad interpretations of knowledge.⁴⁰⁰ For instance, the *Sega* court concluded knowledge when the OSP encouraged infringing activity.⁴⁰¹ The court did not require that the OSPs know exactly when subscribers uploaded or downloaded the infringing materials.⁴⁰² Courts will, therefore, have the power, if the situation demands, to create strict precedents that drive OSPs to carefully supervise the activities on their services and sufficiently protect copyright.

Finally, the contributory and secondary infringement provisions are closely akin to the activities of an OSP. In order to encompass the activities of the OSP under contributory or secondary infringement, the courts would not have to stretch the provisions very far. For example, under U.S. and U.K. law, a person may be liable for contributory or secondary infringement by supplying the means for infringement.⁴⁰³ Similarly, OSPs, by oper-

399. See Dolmans & Schild, *supra* note 351, at 14 (stating "market forces, even absent the threat to access providers of copyright infringement liability, will lead to the development of technological solutions. After all, such technological solutions are closely associated with efforts to develop new ways to meter and charge for a subscriber's use of content, and will be of natural interest to access providers and copyright owners alike.").

400. See *supra* note 166 and accompanying text (detailing knowledge requirement under U.K. law); *Religious Tech.*, 907 F. Supp. at 1374 (explaining requirement of notice); *Sega*, 859 F. Supp. at 686-87 (illustrating U.S. courts' interpretations of knowledge).

401. *Sega*, 859 F. Supp. at 687.

402. *Id.* at 686-87.

403. See Carmichael, *supra* note 3, at 784 (stating that provision of equipment needed for infringement may amount to contributory infringement); *Sega*, 857 F. Supp. at 686 (concluding that defendant's provision of facilities may result in contributory infringement); 1988 Act, *supra* note 139, § 24, at 362 (outlining that acts of secondary infringement may include providing means for making infringing reproductions).

ating and maintaining online services are supplying a way by which subscribers may produce infringing copies.

In addition, under the 1988 Act, an individual commits secondary infringement by transmitting copyrighted material in digital form over a telecommunications system with knowledge that copies of the work will be made upon receipt of the transmission.⁴⁰⁴ The nature of an online service is such that subscribers may transmit copyrighted works over telephone lines for downloading onto a user's computer.⁴⁰⁵ Accordingly, U.K. courts might broadly construe transmitting copyrighted material to encompass the operation and maintenance of an online service by an OSP.

b. Vicarious Liability

The vicarious liability standard is suitable for OSPs because the criteria automatically takes into account the advancement of technology and the ability of OSPs to control online infringement. Vicarious liability, by its definition, presupposes that an OSP is capable of supervising a subscriber's infringing activity.⁴⁰⁶ Implicit in a finding of vicarious infringement is the assumption that an OSP has the technological capabilities to monitor copyrighted material on the system. For example, the court in *Religious Technology* considered the question of vicarious liability in light of evidence that modifications to the OSPs software would have given the OSP the ability to track incoming postings.⁴⁰⁷ If individuals, however, are not able to control the infringing actions of others, they cannot be found vicariously liable. Thus, the vicarious standard does not unfairly require OSPs to track infringing files beyond the reach of technology.

404. 1988 Act, *supra* note 139, § 24, at 362; *see GROVES, supra* note 28, at 68 (explaining that lawmakers added provision to address transmission of works in digital form because 1988 Act already covered broadcasts and cable programs).

405. *See BARAN, supra* note 2, at 28 (explaining operation of online service and subscribers role in obtaining information).

406. *See supra* note 130 and accompanying text (outlining U.S. standard of vicarious liability); *STONE, supra* note 139, at 56 (discussing vicarious infringement under U.K. law).

407. *Religious Tech.*, 907 F. Supp. at 1375-76; *see supra* note 131 and accompanying text (explaining effect of evidence regarding technological capabilities to track files on determination of OSP's control over subscribers).

CONCLUSION

Legislators on the brink of the twenty-first century must develop copyright laws to accommodate the continuing worldwide expansion of online communications. The new computerized methods of reproduction and dissemination of copyrighted works are forcing lawmakers to consider the scope of protection afforded to copyright owners. Specifically, government officials from all over the world need to apply existing copyright principles and define the scope of a copyright owner's exclusive rights in the digital environment. In addition, legislators and courts must determine fair and equitable liability standards for OSPs. OSP liability standards must reflect the state of technology and OSPs' abilities to track infringement on their services. Courts cannot hold OSPs to a direct liability standard of infringement. Instead, in order to insure the growth of the Information Superhighway, courts should impose infringement standards based on the OSPs' knowledge of and ability to block access to infringing works that appear on the Internet.