



---

1-1-2000

## Copyright Protection and Internet Fan Sites: Entertainment Industry Finds Solace in Traditional Copyright Law

Lauren Yamamoto

Follow this and additional works at: <https://digitalcommons.lmu.edu/elr>



Part of the [Law Commons](#)

---

### Recommended Citation

Lauren Yamamoto, *Copyright Protection and Internet Fan Sites: Entertainment Industry Finds Solace in Traditional Copyright Law*, 20 Loy. L.A. Ent. L. Rev. 95 (2000).

Available at: <https://digitalcommons.lmu.edu/elr/vol20/iss1/4>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Entertainment Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# COPYRIGHT PROTECTION AND INTERNET FAN SITES: ENTERTAINMENT INDUSTRY FINDS SOLACE IN TRADITIONAL COPYRIGHT LAW

## I. INTRODUCTION

As the Internet continues to develop and become more accessible, fans are increasingly turning to the Internet to express their adoration for their celebrity idols. For example, a well-known image from the movie *Titanic*<sup>1</sup> of Leonardo DiCaprio and Kate Winslet<sup>2</sup> gliding through the ocean on the bow of a ship is featured on a *Titanic* fan site.<sup>3</sup> Another web site contains quotes and pictures from the latest Alanis Morissette album.<sup>4</sup>

The seduction of the Internet is relentless.<sup>5</sup> As a medium of communication, the Internet has been labeled the “best realization ever of the First Amendment.”<sup>6</sup> Minimal barriers to entry,<sup>7</sup> anonymity,<sup>8</sup> as well as the lack of physical boundaries<sup>9</sup> make the Internet an enticing mode of

---

1. TITANIC (Paramount Pictures, Twentieth Century Fox 1997).

2. Leonardo DiCaprio and Kate Winslet are co-stars of the motion picture *Titanic*. *Id.*

3. *Welcome Aboard the Titanic* (visited Oct. 18, 1999)

<<http://www.members.aol.com/Spicekaren/titanic.html>>.

4. *Eric's Guide to Alanis Morissette* (visited Oct. 16, 1999)

<<http://members.aol.com/ashzero/alanis.html>>.

5. See Byron F. Marchant, *On-Line on the Internet: First Amendment and Intellectual Property Uncertainties in the On-Line World*, 39 HOW. L.J. 477 (1996). In 1996, there were approximately 20–40 million Internet users worldwide. *Id.* at 477, n.1. It is estimated that the number of Internet users will increase to 200 million by the year 1999. *Reno v. ACLU*, 521 U.S. 844, 850 (1997).

6. Cristina Fernandez, *The Right of Publicity on the Internet*, 8 MARQ. SPORTS L.J. 289, 300 (1998).

7. See Robert L. Raskopf, *The Right of Publicity and the Internet*, in 2 PLI'S SECOND ANN. INST. FOR INTELLECTUAL PROPERTY L. at 59, 77 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G-454, 1996); see also Patrick F. McGowan, *The Internet and Intellectual Property Issues*, in GLOBAL TRADEMARK AND COPYRIGHT 1996: MANAGEMENT AND PROTECTION, at 303, 313 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G-455, 1996).

8. See generally Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace*, 104 YALE L.J. 1639, 1643 (1995).

9. See generally *id.* at 1639.

communication to people from diverse segments of society.<sup>10</sup> The Internet thrives as an economical medium for transmitting diverse thoughts and ideas<sup>11</sup> with minimal regulation<sup>12</sup> and no central authority.<sup>13</sup> Nonetheless, in the world of cyberspace, material posted on the Internet is not exempt from laws regulating copyright protection.<sup>14</sup>

Fan sites,<sup>15</sup> however, have not yet come to terms with copyright regulation.<sup>16</sup> There is a perception that information found on the Internet, a fairly new innovation,<sup>17</sup> is “in the public domain, meaning that it’s [the users’] to use or copy or to give away.”<sup>18</sup> When fans post pictures from

---

10. See McGowan, *supra* note 7, at 313. In March of 1996, a Nielsen media research survey concluded 22%–24% of Americans and Canadians ages 16 and older had access to the Internet. *See id.* This number is an increase from 17% in August of 1995. *See id.* The survey also noted that there was an increase in the number of users who were older, had less money and were less educated. *See id.*; see also Steven W. Kopp & Tracy A. Suter, *Developments in Copyright Policy and Network Technologies: The First Generation*, 17 J. PUB. POL’Y & MARKETING 303 (1998) (stating “[a]n estimated 99 million adults use the Internet worldwide, and approximately 58 million of those reside in the United States and Canada”); Robert D. Hof, *The ‘Click Here’ Economy*, BUS. WK., June 22, 1998 (referring to the power and expansion of the World Wide Web).

11. See Raskopf, *supra* note 7, at 77; see also *Reno*, 521 U.S. at 852 (indicating “[i]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought”).

12. See Marc L. Caden & Stephanie E. Lucas, Comment, *Accidents on the Information Superhighway: On-Line Liability and Regulation*, 2 RICH. J.L. & TECH. 3 (1996).

13. See generally *Reno*, 521 U.S. 844 (holding the Communications Decency Act was unconstitutional). “Central authority” refers to a regulating body. See Caden & Lucas, *supra* note 12.

14. See Glenn Gamboa, *Viacom Warns Unofficial ‘Star Trek’ Web Sites About Copyrights*, ORANGE COUNTY REG., Jan. 27, 1997, available in 1997 WL 7404140.

15. A fan site is a web site created by a fan for the purpose of paying tribute to the object of the fan’s adoration, such as a fan’s favorite celebrity, movie, television show, or recording artist. See Erika S. Koster & Jim Shatz-Akin, *Set Phasers on Stun: Handling Internet Fan Sites*, 15 COMPUTER LAW 18 (1998).

16. See Matt McKenzie, *Commentary: Proposals to Clamp Down on Copyright Violators*, SEYBOLD REP. ON INTERNET PUB., Jan. 1, 1998, available in 1998 WL 7874628.

17. See *Reno*, 521 U.S. 849. “It is the outgrowth of what began in 1969 as a military program . . .” *Id.*

18. Christopher Meeks, *Does the Web Care About Copyright?*, WRITER’S DIG., Sept. 1, 1998, available in 1998 WL 14183595; see also Constance Sommer, *Point! Click! Lawsuit! Hollywood Honchos Angry About Images on the Net*, YORK DAILY REC., Jan. 9, 1997, available in 1997 WL 6087470 (quoting a spokesman for the Creative Incentive Coalition in Washington, D.C. as stating “a lot of people right now believe anything on the Internet is free and up for grabs. [People seem to think] if you can get it on the Internet, you’re free of copyright law.”); Victoria A. Cundiff, *Stop Cyber Theft: Respecting Intellectual Property Rights on the Internet*, in PLI’S 16TH ANN. INST. ON COMPUTER L. 93, 96 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G-444, 1996). Another author states, “many computer users do not realize that copyright law applies to Internet activity, or think that they will not be prosecuted for infringement.” Richard Raysman & Peter Brown, *Internet Copyright Developments*, N.Y. L.J., Feb. 10, 1998, at 3.

movies or portions of television scripts on their fan sites, they may be violating copyright law.<sup>19</sup> Fans must meet the demands of copyright law to lawfully use copyrighted material on their fan sites.<sup>20</sup>

This comment argues that even though recently enacted copyright laws, including the Digital Millennium Copyright Act ("DMCA")<sup>21</sup> and the No Electronic Theft Act ("NET Act"),<sup>22</sup> protect copyrighted material in computerized forms, the 1976 Copyright Act<sup>23</sup> continues to be the real backbone of copyright protection.<sup>24</sup> Part II discusses background information regarding the tension that exists between the entertainment industry and fans. Part III discusses how a fan site may violate the 1976 Copyright Act. Part IV explores the extent to which the recently enacted NET Act protects copyright holders' material on the Internet. Part V discusses the DMCA and the amount of protection it provides for copyrighted material on the Internet. Part VI concludes that traditional copyright laws, rather than recent copyright legislation, still afford the best protection in safeguarding the practical concerns of copyright holders.<sup>25</sup>

19. See generally 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, 807 (1995); Adam P. Segal, Comment, *Dissemination of Digitized Music on the Internet: A Challenge to the Copyright Act*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 97, 100 (1996). For example, there has been a recent surge of lawsuits regarding the ability to download music from fan sites. *Id.* Section 106 of the Copyright Act of 1976 states:

[T]he owner of a copyright has the exclusive rights to do and to authorize any of the following: 1) to reproduce the copyrighted work in copies or phonorecords; 2) to prepare derivative works based upon the copyrighted work; 3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; 4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; 5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and 6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (1994 & Supp. IV 1998). Section 501 states "[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 . . . is an infringer of the copyright or right of the author, as the case may be." 17 U.S.C. § 501 (1994).

20. See Gamboa, *supra* note 14.

21. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

22. No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997) (to be codified at 18 U.S.C. § 2311).

23. Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended through July 1, 1996 in 17 U.S.C. §§ 101-1010 (1995)).

24. See Lon Wagner, *Expert: Copyright Law Can Cover Internet*, ROANOKE TIMES & WORLD NEWS, July 28, 1998, available in 1998 WL 5905687 (citing Trotter Hardy of William & Mary who believes current copyright law is strong enough to withstand technological advances).

25. This comment is limited to the difficulties that movie and television studios face to protect their copyrights over the Internet.

## II. BACKGROUND

### A. Tensions Between Fan Site Creators, and Movie and Television Studios as Copyright Holders

There are tensions between fans who feel they should be able to use copyrighted material on their web sites without obtaining authorization, and movie and television studios as copyright holders who want to protect their product. Generally, these tensions have been resolved in favor of the copyright holders.<sup>26</sup> Furthermore, evolving copyright laws allowed increasing, though still limited, protection for copyright holders and owners. A fan may not rightfully post protected material to a fan site without first obtaining permission from the copyright owner.<sup>27</sup> Even fan site creators<sup>28</sup> who technically comply with copyright laws may still pose practical concerns for copyright owners because copyright laws may not adequately address all of their concerns.

Studios may want to retain creative control over their copyrighted products, but do not want to alienate consumers by aggressively enforcing their copyright interests.<sup>29</sup> However, if studios give fan site operators the ability to share their exclusive rights,<sup>30</sup> the operators' rights will become

---

26. See Erika S. Koster & Jim Shatz-Akin, *Set Phasers on Stun: Handling Internet Fan Sites*, 15 *COMPUTER LAW* 18 (1998).

27. See Gamboa, *supra* note 14.

28. For purposes of this article, a fan site creator specifically refers to a person who creates a web site using copyrighted material without permission from the copyright holder/copyright owners.

29. Copyright ownership may induce monetary profits. See S. REP. NO. 105-190, at 8 (1998). The U.S. creative industries accounted for 3.65% of the U.S. gross domestic product—\$278.4 billion. See *id.* at 10. In 1996, U.S. copyright industries achieved foreign sales and exports of \$60.18 billion, thus, leading all major industry sectors such as agriculture, automobiles, and the aircraft industry. See *id.*

30. 17 U.S.C. § 106 (1976). The copyright owner has the exclusive right to:

- 1) reproduce the copyrighted work in copies or phonorecords; 2) prepare derivative works based upon the copyrighted work; 3) distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; 4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; 5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and 6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

diluted and eventually lead to the end of that legal protection.<sup>31</sup> The entertainment industry is not yet willing to give up the benefit of these rights.<sup>32</sup> Thus, despite fears of alienating fans, movie and television studios seek protection against the unauthorized posting of copyrighted material.<sup>33</sup>

Fans who post unauthorized material on the Internet argue against the strict enforcement of copyright laws.<sup>34</sup> Fans willingly hand over their cash to the entertainment industry, thereby determining and defining the meaning of studio success. Thus, fans feel entitled to use the entertainment industry's copyrighted material without obtaining permission or paying for its use.<sup>35</sup> Fans also argue that their unauthorized use of legally protected material on their fan sites actually helps to publicize a copyright holder's work by contributing to its success.<sup>36</sup> The entertainment industry must balance the conflicting interests of securing the rights to creative works and nurturing the support of the fans.<sup>37</sup>

In response to copyright holders' demands for laws that protect their rights on the ever-expanding Internet,<sup>38</sup> Congress has implemented new copyright legislation.<sup>39</sup> Landmark legislation<sup>40</sup> such as the DMCA and the

---

31. See Amy Harmon, *Web Wars: Companies Get Tough on Rogues; Studios and Fortune 500 Firms Target Unauthorized Internet Sites That Feature Their Products*, L.A. TIMES, Nov. 12, 1996, at A1.

32. See Gamboa, *supra* note 14. A spokeswoman for Viacom, the creator of *Star Trek*, notes "[c]opyrights are how we make a living. And we are always looking to protect that." *Id.*; see also Ross Kerber, *Vigilant Copyright Holders Patrol the Internet*, WALL ST. J., Dec. 13, 1995, at B1 (elaborating on different cases in which copyright holders have asked fans to not post their copyrighted material on the Internet without permission).

33. See generally Gamboa, *supra* note 14.

34. See generally Koster & Shatz-Akin, *supra* note 15.

35. See Harmon, *supra* note 31; see also Koster & Shatz-Akin, *supra* note 15, at 21 (noting that fans usually have negative reactions to attempts to protect copyrights). Viacom, the copyright holder of *Star Trek*, has attempted to shut down at least 37 different *Star Trek* fan sites since 1996. See *id.* at 22. However, *Star Trek* fans have reacted negatively to the cease-and-desist letters that Viacom's attorneys have sent out. See Gamboa, *supra* note 14. Fans have formed protest groups such as the Online Freedom Federation, whose sole purpose is to fax and e-mail angry protest letters to the Viacom headquarters. *Id.*

36. See Sommer, *supra* note 18. One fan, the creator of "The Simpsons Archive" web site, after receiving a cease-and-desist letter from the Fox Television Network, justified the use of the copyrighted material by claiming, "I was giving them free publicity." *Id.*

37. See Koster & Shatz-Akin, *supra* note 15, at 18.

38. See *Software Publishers Pleased by Clinton's Signing of the No Electronic Theft Act*, ELEC. EDUC. REP., Jan. 14, 1998, available at 1998 WL 9575031.

39. The Copyright Act was enacted pursuant to Congress's power in Article I, section 8 of the U.S. Constitution. U.S. CONST. art. I, § 8, cl. 8 (providing 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").

40. 144 Cong. Rec. S12376-105 (daily ed. Oct. 12, 1998) (statement of Sen. Hatch). Senator Hatch has stated that the DMCA "is one of the most important pieces of legislation to be

NET Act were enacted in the hope that they would grant greater copyright protection against unauthorized postings on the Internet.<sup>41</sup> Such recent legislation, coupled with the 1976 Copyright Act, has given the entertainment industry a stronger hold on its right to protect infringement of its legally protected material.

The 1976 Copyright Act was enacted prior to technological advancements such as the Internet and does not address the unique concerns that the Internet poses to copyright protection. The NET Act and the DMCA were designed to address some of these concerns. A fan site creator must now adhere to the 1976 Copyright Act, the NET Act and the DMCA to legally use copyrighted material.

### *B. The Fan Site*

An *Ally McBeal*<sup>42</sup> fan site created by a woman known as Gorbie, entitled "Inside the Mind of Ally McBeal,"<sup>43</sup> represents a typical fan site and serves as a good example as to how the 1976 Copyright Act, the NET Act and the DMCA protect against unauthorized use. The web page includes an insight into the "Ally McBeal" character portrayed by actress Calista Flockhart.<sup>44</sup> The fan site provides different categories, including "sound of the week,"<sup>45</sup> quotes,<sup>46</sup> merchandising information<sup>47</sup> and photographs.<sup>48</sup> The fan site also features video clips from the television show.<sup>49</sup> Altogether, the "Ally McBeal" fan site displays numerous images

---

considered by Congress this year, even in recent memory." *Id.* Senator Leahy has called the DMCA "landmark legislation." 144 Cong. Rec. S12730-105 (daily ed. Oct. 20, 1998) (statement of Sen. Leahy); *see also* Krochmal, *Copyright Bill Expands Fair-Use Rights*, TECHWEB TECH. NEWS, (visited Aug. 27, 1999) <<http://www.techweb.com/wire/story/TWB19981013S0021>> (Marybeth Peters, the head of the U.S. Copyright Office, stating that the DMCA is the most important law in that area this decade).

41. *See* Matt McKenzie, *Commentary: Proposals to Clamp Down on Copyright Violators*, SEYBOLD REP. ON INTERNET PUB., Jan. 1, 1998, available in 1998 WL 7874628.

42. *Ally McBeal* (Twentieth Century Fox).

43. Gorbie, *Inside the Mind of Ally McBeal* (visited Nov. 16, 1998) <<http://bluesphere.simplenet.com/AllyMcBeal/index.html>>.

44. *See id.*

45. *Id.* The "sound of the week" and the quote categories allow the visitor to download a printed version of the quote on sound bytes which, when played, allow the visitor to hear the character speaking the lines. *See id.*

46. *See id.*

47. *See id.*

48. *See id.*

49. *See* Gorbie, *supra* note 42.

from the television series as well as images scanned from magazines the visitor can view and download.<sup>50</sup>

This web site is typical of many fan sites that use unauthorized protected material. This Comment analyzes the site under the 1976 Copyright Act, the NET Act, and the DMCA.

### III. TRADITIONAL COPYRIGHT LAW: THE 1976 COPYRIGHT ACT

Traditional copyright law, as set forth in the 1976 Copyright Act, centers around a set of exclusive rights belonging solely to the copyright holder.<sup>51</sup> A violation of any of these exclusive rights constitutes copyright infringement.<sup>52</sup> Thus, a fan site creator must be mindful of these rights before posting anything to their site.<sup>53</sup>

#### *A. Exclusive Rights Held by Copyright Owners*

Of the six exclusive rights enumerated in § 106 of the 1976 Copyright Act,<sup>54</sup> a fan site is likely to infringe four.<sup>55</sup> United States courts have set precedents that further help copyright owners enforce their exclusive rights to material on the Internet.<sup>56</sup>

---

50. *See id.*

51. *See* 17 U.S.C. § 106 (1994 & Supp. IV 1998).

52. *See* 17 U.S.C. § 501 (1994).

53. *See* Glenn Gamboa, *Viacom Warns Unofficial 'Star Trek' Web Sites About Copyrights*, ORANGE COUNTY REG., Jan. 27, 1997, available in 1997 WL 7404140.

54. *See* 17 U.S.C. § 106. The exclusive rights enumerated in this section include the right to:

- 1) reproduce the copyrighted work in copies of phonorecords; 2) prepare derivative works based upon the copyrighted work; 3) distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; 4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; 5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and 6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

*Id.*

55. *See Legal Problems Posed by Digital Commerce Are Focus of 2-Day Seminar*, 10 SOFTWARE L. BULL. 90 (1997).

56. *See, e.g.,* Playboy Enters., Inc., v. Frena, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993) (holding the unauthorized use of photographs on the Internet violated the exclusive rights given to a copyright holder under section 106 of the 1976 Copyright Act); *see also* Marobie-Fl., Inc. v. National Ass'n of Fire Equip. Distrib. and Northwest Nexus, Inc., 983 F. Supp. 1167 (N.D. Ill. 1997) (holding clip art posted to a web site was copyright infringement).



## 1. The Right to Reproduce Copyrighted Work

A copyright owner has the exclusive right to reproduce copyrighted works.<sup>57</sup> Courts have construed this right broadly,<sup>58</sup> especially when the copyrighted material consists of photographs.<sup>59</sup>

In *Playboy Enterprises, Inc. v. Webbworld*,<sup>60</sup> the defendant reproduced unauthorized copies of copyrighted Playboy photographs by posting them on his web site with the intent of commercially exploiting the photographs for his own benefit.<sup>61</sup> The district court held the act of transferring anything from a permanent storage device<sup>62</sup> to a computer's random access memory (RAM)<sup>63</sup> was copying.<sup>64</sup> The court held the defendant's posting of these unauthorized photographs to his web site constituted copying, which also infringed the plaintiff's copyright.<sup>65</sup> The court's broad construction of "copying" necessarily includes activities indispensable to creating a fan web site.

Under *Webbworld*, a fan downloading material from the Internet is copying the material.<sup>66</sup> Even scanning a photograph into a computer may be considered copying.<sup>67</sup> These actions concern accessing information

---

57. See 17 U.S.C. § 106(1). Copies are defined as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101 (1994 & Supp. IV 1998).

58. See *Playboy Enters., Inc. v. Webbworld, Inc.*, 991 F. Supp. 543, 552 (N.D. Tex. 1997).

59. See *id.*

60. *Id.*

61. See *id.* at 551. The defendant in this case sold subscriptions which would entitle the viewer to look at the photographs. *Id.* at 548.

62. A storage device is a "peripheral device for storing data. Tapes and disks are storage devices." *Currents High-Tech Dictionary* (visited Sept. 21, 1999)  
<<http://www.currents.net/resources/dictionary/definition.phtml?lookup=4863>>.

63. See *id.* RAM is "the physical memory installed on a computer." ALAN R. CARTER, WINDOWS NT 4.0 MCSE STUDY GUIDE 1269 (1997). RAM is also defined to be "random access memory" which is the "working memory of the computer. RAM is memory used for storing data temporarily while working on it, running application programs, etc . . . RAM is called volatile memory; information in RAM will disappear if the power is switched off before it is saved to disk." *Currents High-Tech Dictionary* (visited Sept. 21, 1999)  
<<http://www.currents.net/resources/dictionary/definition.phtml?lookup=4263>>.

64. See *Webbworld*, 991 F. Supp. at 551. This court followed the Ninth Circuit's definition of "copying." *Id.* The 9th Circuit held copying "occurs when a computer program is transferred from a permanent storage device to a computer's random access memory." *Id.*; see also *Mai Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993).

65. See *Webbworld*, 991 F. Supp. at 551.

66. See *id.*

67. *Currents High-Tech Dictionary* (visited Oct. 16, 1999)  
<<http://www.currents.net/resources/dictionary/definition.phtml?lookup=4948>>. A scanner, for

from the computer's RAM. Thus, a fan site creator who wants to use copyrighted photographs must access information from the computer's RAM and, in doing so, will reproduce or copy protected material.<sup>68</sup> Given *Webbworld's* interpretation of § 106, such unauthorized use infringes on the copyright owner's exclusive right to reproduce a protected work.<sup>69</sup>

Under the court's decision in *Webbworld*, the *Ally McBeal* fan site appears to constitute a copyright violation. The fact that the material comes from RAM or a magazine is of no relevance. On its face, it seems as though Gorbie has already violated the first exclusive right to reproduce copyrighted work.

## 2. The Right to Distribute Copies of the Copyrighted Work

The second exclusive right held by the copyright owner is the right to distribute and sell copies of protected works to the public.<sup>70</sup> The right to distribute is directly related to the public's access to material posted on the Internet.<sup>71</sup> For example, a fan site creator who allows visitors of the site to download copyrighted pictures and "print copies of electronic image files"<sup>72</sup> violates the exclusive distribution right.<sup>73</sup>

In *Playboy Enterprises, Inc. v. Hardenburgh, Inc.*,<sup>74</sup> a web site owner created an Internet computer billboard and scanned copyrighted photographs onto his fan site.<sup>75</sup> The district court found the copyright owner's distribution right was violated the moment the defendant supplied unauthorized copies of a protected work to web site visitors.<sup>76</sup> Thus, fan site creators who are not the copyright owners of posted material, but who allow copyrighted material to be downloaded or printed from their sites, violate the exclusive distribution right of the copyright owner<sup>77</sup> and therefore can be held liable.<sup>78</sup>

---

instance, is "an input device that reads images or text and converts the data into digital signals." *Id.*

68. See *Webbworld*, 991 F. Supp. at 551.

69. *Id.*

70. See 17 U.S.C. § 106(3) (1994).

71. *Playboy Enters. v. Hardenburgh, Inc.*, 982 F. Supp. 503, 513 (N.D. Ohio 1997). This court states "in order to establish distribution of a copyrighted work, a party must show that an unlawful copy was disseminated to the public." *Id.*

72. *Webbworld*, 991 F. Supp. at 551.

73. See *id.*

74. 982 F. Supp. 503 (N.D. Ohio 1997).

75. See *Hardenburgh*, 982 F. Supp. at 505-06.

76. See generally *id.* at 513.

77. 17 U.S.C. § 106 (3).

78. See *id.*

The *Ally McBeal* fan site allows anyone with Internet access to view the web site and download its images free of charge. Thus, the fan site violates the second exclusive right given to the copyright holder.

### 3. The Right to Display the Copyrighted Work Publicly

The copyright owner is vested with the exclusive right to publicly display the copyrighted work.<sup>79</sup> The concept of display is broad.<sup>80</sup>

In three different cases, Playboy Enterprises sued web site creators who had posted copyrighted Playboy photographs without permission.<sup>81</sup> In all three cases, the courts found that Playboy's exclusive right to publicly display the material was infringed the instant its copyrighted photographs were posted to the defendants' web sites without permission.<sup>82</sup> The *Frena* court clarified that the right to publicly display applies to the unauthorized transmission of material by a computer system, specifically via the Internet through web sites.<sup>83</sup> Additionally, the *Frena* court stated a web site is "open to the public" even when a web site creator limits visitors by charging a subscription fee to access the material.<sup>84</sup> Based on the *Playboy* cases, a fan site creator violates the exclusive public display right by posting unauthorized copyrighted material to a site, enabling other Internet users to view the copyrighted work.<sup>85</sup>

---

79. See 17 U.S.C. § 106(5) (Supp. IV 1998). Section 106(5) states the copyright owner has the right "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly." *Id.* The 1976 Copyright Act defines "display" as "show[ing] a copy of [a work], either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially." 17 U.S.C. §101. The 1976 Copyright Act also defines "publicly" as: "[t]o . . . display a work 'publicly' means - (1) to . . . display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered . . ." *Id.*

80. H.R. REP. NO. 94-1476, at 64 (1976). The concept of display 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.* See generally 2 MELVILLE B. NIMMER & DAVID NIMMER, 2 NIMMER ON COPYRIGHT §8.20[A], at 8-278 (1998) (elaborating on what constitutes "display").

81. See *Frena*, 839 F. Supp. at 1552.

82. See *id.*; see also *Hardenburgh*, 982 F. Supp. at 503; *Webbworld*, 991 F. Supp. at 543.

83. See *Frena*, 839 F. Supp. at 1556.

84. *Id.* at 1557. The *Webbworld* court noted the violation of the public display right was partly due to the fact that the copyrighted work could be viewed by merely visiting the web site. *Webbworld*, 991 F. Supp. at 552.

85. See *Frena*, 839 F. Supp. at 1552; *Hardenburgh*, 982 F. Supp. at 506; *Webbworld*, 991 F. Supp. at 551.

Just as the Playboy photographs posted on the Internet violates the exclusive right to publicly display copyrighted material, the photographs posted on the *Ally McBeal* website similarly violate this exclusive right.

#### 4. The Right to Publicly Perform the Copyrighted Work

Another exclusive right granted to a copyright owner is the right to publicly perform the copyrighted work.<sup>86</sup> In the context of the fan site, this right applies specifically to those sites that allow visitors to download copyrighted music.<sup>87</sup>

Section 106(6) states: “in the case of sound recordings, the copyright holder has the exclusive right to perform the copyrighted work publicly by means of a digital audio transmission.”<sup>88</sup> Thus, downloading copyrighted sound recordings from Internet sites violates the copyright owner’s public performance right.<sup>89</sup> Therefore, fans who post copyrighted sound recordings on their web sites without permission—anticipating that such music will be downloaded—may be violating the copyright owner’s exclusive right to publicly perform the copyrighted work.<sup>90</sup>

Section 501 of the 1976 Copyright Act specifically states that anyone who violates the exclusive rights enumerated in § 106 may be held liable, regardless of the infringer’s intent.<sup>91</sup> Based on the foregoing discussion, site creators who post copyrighted material to their fan sites without authorization may violate four of the exclusive rights granted to copyright owner’s. Furthermore, these individuals cannot use a fair use defense<sup>92</sup> to avoid liability.

---

86. 17 U.S.C. § 106(4) (Supp. IV 1998).

87. This comment will not focus on the current controversy over music digitally downloaded from web sites. However, this right warrants some recognition due to the recent creation of more fan sites that allow access to music that can be downloaded.

88. 17 U.S.C. § 106(6) (Supp. IV 1998). “Sound recordings” are defined as “works that result from the fixation of a series of musical, spoken, or other sounds . . . .” 17 U.S.C. § 101. A “digital audio transmission” is further defined as “a transmission in whole or in part in a digital or other non-analog format.” *Id.* Section 101 also defines “public performance” as being: “(1) to perform . . . at a public place open the public . . . (2) to transmit or otherwise communicate a performance . . . by means of any device or process . . . .” *Id.*

89. See Adam P. Segal, Comment, *Dissemination of Digitized Music on the Internet: A Challenge to the Copyright Act*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J., 97, 117 (1996). In general, it is conceded that other exclusive rights, specifically the right to reproduce and distribute, are infringed when sound recordings are downloaded from a web site. *Id.*

90. See *id.*

91. See *Frena*, 839 F. Supp. at 1561.

92. See 17 U.S.C. § 107.

### B. The Fair Use Doctrine

The fair use doctrine operates as an affirmative defense and limitation to the exclusive rights enumerated in § 106.<sup>93</sup> This doctrine allows, under certain conditions, the use of copyrighted material without authorization from the copyright owner.<sup>94</sup> Section 107 of the 1976 Copyright Act states specific unauthorized uses of the copyrighted material, such as for criticism, comment, news reporting, teaching, scholarship or research, will not be considered infringements of the copyright.<sup>95</sup> Section 107 specifically enumerates four factors that are to be considered in determining whether the use of the copyrighted material may be deemed a fair use.<sup>96</sup> The fan site does not come under these exceptions and therefore cannot succeed.

#### 1. The First Factor: The Use of the Material

To help determine if use of the copyrighted work is protected under the fair use doctrine, courts consider whether the material was used for commercial gain,<sup>97</sup> and also consider the purpose and character of the use<sup>98</sup> of the work.<sup>99</sup> A finding of commercial gain will weigh against a finding of fair use because courts do not want unauthorized users to profit from the work.<sup>100</sup>

Generally, courts look to see if a profit was made from the infringing use.<sup>101</sup> For example, one court found commercial gain when a web site creator charged a subscription fee to access copyrighted photographs.<sup>102</sup> Commercial gain was also found when Kinko's, a duplication business, copied and sold "course packets" containing copyrighted material.<sup>103</sup>

---

93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.*

98. *See* 17 U.S.C. § 107 (1994).

99. *See id.*

100. *See, e.g., Frena*, 839 F. Supp. at 1557.

101. *See id.*

102. *See Frena*, 839 F. Supp. at 1557-58 (stating "[o]ne who distributes copyrighted material for profit is engaged in a commercial use even if the customers supplied with such material themselves use it for personal use."). *Id.*

103. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1526 (S.D.N.Y. 1991). "Course packets" were copied and bound excerpts of copyrighted literary material. These packets were sold to students for their studies. *Id.*

In contrast, a district court in Colorado found that there was no commercial gain when a non-profit corporation posted the writings of L. Ron Hubbard, the founder of the plaintiff's religious group, to the Internet.<sup>104</sup> The court justified the posting as non-commercial and stated it was "made for non-profit purposes to advance understanding of issues concerning the Church . . . ."<sup>105</sup> Courts differentiate between the use of copyrighted works for personal profit and the dissemination of information that does not result in a monetary benefit.<sup>106</sup> Courts want to encourage public dissemination of information, but at the same time deter people from benefiting from products that are not their own.<sup>107</sup> In light of these policy concerns, courts are more likely to allow the use of protected material posted on the Internet if the use does not result in financial gain to the fan site creator.<sup>108</sup>

The *Ally McBeal* fan site does not result in commercial gain for the fan site creator. The site does not require a subscription fee to access any of the site's material and Gorbie does not otherwise ask for monetary compensation.<sup>109</sup> In the tradition of the non-profit corporation, the creator has posted material for others, free of charge.<sup>110</sup> Thus, the *Ally McBeal* site would not be deemed a site that uses unauthorized copyrighted material for commercial gain.<sup>111</sup>

Another element of the fair use defense considers the purpose of the infringing use.<sup>112</sup> A court will specifically look at whether the use of the copyrighted material is "transformative."<sup>113</sup> If the infringement adds something new to the infringed work,<sup>114</sup> such that it adds "further purpose or different character, altering the first with new expression, meaning or

---

104. *Religious Tech. Ctr. v. F.A.C.T. Net, Inc.*, 901 F. Supp. 1519, 1521 (D. Colo. 1995).

105. *Id.* at 1525.

106. *See id.* at 1526.

107. *Id.*

108. *Id.*

109. Gorbie, *Inside the Mind of Ally McBeal* (visited Nov. 16, 1998) <<http://bluesphere.simplenet.com/AllyMcBeal/index.html>>. However, the fan site suggests where *Ally McBeal* merchandise can be found for sale and does not require the viewer to purchase any merchandise. *Id.*

110. *See Gorbie, supra* note 42.

111. A corporate insider mentioned when searching for fan sites that infringe on the studio's copyrights, financial incentive to post the fan site will be a factor. Telephone interview with anonymous movie studio executive (June 11, 1999).

112. 17 U.S.C. § 107(1).

113. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); *Basic Books*, 758 F. Supp. at 1530.

114. *See Campbell*, 510 U.S. at 579.

message,”<sup>115</sup> then the use of the copyrighted work is “transformative.” A “transformative” use favors a successful fair use defense.<sup>116</sup> Courts consider “transformative” uses to be consistent<sup>117</sup> with the goals of copyright law, which include promoting creative efforts.<sup>118</sup>

In *Campbell v. Acuff-Rose Music, Inc.*,<sup>119</sup> the copyright holders of the song “Oh, Pretty Woman” sued the defendants for copyright infringement based on the defendants’ parody of the song.<sup>120</sup> The Supreme Court found the parody was a transformative use because it qualified as a form of social criticism and provided a social benefit.<sup>121</sup> The new use of the song, in the form of a parody, was found to be sufficiently different from the original song.<sup>122</sup> This element weighed in favor of the defendant’s fair use defense.<sup>123</sup>

However, when there is no transformative use, the first element of the fair use defense weighs in favor of the copyright holder.<sup>124</sup> In *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*,<sup>125</sup> the producers of the television series *Seinfeld*<sup>126</sup> brought a copyright infringement suit against an author and publisher of a book containing trivia questions based upon the television series.<sup>127</sup> The book, entitled “The Seinfeld Aptitude Test” (“SAT”) consists of trivia questions and answers about the events and characters of the television show.<sup>128</sup> The court found the SAT was not a transformative use because the book merely “repackaged” the television

115. *Id.*

116. *See id.*

117. *See* U.S. CONST. art. I, § 8, cl. 8 (stating the purpose of copyright law is “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and inventors the exclusive Right to their respective Writings and Discoveries”). The fair use doctrine helps to encourage authors to create by building on prior copyrighted works of other authors. 17 U.S.C. § 107.

118. *See id.*

119. 510 U.S. at 569.

120. *See Campbell*, 510 U.S. at 573.

121. *See id.* at 579. The defendant in this case kept the underlying theme and melody of the song, but changed the lyrics and converted it into a rap song. *See id.* at 583. The Court stated “parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s . . . imagination.” *Id.* at 580–81.

122. *Id.* at 581.

123. *See id.* at 579.

124. *See* *Castle Rock Entertainment, Inc. v. Carol Publ’g. Group, Inc.*, 150 F.3d 132, 142 (2d Cir. 1998).

125. 150 F.3d 132 (2d Cir. 1998).

126. *Seinfeld* (National Broadcasting Company).

127. *See* *Castle Rock Entertainment v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 135 (2d Cir. 1998).

128. *See id.*

series and did not criticize, parody, or comment on the series.<sup>129</sup> Without any finding of transformative use, the court concluded the first element of fair use weighed in favor of the copyright holders.<sup>130</sup>

The *Ally McBeal* fan site features the opinion of the fan site creator.<sup>131</sup> However, Gorbie's opinions are not detailed or commentaries that would benefit society and therefore, they do not meet the standard the Supreme Court set in *Campbell* for the transformative use.<sup>132</sup> The comments on the *Ally McBeal* fan site are very minimal and do not transform or mold the underlying *Ally McBeal* material into anything different.<sup>133</sup> The use of the material on the fan site is similar to the use of material in *Basic Books v. Kinko's Graphics Corp.*<sup>134</sup> and *Castle Rock Entertainment* in that it copies and repackages material without adding much additional commentary or research to the posted material.<sup>135</sup> The *Ally McBeal* fan site probably would not qualify as transformative use, and this factor weighs in favor of the copyright holder, Twentieth Century Fox.<sup>136</sup>

## 2. The Second Element: The Nature of the Copyrighted Material

The second element of the fair use defense focuses on the nature of the copyrighted material.<sup>137</sup> This element considers the level of creativity of the work.<sup>138</sup> Courts will look at whether the protected work is "closer to the core of intended copyright protection than others."<sup>139</sup> This element of

---

129. *See id.* at 142.

130. *Castle Rock*, 150 F.3d at 141. A non-transformative use will not further the policies behind the fair use doctrine. *Id.* at 142. For example, the Supreme Court stated, "if . . . the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish) . . ." *Campbell*, 510 U.S. at 580; *see also Basic Books*, 758 F. Supp. at 1522 (finding no transformative use in directly repackaging literary material without any additional commentary).

131. *See Gorbie*, *supra* note 42.

132. *See Campbell*, 510 U.S. at 579.

133. *See Gorbie*, *supra* note 42.

134. 758 F. Supp. 1522 (S.D.N.Y. 1991).

135. *See Basic Books v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

136. Twentieth Century Fox owns the copyright in *Ally McBeal*. U.S. Copyright Office *Records* (visited Sept. 21, 1999) <<http://www.loc.gov/copyright/rb.html>>. Search of Telnet [locis.loc.gov](http://locis.loc.gov), Copyright Information library, "Works registered for copyright since 1978" library, COHM file.

137. *See* 17 U.S.C. § 107(2).

138. *See Castle Rock*, 150 F.3d at 144.

139. *Id.* at 143.



the fair use defense tends to weigh in favor of the copyright holder when the copyrighted material is fictional.<sup>140</sup>

In the context of a television show, a court will consider the protected material as a whole instead of treating each episode as a separate copyrighted work.<sup>141</sup> In *Castle Rock*, the Second Circuit Court of Appeals found the *Seinfeld* television series, as a creative and fictional work, should be given protection.<sup>142</sup>

*Ally McBeal*, like *Seinfeld*, is a fictional and creative work. Because Gorbie extracted the quotes and images for the web site from the television series, a court would likely find the nature of the work weighs in favor of the copyright holders and against a finding of fair use.<sup>143</sup>

### 3. The Third Element: Quantity and Quality of the Copyrighted Material

The third element of fair use focuses on the quantity and quality of the portion of the copyrighted material used in relation to the copyrighted work as a whole.<sup>144</sup> There are no absolute rules in determining how much one can use of a copyrighted work before the fair use defense no longer applies.<sup>145</sup> Some courts have found that extracting even a small portion of the copyrighted work constitutes infringement if that small portion contains “the heart” of the work.<sup>146</sup> A court will look to see if the most important parts or a large portion of the infringed material was extracted and used.<sup>147</sup> If so, a fair use defense may not be available to the infringer.<sup>148</sup>

In *Basic Books*, the district court found a qualitative taking of copyrighted material when the Kinko’s copying center copied the critical parts of certain books to use in its course packets.<sup>149</sup> In *Maxtone-Graham*

140. *See id.* at 144; *Twin Peaks Prods., Inc. v. Publications Int’l.*, 996 F.2d 1366, 1376 (2d Cir. 1993).

141. *See Castle Rock*, 150 F.3d at 138.

142. *See id.* at 143–44.

143. *See generally id.*

144. *See* 17 U.S.C. § 107(3); *see also Basic Books*, 758 F. Supp. at 1533.

145. *See Maxtone-Graham v. Burtchael*, 803 F.2d 1253, 1262 (2d Cir. 1986); *see also Campbell*, 510 U.S. at 586 (stating that courts should also look at the justifications for the use while keeping in mind the first factor of fair use, the purpose and the character of the use).

146. *See Campbell*, 510 U.S. at 587–88. The U.S. Supreme Court stated, “[A] work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.” *Id.*

147. *See id.* at 587.

148. *See id.* at 586.

149. *Basic Books*, 758 F. Supp. at 1533. The portions of the books copied were found to be critical because professors wanted their students to read these specific parts of the actual books for their classes. *See id.*; *see also Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539,

*v. Burtchaell*,<sup>150</sup> the court found the defendant, a Catholic priest who used quotes from another author's book to make his own book "more persuasive,"<sup>151</sup> had not actually taken the heart of the infringed book because there was no "identifiable core that could be appropriated."<sup>152</sup> In other words, the heart of the work had not been extracted.

In terms of quantity, courts consider whether the defendant used a substantial percentage of the infringed work.<sup>153</sup> While there is no bright-line rule defining what percentage constitutes a substantial taking,<sup>154</sup> the court in *Basic Books* held the fair use defense was not available when 5.2% to 25.1% of the copyrighted works had been copied.<sup>155</sup> In contrast, the Second Circuit held that copying 4.3% of a copyrighted work was not an infringement.<sup>156</sup> The court in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.* held there was substantial copying when the defendant posted "all or almost all of many of the works"<sup>157</sup> of the plaintiff's writings on the Internet.<sup>158</sup>

In *Twin Peaks Productions, Inc. v. Publications International, Ltd.*,<sup>159</sup> the Second Circuit found there was infringement when the defendant excerpted a total of eighty-nine lines of dialogue from several episodes of a television series and incorporated them into a book.<sup>160</sup> The court noted the defendant used descriptions from a large number of episodes of the television series *Twin Peaks*<sup>161</sup> "lift[ing] many parts verbatim from the script."<sup>162</sup>

Thus, courts have refrained from defining how much appropriation constitutes an unlawful taking. Overall, the court considers both the quantity and quality of the extracted material.

---

564–65 (holding the defendants unauthorized copying of President Ford's memoirs constituted the heart of the work).

150. 803 F.2d 1253 (2d Cir. 1986).

151. *Maxtone-Graham v. Butchaell*, 803 F.2d 1253, 1263 (2d Cir. 1986).

152. *Id.*

153. *See Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 923 F. Supp. 1231, 1246 (N.D. Cal. 1995).

154. *See id.*

155. *See Basic Books*, 758 F. Supp. at 1533.

156. *See Maxtone-Graham*, 803 F.2d at 1263.

157. *See Religious Tech. Ctr.*, 923 F. Supp. at 1247.

158. *See generally id.*

159. 996 F.2d 1366 (2d Cir. 1993).

160. *See Twin Peaks Productions, Inc. v. Publications Int'l, Ltd.*, 996 F.2d 1366, 1372 (2d Cir. 1993).

161. *Twin Peaks* (Twin Peaks Productions, Inc.).

162. *Twin Peaks*, 996 F.2d at 1376–77.

The quantity/quality element of fair use would most likely favor the fan site creator of *Ally McBeal*.<sup>163</sup> Although sentences from television scripts are dispersed throughout the fan site,<sup>164</sup> the site's creator identifies a majority of the quotes according to which episode it came from and the episode's airdate.<sup>165</sup> In terms of quantity, the fan site includes only a small number of quotes from the television series.<sup>166</sup> Gorbie has lifted a maximum of only eight quotes per one-hour episode.<sup>167</sup> Courts consider percentages in determining the quantity of the copyrighted work infringed. In *Maxtone-Graham*, the court held that 4.3% of a taking did not constitute an infringement.<sup>168</sup> It is unlikely the *Ally McBeal* fan site creator has enough material from the television series to constitute a quantitative taking.

The *Ally McBeal* fan site faces a greater obstacle with the qualitative prong of the analysis. Gorbie devotes her site to capturing the essence of the *Ally McBeal* character.<sup>169</sup> Gorbie refers to all of the characteristics that make the show's main character, *Ally McBeal*, attractive.<sup>170</sup> For example, Gorbie praises *Ally* as being "insecure yet hopeful"<sup>171</sup> and supports her opinion by quoting from an episode in which *Ally* states, "[E]ven if I get past all my problems I'm just going to go out and get new ones."<sup>172</sup> Gorbie's praise of *Ally* accompanied by quotes from the television show comprise most of her fan site.<sup>173</sup> Just as Gorbie's adoration for the *Ally* character inspired her to create an *Ally McBeal* fan site, the *Ally McBeal* character may be what induces television viewers to watch the show. In other words, *Ally McBeal's* character<sup>174</sup> itself may comprise the heart of the television series. The fact that the television show's title is the name of

---

163. However, one should keep in mind a quantitative taking may be found if complete photographs are posted to Gorbie's web site. Because these photographs are copyrighted by, perhaps, photographers or the television studio itself, it should be noted, in light of this view, Gorbie's posting of these photographs would be an absolute taking of copyrighted material.

164. See Gorbie, *supra* note 42.

165. See *id.*

166. See Gorbie, *supra* note 42. Quotes are extracted in different amounts. At times, three quotes are taken from an episode. On occasion, Gorbie takes eight quotes from an episode. *Id.*

167. See Gorbie, *supra* note 42. The fan site creator has not included quotes from a majority of the *Ally McBeal* episodes. *Id.*

168. 803 F.2d at 1263.

169. See Gorbie, *supra* note 42.

170. See *id.*

171. *Id.*

172. *Id.*

173. See *id.*

174. Characters themselves are copyrightable under certain circumstances. See, e.g., *Anderson v. Stallone*, 11 U.S.P.Q.2d 1161 (C.D. Cal. 1989).

the character attests to the idea that the character is the basis of the series. Thus, posting numerous quotes encapsulating the traits of the character, even if only a handful of quotes are taken from any one episode, may likely infringe on the heart of Twentieth Century Fox's copyright.<sup>175</sup>

#### 4. The Fourth Element: Effect on the Market or Value

The fourth fair use element looks to see if unauthorized use of the copyrighted material has an effect on the potential market for, or value of, the copyrighted work.<sup>176</sup> This factor requires courts to consider not only the individual harm caused by the infringer, but also whether widespread conduct of this sort would result in a substantially adverse impact on the potential market for the original work.<sup>177</sup> Thus, in examining the fourth factor, courts consider the impact on the potential market, and whether the value of the copyright infringement is affected if infringement occurred on a widespread basis.<sup>178</sup> This inquiry must also consider "the harm to the market for derivative works."<sup>179</sup>

For example, in *Campbell*, the court decided "evidence of substantial harm to [the market for derivative works] would weigh against a finding of fair use, because the licensing of derivatives is an important economic incentive to the creation of originals."<sup>180</sup> Furthermore, the court in *Religious Technology Center*<sup>181</sup> found the potential market for Scientology Church members was not affected when the defendant posted some of the Church's writings on his web site.<sup>182</sup> The court reasoned the defendant's postings to the Internet were not complete and the demand for the teachings of the Church would not diminish.<sup>183</sup>

In contrast, the court in *Basic Books* held the fourth factor weighed

---

175. David E. Kelley is the creator of *Ally McBeal*, but Twentieth Century Fox owns the copyright to the show. See *supra* note 136.

176. See 17 U.S.C. § 107(4) (1994).

177. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 589 (1994).

178. See *id.* at 591.

179. *Harper & Row Publishers*, 471 U.S. at 568; see also 17 U.S.C. §101. A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. *Id.* A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work." *Id.*

180. *Campbell*, 510 U.S. at 593.

181. 923 F. Supp. at 1231.

182. See *Religious Tech. Ctr.*, 923 F. Supp. 1231 (N.D. Cal. 1995).

183. See *id.* at 1248.

heavily in favor of the plaintiffs because there would be potential market harm if all copying stores, such as Kinko's, were able to use unauthorized copyrighted material to make "course packets."<sup>184</sup> If copying literary material to make the course packets was done in the aggregate, no one would purchase the actual books from which the course packets took their material.<sup>185</sup> The course packets had replaced the need for the actual books.<sup>186</sup>

Similarly, in *Castle Rock*, the court of appeals found that although the *Seinfeld* trivia book complemented the show and encouraged the current market for the show, the book harmed the potential market for derivative uses.<sup>187</sup> The court held the plaintiffs were entitled to the exclusive option of exploring the market for trivia games<sup>188</sup> and the *Seinfeld* trivia book encroached on that market.<sup>189</sup>

Based on the *Basic Books* and *Castle Rock* cases, the *Ally McBeal* fan site similarly detracts from and harms the current derivative markets of the *Ally McBeal* show. The copyright owners are entitled to the exclusive option of exploring such markets even though the site may help to publicize the show.<sup>190</sup> The photographs and quotes alone displayed on the *Ally McBeal* fan site are probably not enough to deter people from watching the show. Thus, even though the primary market of the copyrighted show may not be affected, the fan site may negatively impact a derivative market and therefore violate the show's copyright.

Gorbie's unauthorized fan site may be a derivative work given the 1976 Copyright Act's definition.<sup>191</sup> However, Twentieth Century Fox<sup>192</sup> already occupies this derivative market with its own fan site.<sup>193</sup> The official site describes the cast, explains the plot, and has a photographic album.<sup>194</sup> Consequently, Gorbie's fan site may be attracting viewers who

---

184. See *Basic Books*, 758 F. Supp. at 1534.

185. See *id.*

186. See *id.*

187. See *Castle Rock*, 150 F.2d 132 (2d Cir. 1998). But see *Campbell*, 510 U.S. at 592 (holding defendant's rap parody did not affect the market for derivative works due to the nature of rap music and the fact that it was a parody).

188. See *Castle Rock*, 150 F.3d at 145.

189. See *id.*

190. See *Basic Books*, 758 F. Supp. at 1522; see also *Castle Rock Entertainment*, 150 F.3d 132.

191. See 17 U.S.C. § 101.

192. See *Ally McBeal*, *supra* note 42. Twentieth Century Fox is also the copyright owner of the show. See U.S. Copyright Office Records, *supra* note 142.

193. See *id.*

194. See *id.*

might otherwise access Fox's official *Ally McBeal* fan site.<sup>195</sup> While Fox can control the presentation of its copyrighted material on its official *Ally McBeal* fan site, it has no such control over Gorbie's unofficial site. Therefore, the fourth element of the fair use defense weighs in favor of the copyright holder and against a finding of fair use.

Copyright holders are often vigilant in enforcing their exclusive right to derivative markets. This can be attributed to their interest in maintaining control over the presentation of their copyrighted work to the public as well as their concern over potential lost revenue.<sup>196</sup> For example, Viacom, the copyright holder of *Star Trek*,<sup>197</sup> has an official *Star Trek* fan site located on the Microsoft Network.<sup>198</sup> Viacom has sent several cease-and-desist letters to web site creators, demanding they shut down their unauthorized web sites.<sup>199</sup> Because access to this official fan site requires a fee,<sup>200</sup> unofficial *Star Trek* sites infringe on the copyright holder's chance to exploit the fan site market and may result in lost profits.<sup>201</sup> Because copyright holders participate in the market for derivative works, fan site creators may not be protected by the fair use doctrine.

A fair use defense would probably fail for Gorbie because a majority of the fair use factors tend to favor the copyright holder, Twentieth Century Fox. Thus, a fair use defense cannot save Gorbie's unauthorized fan site and others like it from the protection that § 106 affords copyright holders.

#### IV. THE NET ACT

##### *A. Introduction*

In addition to the protection granted by the 1976 Copyright Act, copyright owners may also have recourse under the No Electronic Theft Act<sup>202</sup> ("NET Act"). This act specifically protects copyrighted works in

---

195. *See id.*

196. *See* Erika S. Koster & Jim Shatz-Akin, *Set Phasers on Stun: Handling Internet Fan Sites*, 15 *COMPUTER LAW* 18 (1998).

197. *Star Trek* (Viacom); *see* Gamboa, *supra* note 14.

198. *See* Gamboa, *supra* note 14.

199. *See id.*

200. *See id.*

201. *See id.*

202. Pub. L. No. 105-147, 111 Stat. 2678 (1997) (to be codified at 18 U.S.C. §2311). The 105th Congress enacted both the DMCA and the NET Act. *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998); NET Act, Pub. L. No. 105-147, 111 Stat. 2678. The President signed the NET Act into law on December 16, 1997. *See* NET Act, 111 Stat. at 2680.

electronic form.<sup>203</sup> The NET Act was enacted in response to the "LaMacchia loophole"<sup>204</sup> left open by *United States v. LaMacchia*.<sup>205</sup>

In *LaMacchia*, defendant David LaMacchia, a 21-year-old MIT college student, used MIT's computer network to gain access to the Internet.<sup>206</sup> After creating an electronic bulletin board named "Cynosure," LaMacchia encouraged people to upload<sup>207</sup> popular software applications and computer games.<sup>208</sup> The immense amount of Internet traffic generated by LaMacchia's bulletin board attracted the attention of authorities who charged him with conspiring to violate a wire fraud statute.<sup>209</sup>

The Massachusetts District Court held LaMacchia's conduct did not violate the wire fraud statute<sup>210</sup> as the statute was not intended to protect copyright.<sup>211</sup> In addition, the court found criminal sanctions for copyright infringement, as provided for in § 506 of the 1976 Copyright Act,<sup>212</sup> did not apply because LaMacchia did not receive commercial or financial gain from his activity.<sup>213</sup> The Massachusetts District Court stated, "[i]t is the legislature, not the Court which is to define a crime, and ordain its punishment."<sup>214</sup> In response to *LaMacchia*, Congress passed the NET Act.<sup>215</sup>

### B. The Law

The NET Act makes it a crime to:  
infring[e] a copyright willfully either—

- 1) for purposes of commercial advantage or private financial

203. *See id.*

204. *See* Richard Raysman & Peter Brown, *Internet Copyright Developments*, N.Y. L.J., Feb. 10, 1998, at 3.

205. 871 F. Supp. 535 (D. Mass. 1994).

206. *See* *United States v. LaMacchia*, 871 F. Supp. 535, 536 (D. Mass. 1994).

213. Uploading means "to transfer files or data from one computer to another." *Currents High-Tech Dictionary* (visited Sept. 21, 1999) <<http://www.currents.net/resources/dictionary/definition.phtml?lookup=5468>>.

208. *See LaMacchia*, 871 F. Supp. at 530. Uploading means "to transfer files or data from one computer to another." *Currents High-Tech Dictionary* (visited Sept. 21, 1999) <<http://www.currents.net/resources/dictionary/definition.phtml?lookup=5468>>.

209. *See LaMacchia*, 871 F. Supp. at 545.

210. *Id.*

211. *Id.* at 542-43.

212. *See* 17 U.S.C. § 506.

213. *See LaMacchia*, 911 F. Supp. at 542-43.

214. *See id.* at 545 (quoting *Dowling v. United States*, 473 U.S. 207, 214 (1985)).

215. NET Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997) (to be codified at 18 U.S.C. § 2311).

gain, or

2) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000.<sup>216</sup>

The NET Act, which defines financial gain as the “receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works,”<sup>217</sup> punishes those who profit financially from their infringement.<sup>218</sup> In addition, section 2 of the NET Act provides those who do not financially benefit from willful infringement can also be held liable.<sup>219</sup>

The NET Act only punishes willful infringement.<sup>220</sup> Therefore, unintentional infringement will not be considered a violation.<sup>221</sup> Thus, the intent requirement limits the NET Act’s ability to reach all copyright infringers.

### C. A Fan Site and the NET Act

A fan site that uses copyrighted material does not necessarily violate the NET Act, even if the infringement is done for commercial gain or infringes copyrighted material worth more than \$1,000.<sup>222</sup> For a fan site creator to be held liable under the NET Act, the infringement must be willful.<sup>223</sup>

Willful infringement means the infringer is aware that his or her conduct constitutes copyright infringement.<sup>224</sup> In *Hearst Corp. v. Stark*,<sup>225</sup>

---

216. *Id.* at § 2(b).

217. *Id.* at § 2(a).

218. *See id.* § 2(a)–(b).

219. *See Software Publishers Pleased by Clinton’s Signing of the No Electronic Theft Act*, ELEC. EDUC. REP., Jan. 14, 1998, available in 1998 WL 9575031.

220. *See* NET Act § 2(b). However, it should also be noted the legislation was criticized for not having explicitly preserved the “fair use” privilege. Goldie Blumenstyk, *Copyright Law Closes Loophole on Distribution of Software*, CHRON. OF HIGHER EDUC., Jan. 9, 1998, available in 1998 WL 27338132.

221. *See* NET Act § 2(b).

222. *See id.* § 2(b)(a)(2).

223. *See id.* § 2(a).

224. *Peer Int’l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1335 (9th Cir. 1990) (holding “willful” means there was “knowledge that the defendants’ conduct constituted an act of infringement”); *see also Dolman v. Agee*, 157 F.3d 708, 715 (9th Cir. 1998) (holding that “[i]n the copyright context, ‘willful’ means acting with knowledge that [one’s] conduct constitutes copyright infringement”).

225. *Hearst Corp. v. Stark*, 639 F. Supp. 970 (N.D. Cal. 1986).



the court expanded the definition by finding willful infringement when an individual “was or should have been”<sup>226</sup> aware of his or her infringing acts. Willful infringement also occurs when the infringer acts with a “reckless disregard for the rights” of the copyright holder.<sup>227</sup> A determination of willfulness is a question of fact presented for a jury.<sup>228</sup>

A fan that creates a site using unauthorized copyrighted material is not necessarily willfully infringing a copyright. The *Ally McBeal* fan site may constitute willful infringement if Gorbie knew her site violated the copyright laws. It is likely Gorbie knew she was using copyrighted material from a television series.

Although Congress enacted the NET Act to afford copyright owners more protection, this law is somewhat emasculated by the intent requirement.<sup>229</sup> However, a court would likely find a fan site creator, like Gorbie, willfully infringed because of the use of material from a mainstream copyrighted work.

## VI. THE DIGITAL MILLENNIUM COPYRIGHT ACT

### A. Introduction

Recently Congress recognized that intellectual property law needs to keep pace with technological advances such as the Internet.<sup>230</sup> In February of 1993, the U.S. federal government formed the Information Infrastructure Task Force, which established the Working Group on Intellectual Property Rights.<sup>231</sup> The Working Group investigated “the effects of emerging digital technology on intellectual property rights”<sup>232</sup> and made recommendations regarding appropriate changes to U.S. intellectual property law and policy.<sup>233</sup> As a result, they published a report with their findings ultimately known as the “White Paper.”<sup>234</sup> This was the beginning of the inquiry into Internet copyright protection.

---

226. *Id.* at 979.

227. *Id.* (quoting *Lauratex Textile Corp. v. Allton Knitting Mills*, 519 F. Supp. 730, 733 (S.D.N.Y. 1981)).

228. *Hearst*, 639 F. Supp. at 980.

229. The 1976 Copyright Act does not require intent to constitute a violation of a copyright. 17 U.S.C. § 504(c)(2). The court has the discretion to determine damages in the context of either a willful or innocent infringement. *Id.*

230. *See* S. REP. NO. 105-190, pt. 2, at 2 (1998).

231. *See id.*

232. *Id.*

233. *See id.*

234. *See id.*

On the international front, the U.S., along with 150 other countries, met under the name of the World Intellectual Property Organization (“WIPO”) in December of 1996 to negotiate the Copyright Treaty and the Performances and Phonograms Treaty.<sup>235</sup> To implement the WIPO treaties, Congress passed the Digital Millennium Copyright Act of 1998<sup>236</sup> (DMCA).

Congress had two purposes in passing the DMCA.<sup>237</sup> First, Congress wanted to promote the continued growth and development of electronic commerce<sup>238</sup> and wanted to protect intellectual property rights.<sup>239</sup> Congress especially wanted to “encourage copyright owners to make their works available over the Internet and in other digital formats,”<sup>240</sup> keeping in mind, “[p]rotecting and encouraging the intellectual creations of our citizens has always been a fundamental priority for our country and a responsibility of our national government.”<sup>241</sup>

Support for the DMCA was not hard to find.<sup>242</sup> Supporters, including intellectual property owners,<sup>243</sup> emphasized “America’s creative communities contribute as much as \$250 billion each year to the U.S. Gross Domestic Product, support nearly three million American jobs, and account for more than \$50 billion in exports and foreign sales each year.”<sup>244</sup>

---

235. See H.R. REP. NO. 105-551, pt. 2, at 20 (1998).

236. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 101, 112 Stat. 2860 (1998).

237. See H.R. REP. NO. 105-551, pt. 2, at 20 (1998).

238. *Id.* at 21.

239. *Id.* at 20.

240. 144 Cong. Rec. S12730 (daily ed. Oct. 20, 1998) (statement of Sen. Leahy). Congress also wanted to create additional employment in the copyright-based industries. *Id.*

241. *Id.* Senator Leahy has also voiced approval for the Act by stating this “bill is a product of our recognition that the digital age presents us with unprecedented challenges to copyright protection. Copyright protection is the engine that converts the energy of artistic creativity into public arts and entertainment. The government’s role has been to encourage creativity and innovation by protecting copyrights, which creates incentives for the dissemination to the public of new works and forms of expression.” *Reaction of Sen. Leahy to Senate Passage of WIPO Treaties Implementation Bill*, U.S. NEWSWIRE, May 14, 1998, available in 1998 WL 5685836.

242. See generally David M. Young, *Congress Modifies Copyright Protections for the Digital Age*, 14 LEGAL BACKGROUNDER, Feb. 19, 1999, available in LEXIS, Nexis Library, News File.

243. See Young, *supra* note 242. Intellectual property authors include software developers, musicians, writers, and film makers. *Id.* Supporters of stronger copyright protection also include the Authors Guild, the Motion Picture Association of America and the Recording Industry Association of America. *Id.* The Commercial Internet Exchange Association (“CIX”) also expressed its support. See *CIX Supports Passage of H.R. 2281*, ASSOCIATED PRESS POL. SERV., available in 1998 WL 7424145. Also supporting the Act were the Screen Actors Guild, the Directors Guild of America, and the Writers Guild of America. See Roger Armbrust, *Guild Leaders Laud WIPO Treaty*, BACK STAGE, Oct. 16, 1998, available in 1998 WL 10627207.

244. See Young, *supra* note 242.

These supporters say without stronger copyright protection, all their hard work would be at risk because the exclusive rights of the copyright owners would no longer be considered exclusive.<sup>245</sup> In addition, proponents note that approximately \$20 billion worth of copyrighted materials are stolen each year.<sup>246</sup> Clearly, new legislation was needed to respond to the concerns of copyright owners whose material was being used over the Internet without their permission. However, defining new standards for copyright protection proved to be difficult. Legislators had to balance the expansion of copyright protection and the public's fair use of those copyrighted works.<sup>247</sup>

The DMCA is not without its critics. Opponents, such as the Electronic Frontier Foundation and the Association for Computing Machinery,<sup>248</sup> claim the DMCA oversteps the boundaries of fair use.<sup>249</sup> Because the DMCA affords copyright holders additional copyright protection, it may cut into the fair use doctrine and hinder the right to use copyrighted work. During the hearings for the DMCA, both the House and Senate "faced significant opposition from many private and public sector interests, including libraries, institutions of higher learning, consumer electronics and computer product manufacturers, and others with a vital stake in the growth of electronic commerce and the Internet."<sup>250</sup> Still other opponents feel the DMCA hinders advancement of information security technology and research.<sup>251</sup> Nevertheless, the DMCA became law in October 1998.<sup>252</sup>

245. See generally *id.*

246. See Young, *supra* note 242. It is also estimated that forty percent of computer software is pirated each year worldwide. See *id.* These losses demonstrate why such software manufacturers and their trade association, the Business Software Alliance, feel the DMCA was a "much-needed measure to prevent software piracy . . ." *Senate Passes Digital Millennium Copyright Act*, 15 ANDREW'S COMPUTER & ONLINE INDUS. LITIG. REP. 10 (1998).

247. See 144 Cong. Rec. E2141 (daily ed. Oct. 13, 1998) (Speech of Hon. Constance A. Morella).

248. See *U.S. Digital Copyright Act Gets the Nod from the President*, SEYBOLD REP. ON INTERNET PUB., Dec. 1, 1998, available in 1998 WL 18354800.

249. See James Nicolai, *Clinton Signs Digital Copyright Bill*, NETWORK WORLD FUSION, Oct. 29, 1998, available in 1998 WL 29550021.

250. H.R. REP. NO. 105-551, pt. 2, at 22 (1998).

251. See Gene Spafford, *WIPO Letter from the InfoSec Community* (visited July 30, 1998) <<http://www.cs.purdue.edu/homes/spaf/WIPO>>.

252. In his statement after the signing of the DMCA, President Clinton said, "[t]hese treaties will become effective at a time when technological innovations present us with great opportunities for the global distribution of copyrighted works" and this Act "carefully balanc[es] the interests of both copyright owners and users." *Clinton Statement on the Digital Millennium Copyright Act*, U.S. NEWSWIRE, Oct. 28, 1998. President Clinton concluded his remarks by stating, "[t]hrough enactment of the Digital Millennium Copyright Act, we have done our best to

### B. The Law

To implement laws enabling copyright owners to further protect their works on the Internet, the DMCA added a completely new chapter to the existing copyright laws.<sup>253</sup> The DMCA makes various activities on the Internet illegal including the circumvention of copyright protection systems.<sup>254</sup> 17 U.S.C. § 1201(a)(1)(A), as enacted by the DMCA, states, “[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title.”<sup>255</sup> Section 1201(2)(A) through § 1201(2)(C) makes it illegal to circumvent, breakthrough, or bypass certain protective measures,<sup>256</sup> such as watermarks<sup>257</sup> or encryptions.<sup>258</sup> It is also illegal to market and sell equipment that would enable a person to circumvent a technological protective measure.<sup>259</sup>

---

protect from digital piracy the copyright industries that comprise the leading export of the United States.” *Id.*

253. See Pub. L. No. 105-304, §§ 1201-1205, 112 Stat. 2860, 2863-2877 (1998).

254. See 17 U.S.C. § 1201(a)(1)(A) (Supp. IV 1998).

255. *Id.*

256. There are a wide variety of means available to protect one’s copyright. See Charley Reese, *You Can Catch Bad Guys Without Spying on the Rest of America*, ORLANDO SENTINEL, July 13, 1999, available in 1999 WL 2820286. Copyright owners may choose to protect their copyrights through mechanical means. For instance, the “automated rights management” allows copyright owners to create and enforce contracts that specify other sets of rights and would allow information providers to cost-effectively enforce “standard copyright and trade secret claims.” Tom Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright’s Fair Use Doctrine*, 76 N.C. L. REV. 557, 564 (1998). Automated rights management may be implemented via firewalls, encryption and passwords. *Id.* Thus far, IBM has convinced thirty companies, such as America Online, Yahoo! and Xerox, to employ its ARM technology. See *id.* at 565. There is also a bill currently in Congress known as the “Security and Freedom through Encryption (SAFE) Act of 1999.” Charley Reese, *You Can Catch Bad Guys Without Spying on the Rest of America*, ORLANDO SENTINEL, July 13, 1999, available in 1999 WL 2820286. The bill is intended to do three things, including protecting people’s communications and lifting the restrictions on the importation of encryption products. See *id.*

257. See Kim S. Nash, *Copyright Issues Haunt IS on Net*, COMPUTERWORLD, Jan. 6, 1997, available in 1997 WL 7732579. A digital watermark is “embedded in images or text to identify the file’s author.” *Id.* A digital watermark allows the copyrighted product to be viewed, thus, not hindering the publicity of a product. See *id.* A watermark is also defined to be “an indelible copyright notice that is inextricably embedded in a digital document. Digital watermarks do not prevent piracy or redistribution. They only make it possible to prove, after the fact, that piracy has occurred.” Jonathan Schull, *Infonomics 101: A Map of the Information Economy*, INFORM, Feb. 1, 1999, available in 1999 WL 11041052.

258. See Diedra Henderson, *Byte-ing Back! - - Internet’s Free-Use Philosophy Being Challenged*, SEATTLE TIMES, May 21, 1996, available in 1996 WL 3664219. Encryption is the “deliberate scrambling of files so that only a sender and the reader with a key get intelligible versions.” *Id.*

259. See 17 U.S.C. § 1201(2)(a)(1)(A) (Supp. IV 1998).

There are exceptions to § 1201. First, nonprofit libraries, archives and educational institutions may bypass the technological prevention measure.<sup>260</sup> However, their use of the copyrighted material must be in good faith<sup>261</sup> and solely to determine whether to acquire an authorized copy of the work.<sup>262</sup> Another exception under § 1201(g) applies to encryption research.<sup>263</sup> Under this exception, circumvention of a technological measure<sup>264</sup> is lawful if: 1) “the person lawfully obtained the encrypted copy . . . of the published work;”<sup>265</sup> 2) “such act is necessary to conduct such encryption research;”<sup>266</sup> 3) there was a “good faith effort to obtain authorization before the circumvention;”<sup>267</sup> and 4) “such act does not constitute copyright infringement under this title” or under any other title.<sup>268</sup> A final exception to the DMCA is entitled “Protection of Personally Identifying Information.”<sup>269</sup> Under this exception, Congress made it legal to circumvent a technological protection measure if it is done in an effort to identify a potential infringer.<sup>270</sup>

Under § 1202, also enacted by the DMCA, it is illegal to “remove or alter any copyright management information” from any protected work.<sup>271</sup> This means anyone who removes any information that identifies the copyrighted work, such as the title, author or name of the work, can be prosecuted.<sup>272</sup>

The copyright owner has several civil remedies under the DMCA,<sup>273</sup> including actual<sup>274</sup> and statutory damages.<sup>275</sup> Furthermore, under § 1204,

260. See 17 U.S.C. § 1201(d) (Supp. IV 1998).

261. See *id.*

262. See *id.*

263. See 17 U.S.C. § 1201(g) (Supp. IV 1998). “Encryption research” refers to technological research for the purposes of furthering the advancement of encryptions. *Id.*

264. For instance, an encryption or a watermark. See Henderson, *supra* note 257. This refers to mechanical copyright protections.

265. 17 U.S.C. § 1201(g)(2)(A) (Supp. IV 1998).

266. 17 U.S.C. § 1201(g)(2)(B) (Supp. IV 1998).

267. 17 U.S.C. § 1201(g)(2)(C) (Supp. IV 1998).

268. 17 U.S.C. § 1201(g)(2)(D) (Supp. IV 1998).

269. 17 U.S.C. § 1201(i) (Supp. IV 1998).

270. See *id.* This may become a more important measure in light of the limitations on Internet Service Provider liability. See 17 U.S.C. § 512 (Supp. IV 1998).

271. 17 U.S.C. § 1202(b) (Supp. IV 1998).

272. See *id.*

273. See 17 U.S.C. § 1203 (Supp. IV 1998).

274. See 17 U.S.C. § 1203(c)(2) (Supp. IV 1998).

275. See 17 U.S.C. § 1203(c)(3) (Supp. IV 1998). Statutory damages range from \$200 to \$2,500 per act of circumvention. *Id.*

criminal penalties can be imposed<sup>276</sup> when a person violates § 1201 or § 1202 “willfully and for purposes of commercial advantage or private financial gain. . . .”<sup>277</sup>

The DMCA made it easier for a copyright holder to protect copyrighted material from unauthorized posting on the Internet.<sup>278</sup> With the advent of the Internet, technology has also provided mechanical protections for copyright.<sup>279</sup> The DMCA provides copyright holders with mechanical copyright protection systems<sup>280</sup> have the right to enforce those copyrights.<sup>281</sup> Anyone who attempts to circumvent these mechanical measures can be held liable for their actions.<sup>282</sup> Thus, through the DMCA, Congress has enacted more legislation favoring the increased protection of copyrights.

### C. *The DMCA and the Fan Site*

#### 1. Section 1201

Although the DMCA affords greater protection to copyright owners, it does not always protect them from having their work used without permission on a fan site.<sup>283</sup> In order for the DMCA to apply to a web site, the fan site must meet certain criteria.<sup>284</sup>

First, under § 1201(a), it is illegal to circumvent any protective measure that enforces an owner’s copyright.<sup>285</sup> For this provision to apply, the copyrighted material on the Internet must have a “technological measure”<sup>286</sup> that “effectively controls access to a work . . .”<sup>287</sup> This means the fan site creator must have extracted some material from a computerized form, such as the Internet or other electronic medium, in which a

---

276. 17 U.S.C. § 1204 (Supp. IV 1998).

277. 17 U.S.C. § 1204(a) (Supp. IV 1998). Criminal penalties include imprisonment for up to ten years and fines up to \$1,000,000. 17 U.S.C. §§ § 1204(a)(1)–1204(a)(2) (Supp. IV 1998).

278. See 17 U.S.C. § 512(c)(1)(C) (Supp. IV 1998).

279. See Nash, *supra* note 256.

280. See 17 U.S.C. § 1201(a)(3)(B) (Supp. IV 1998).

281. See 17 U.S.C. § 1201(a) (Supp. IV 1998).

282. See *id.*

283. For purposes of this discussion, it is assumed the fan using the copyrighted material does not qualify under any of the aforementioned exceptions to section 1201. See *supra* Part VI.B.

284. See 17 U.S.C. § 1201(a).

285. See *id.*

286. See *id.* § 1201(a)(3)(B).

287. See *id.*

“technological measure” could be implemented to protect the work.<sup>288</sup> This section of the DMCA does not apply to individuals who have taken material from a magazine and scanned it in order to post the material to a fan site. In such circumstances, there are no “technological measures” to circumvent.<sup>289</sup>

Given this limitation, the DMCA still provides copyright owners added protection.<sup>290</sup> With the arrival of the Internet, there has been a wave of technological advances that have improved protection for copyrighted material on the Internet.<sup>291</sup> First, a copyright owner may choose to protect its online postings through encryption.<sup>292</sup> Encryption is the “deliberate scrambling of files so that only a sender and the reader with a key get intelligible versions.”<sup>293</sup> Also available to the copyright owners are the recently-released “cryptolope containers” which deliver the contents of a message in a “secure container.”<sup>294</sup> These technological advances solve some privacy issues by not allowing public access to the copyrighted material.<sup>295</sup> Because many television networks and movie studios have their own official web sites for their products, privacy is not a significant concern for these copyright holders.<sup>296</sup> Nonetheless, television networks and movie studios do not want their work being copied and want to retain control over their copyrighted material.

A digital watermark may, in some situations, be more appropriate than an encryption. A digital watermark is “embedded in images or text to identify the file’s author,”<sup>297</sup> yet allows the copyrighted product to be viewed.<sup>298</sup> Also available to the copyright owner are embedded templates.<sup>299</sup> Embedded templates allow only the licensees of the copyrighted material or the copyright holder to access the material.<sup>300</sup> Some companies have even resorted to old-fashioned monitoring of the Internet in order to protect their copyrights.<sup>301</sup> In any case, the DMCA is

---

288. *See id.*

289. *See id.*

290. *Id.* § 1201(a)(3)(A) (Supp. IV 1998).

291. *See Nash, supra* note 256.

292. *See Henderson, supra* note 257.

293. *Id.*

294. *Id.*

295. *See id.*

296. *See Koster & Shatz-Akin, supra* note 15.

297. *Nash, supra* note 256.

298. *See id.*

299. *See id.*

300. *See id.*

301. For instance, “the Software Publishers Ass’n. and the Recording Industry Association

essentially only geared towards protecting material that already has some technological protection.<sup>302</sup>

## 2. Applying Section 1201 to the *Ally McBeal* Fan Site

To be considered an infringer under § 1201, Gorbie must have circumvented a technological measure that was especially designed to protect the copyright in the photographs or downloadable material.<sup>303</sup> Because this provision of the DMCA is so narrow, not every fan site that posts unauthorized copyrighted material will infringe on legally protected material.<sup>304</sup>

The DMCA provides little recourse against Gorbie for posting material that was extracted from scripts and magazines<sup>305</sup> because those materials are not technologically protected. Fox, therefore, cannot successfully hold Gorbie liable under § 1201. Thus, the narrow reach of § 1201 may not achieve its stated purpose of extending more protection to copyright holders.<sup>306</sup>

## 3. Section 1202

Even though § 1201 does not necessarily protect copyright owners from fan sites that use their work without authorization, § 1202 may help to secure their rights.<sup>307</sup> Section 1202 makes it illegal to remove or alter copyright management information,<sup>308</sup> including the title of the work,<sup>309</sup> author<sup>310</sup> or copyright owner of the work.<sup>311</sup>

This means any text identifying the title, author or copyright owner that accompanies the pictures from the magazines, publicity photographs or

---

of America here have set up sophisticated computers and hired staff to prowl the Internet 24 hours a day in search of copyright violators." Jube Shiver Jr., *Panel to Review Bill that Would Ban Some Web Devises Technology*, L.A. TIMES, April 30, 1998.

302. See 17 U.S.C. § 1201. The DMCA specifically refers to technological circumvention. See *id.*

303. See *id.* § 1201(a).

304. See *id.*

305. See *id.* § 1201.

306. The DMCA may help movie and television studios by making it illegal to manufacture or sell devices that are used to circumvent technological protections. See 17 U.S.C. § 1201(a)(2) (Supp. IV 1998).

307. See generally *id.*

308. See 17 U.S.C. § 1202(b) (Supp. IV 1998).

309. See 17 U.S.C. § 1202(c)(1) (Supp. IV 1998).

310. See 17 U.S.C. § 1202(c)(2) (Supp. IV 1998).

311. See 17 U.S.C. § 1202(c)(3) (Supp. IV 1998).



quotes that Gorbie posts on her web site must remain with the material at all times once she has posted them.<sup>312</sup> None of the photographs located on the *Ally McBeal* web site have any marks.<sup>313</sup> If these photographs originally had identifying marks, and if Gorbie eliminated these marks, the *Ally McBeal* fan site may violate § 1202. According to the DMCA, it is unlawful to remove any identifying marks from copyrighted material, even if the copyrighted material is not in digital form.<sup>314</sup> Thus, if it can be proven Gorbie removed the identifying marks from the copyrighted material, she could be prosecuted under § 1202.<sup>315</sup>

However, § 1202 may not alleviate the practical concerns of copyright owners who want to monitor the use of their copyrighted material.<sup>316</sup> If a fan site creator posts protected material on a fan site without authorization and leaves the copyright information with the accompanying photograph, the fan may be abiding by the DMCA even though he or she is using unauthorized copyrighted material.<sup>317</sup> Thus, a fan who keeps the copyright information with the copyrighted material is able to circumvent the copyright protection the DMCA was meant to strengthen.<sup>318</sup>

Sections 1201 and 1202 do not prevent all fan sites from using copyrighted material without permission.<sup>319</sup> As long as a fan does not circumvent a technological prevention system<sup>320</sup> or omit or delete the copyrighted information from the protected works,<sup>321</sup> a fan may still lawfully post copyrighted material on a fan site<sup>322</sup> without the copyright holder's authorization.

However, the DMCA does afford greater protection to copyright owners, but only within narrowly tailored boundaries. Because it is legal to circumvent a technological measure for the purpose of identifying a possible infringer, copyright holders may have a right to defend their

---

312. See 17 U.S.C. § 1202 (Supp. IV 1998).

313. See Gorbie, *supra* note 42.

314. See 17 U.S.C. § 1202(c) (Supp. IV 1998).

315. See *id.*

316. See *id.* A fan site operator is not absolutely barred from using copyrighted material under this provision. See *id.*

317. See *id.*

318. See *id.*

319. See *id.*

320. See 17 U.S.C. § 1201(a).

321. See *id.* § 1202(b).

322. If a fan's use of the work satisfies the fair use doctrine, then the fan may not be held liable for copyright infringement. See 17 U.S.C. § 107 (1994).

copyrights by alerting the Internet service provider of the infringing use.<sup>323</sup> Under the provisions of the DMCA, an Internet service provider is required to remove infringing work if it is on notice of the infringement.<sup>324</sup> This helps copyright owners monitor the use of their works.<sup>325</sup>

In spite of the limited protection afforded by the 1976 Copyright Act, the NET Act and the DMCA, many copyright owners feel they must rely upon the public<sup>326</sup> to alert them of copyright infringement.<sup>327</sup> In fact, public participation plays a significant role in enforcing copyrights.<sup>328</sup> An attitude of many movie studios seems to be that legal action will not be taken against a fan site using unauthorized copyrighted material unless a potential commercial profit is being usurped.<sup>329</sup> Movie studios are afraid that aggressively pursuing infringers will result in a backlash from their fans.<sup>330</sup>

Legislators are still considering statutes that would allocate more copyright protection to copyright owners.<sup>331</sup> For example, the "Collections of Information Antipiracy Act" is a proposed bill currently in Congress that seeks to specifically guard against the misappropriation of information.<sup>332</sup> Given the current support for copyright protection in Congress, the entertainment industry has increasing avenues with which to pursue copyright infringers.

## VII. CONCLUSION

Although legislators recognize the need to keep copyright law current with Internet development, recently enacted copyright law designed specifically to address copyrighted work in electronic form may not help

---

323. See 17 U.S.C. § 512(c)(1)(C) (Supp. IV 1998). An internet service provider (ISP) will not be held directly liable under the DMCA. If the ISP was unaware of the infringing use on its server, the ISP does have an obligation to remove the infringing work if it is on notice of such illegal activity. *Id.* One movie studio executive noted he has used the ISP as a means of identifying the violator. Telephone interview with an anonymous movie studio executive (June 11, 1999).

324. Telephone interview with an anonymous movie studio executive (June 11, 1999).

325. See *id.*

326. This is with the exception of the ISP notice previously mentioned. See *supra* note 322.

327. Telephone interview with an anonymous movie studio executive (June 11, 1999).

328. *Id.*

329. Many fans will shut down or redo their fan sites when they receive a cease-and-desist letter from a studio. Telephone interviews with a number of an anonymous movie studio executives who wish to remain anonymous (June 11, 1999).

330. Telephone interviews with a number of movie studio executives who wish to remain anonymous (June 11, 1999).

331. See H.R. 2281, 105th Cong. §1302 (1998).

332. *Id.*

copyright holders to the extent Congress had anticipated. A fan site can very easily fall through the cracks of the NET Act and the DMCA.

Legal protection will be afforded under these laws only when copyright laws such as DMCA and the NET Act require that copyrighted works take a very specific form.<sup>333</sup> For instance, if there is no technological measure protecting the material, then the DMCA will not apply.<sup>334</sup> Additionally, infringement must be accomplished with a specific intent or purpose.<sup>335</sup> Therefore, in spite of these recent enactments, the 1976 Copyright Act may still provide the greatest level of protection against infringers of copyrighted material posted on the Internet. Thus, although the new copyright legislation may give copyright owners some additional support, the backbone of protection continues to be found in traditional copyright laws.

*Lauren Yamamoto*\*

---

333. See DMCA, Pub. L. No. 105-304, 112 Stat. 2860; NET Act, Pub. L. No. 105-147, 111 Stat. 2678.

334. See 17 U.S.C. § 1201(a) (Supp. IV 1998).

335. Under the NET Act, the accused must have infringed the work willfully before any protection measure under this Act can be asserted. NET Act, § 2(b).

\* I would like to thank my parents, my brother, and Gary, for their support and patience. I would also like to give special thanks to my sister for her never-ending encouragement. I am also very grateful to Professor Helfer, who graciously gave his time and suggestions to this comment as well as the editors and staff of the *Loyola of Los Angeles Entertainment Law Review* who dedicated their time and efforts to this comment.