# Redefining Copyright Law on the World Wide Web

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**5/30/01**

**Abstract**

Fences are finally beginning to be drawn on the once Wild West of the Internet. Impeding corporate and private construction is the ambiguity of copyright law with respect to the World Wide Web (WWW), better known as a Port 80 application in the computer world. This article is narrowly tailored, focusing on the need for a legal standard that describes the rights of copyright holders once they publish freely on the WWW. I argue that once a publisher places digital information on a WWW site that is available without subscription or decryption, readers should be allowed unrestricted copying rights under the fair use doctrine. This act (Freedom of Web Information Act) would not affect other parts of the Internet, such as FTP sites, P2P, or anything other than sites opened to Port 80.

During the past five years, the United States has been home to some of the most radical changes in the creation and distribution of intellectual property since Johannes Gutenburg's invention of the printing press. Use of the Internet, more specifically the World Wide Web (WWW), has increased exponentially. Some statistically figures show as many as 7 trillion web pages are currently available for viewing on the Internet. With audiences for these web pages growing by the day, companies have realized the profitability of building corporate enterprises that use the power of the Internet. As more companies begin homesteading on the WWW, the fences that separate their copyrighted materials are slowly being built. Problems arise as owners of copyrighted materials, such as books, software, and art, find their creations distributed without their permission. For example, a book author might find chapters of his book placed on the website of a fan who wishes to allow others to read the author's work. A newspaper company places an article on their website and it is subsequently used in other news organization's websites without the newspaper company's permission. Do these copyright holders stand on stable legal grounds to sue for the misuse of their creations? So far, the only legislation that at least indirectly answers this question is the Digital Millennium Copyright Act (DMCA) of 1997 and the No Electronic Theft Act (NET Act) of 1997, both of which would side with the copyright holders. The question that belies copyright issues on the WWW is whether traditional copyrights can be crafted to protect digital

speech as it does written speech. As futurist Ithiel de Sola Pool wrote, "Electronic publishing is analogous not so much to the print shop of the eighteenth century as to word-of-mouth communication, to which copyright was never applied."[1]

I argue that this new area of communication and duplication is far from clear. The DMCA and NET Act both took a broad shot to the rights of users of copyright materials, while overly protecting the rights of copyright holders. The WWW makes duplication of digital materials nearly costless, and by doing so allow users to easily copy and distribute materials on the Internet. While many believe that media publications might find that duplication of their material on the WWW could be free advertising for their material, I believe the courts should not try to infer the desire of the copyright holders. Instead, I argue that the media publications should have the right to determine their work's own destiny. If they choose to place it on the WWW, without a subscription service or encryption, they have essentially placed their work on a virtual bulletin board. By doing so, they have determined that possible mass duplication is outweighed by the possible advertising that could attract eyes to their website for other stories. For instance, a newspaper could publish only top headlines on their public website in order to lure visitors to read their other articles on their private site (i.e. through some sort of registration system or other means).

**Present Internet Related Copyright Laws**

It is important that we first look at the reason why we have copyright laws. The US Constitution says 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[.]"[2] Though many have tried to more narrowly interpret this clause, I will interpret it in a broad sense. Essentially, this allows Congress to make copyright laws in the interests not only of the authors and inventors, but also the interests of the public. This distinction is important in the current online copyright debates. Many times, corporations that produce copyrighted works believe that copyright laws are made only to protect their work. I believe this to be a misconception and instead argue

[1] Ithiel de Sola Pool, Technologies of Freedom 214 (1983).
[2] United States Constitution, Article I, Section 8, Clause 8.

that the founding fathers placed value in the public good by granting the users of the copyrighted works in this fundamental clause.

This article will not argue the benefits and drawbacks of the spotlighted copyright laws (DMCA, NET Act, and the US Code) on an individual basis, but rather it will look at which parts of these laws are in contradiction with the FWIA. The NET Act, signed into law in 1997, focused solely on Title 17 and 18 of the US Code, both of which deal with copyright laws. Specifically, these changes to the USC made it easier for the Department of Justice to make federal prosecution on the basis of electronic copyright violations. Siding heavily with the rights of the content producers, the NET Act made it illegal for large-scale digital duplication or distribution even when a profit motive is not found. Although the law does state that those who duplicate copyrighted work for non-commercial purposes valued less than $1,000, the law does not state how the actual value of the copyrighted work should be ascertained. In general, the changes made to copyright laws by the NET Act seem to be extensions of traditional copyright laws by simply clarifying that electronic copyrights should be upheld. However, it does chip away at the fair use doctrine by trying to put a specific dollar value on the copyrighted work duplicated (taking the determined value to the company over the value to an educational institute or researching individual).

While the NET Act provided some key changes to copyright law, none of its additions were as dramatic as the effects of the DMCA. Essentially, the DMCA was created to again protect creators of works from those who would like to build programs that crack anti-piracy measures created by the publisher. Though the act explicitly states, "[n]othing in this section shall affect rights, remedies, limitation, or defenses to copyright infringement, including fair use…" it clearly does affect the rights of users to determine how they wish to use legally obtained products. If it is legal for someone to purchase a door lock and subsequently teach himself how to pick the lock without the key, why shouldn't a software owner be allowed to do the same?

The NET Act and the DMCA both have been used as first steps in keeping copyright laws in step with the change of technology. This has occurred many times in the history of new technologies. When Sony began producing their Video Cassette Recorders (VCRs), the motion picture industry feared that this

new technology would hail the end of the movie industry by allowing consumers to record copyrighted material. In the case Sony v. Universal Studios, the US Supreme Court decided that barriers to building new technologies by threats to copyrights are tempered by the substantial noninfringing uses of the device.

**Adding Internet Postings to Fair Use**

As technologies in the world begin to change, the American legal system has normally been able to keep up with the changes not by radical restructuring of US laws, but rather by learning how to adopt old legal standards to the new technology. While this has worked well in the copyright sector during the advent of the photocopying machine and the home recording devices, the radical shifts we are going through in this digital society will force us not only to make minor changes to copyright laws, but completely change the way we think about copyrights in general.

Copyright and other legal problems often arise in the digital world because of its seemingly boundless structure. Though some believe that the government will soon be able to change the structure of the Internet to better suit its legal needs, I will assume that most world governments will find such a feat impossible. Instead, what we need is a new set of legal standards that will set the manner in which the Internet's structure is built by imposing laws on the builders and the users themselves. For instance, instead of trying to regulate the creation of private networks, the government should instead create Internet copyright legislation that recognizes the difference between copyrights on physical materials and digital material.

Now it would be difficult (if not impossible) to create legislation that simply rewrote copyright law as we know it. Instead, I propose an act of US Congress that would change the US Code in the arena of fair use of copyrights. Since the massive overhaul of copyright laws in 1976, the current areas of fair use include, "for purposes such as criticism, comment, news reporting, teaching…scholarship, or research…"[3] Under this section of the U.S.C. could be placed the following amendment:

[3] 17 U.S.C. §107

> "**…any and all non-trademarked or non-patented information taken from an unrestricted world wide website created by the copyright holder…**"

This small phrase has massive implications. It essentially tells providers of information on the web that anything they put up on a website, so long as it is not a registered trademark or patent, and is not protected by any restrictive device (such as encryption, registration system, etc), it can be subject to duplication without the permission of the owner.

The wording of this addition to 17 U.S.C. §107 has been carefully crafted to make sure that the WWW continues to be a place where users can freely exchange ideas and content providers can still protect their copyrights in special restricted arenas. Let us dissect the wording of the FWIA to bring out the nuances it holds within.

***Areas of Internet covered***

This amendment to the fair use doctrine only affects those digital documents that are saved on hard-drives that have Port 80 opened to unrestricted traffic. In order to create standards on the Internet that would make sure packets of information would flow in and out the correct programs, the transport control protocol/Internet protocol (TCP/IP) was created. These standards provide a very basic structure for dividing different tasks on the Internet. On a computer server, different services and application are connected to different TCP/IP ports. For instance, Port 21 is used by File Transfer Protocol (FTP) applications, Port 25 by email services, and Port 119 for newsgroups. In our case, Port 80 is used specifically for hypertext transfer protocol (HTTP) pages, which are web pages. Since the WWW is by far the most accessed part of the Internet, the FWIA will affect only this specific port, although future legislation may define other ports in the future.

***Types of posted material***

The Freedom of Web Information Act would imply the use of any type of material posted on a website, including words, source code, pictures, sounds, video, etc. To avoid future loopholes, it should be noted that the "any and all" clause should be taken literally. Essentially, everything on a web page can be found in the source code. Since the source code is being placed into a local computer's Random Access Memory (RAM), and it has been determined by the courts in *Mai Systems Corp. v. Peak Computer, Inc.*, that placing code in RAM constitutes copying, then FWIA will contradictorily render anything that can be stored to a local computer's RAM via the WWW fair use.[4]

With respect to hypertext links, the FWIA would also place under fair use the listing of links. Links need to be dissected into two parts for clarification. The first half is what I call the "signpost". This is what the link says to the reader through the web browser. The FWIA covers this part of the link under the fair use doctrine, along with the underlying web address it points to. The second part of a link is the "action" part, that when clicked on pulls the user to another website. It would be a fallacy for us to allow that action to be brought under fair use, as the hypertext may bring us to another web page that does not fall under our category of fair use. So in essence, the FWIA covers the signpost and address of a hyperlink, but not the action associated with it. Users must make it their responsibility to know where a hyperlink takes them to before they click on it.

***Patents and trademarks***

While I argue that by placing a created piece on the web, one has given up most of their work to fair use, patents and trademarks will never be relinquished, under the FWIA, to fair use. Although they could fall into other areas of fair use, patents and trademarks will be kept under the protection of the law. For instance, if the Los Angeles Times were to place an article on the Internet following these policy outlines, and that article had on it the newspaper's trademarked logo, everything except for the logo could fall under the fair use doctrine. By adding this section, I wish to avoid a stifling of speech on the Internet by allowing corporations to freely attribute work to their trademarked items. If not, many companies would fear placing anything on a web page, and by doing so would drain much of the intellectual and scientific progress we see taking place on the Internet.

[4] MAI Systems Corp. v. Peak Computer, Inc., 991F.2d 511, 519 (9th Cir. 1993), cert. dismissed, 114 S.Ct. 671 (1994)

***Defining unrestrictive websites***

Of the over 7 trillion web pages on the Internet today, most remain unseen by the public. Intranets, which run off web servers but are kept under a strict internal security structure, often hold a company's most vital information, such as e-mail, product plans, marketing ideas, and other valuable private information. In order to protect such websites, the FWIA would not allow restricted web pages from be covered by fair use. Obviously, doing so would stifle progress on the Internet, as was seen by the section on patents and trademarks, and very likely could be held as unconstitutional. A restrictive web page is one that some sort of protection stopgap that would keep a web surfer from accessing a web page without some form of identification. This security measure can be formulated in any way a copyright holder wishes. A login and password, a registration page, and encryption could be possible ways of making a web page restrictive. If there exists no such visible (the web page user can see it in the web browser) restriction system, then the page shall fall under the fair use doctrine.

***Determining authorship of the web page***

It is possible that a web page that follows all the rules outlined by the FWIA could still not fall under fair use if the information is posted by someone who is not the original copyright holder. To avoid this phenomena, if someone wishes to use another's copyrighted material without their permission, and the use of such does not fall under other categories of fair use, then the copier must cite the original Uniform Resource Locator (URL) of the copyrighted work as evidence that it is not their copyright. Currently, copyright law does not give owners of intellectual property a "right of attribution". On the Internet, often authors would enjoy wide ranging distribution so long as attribution is given. This law would apply such an attribution rule, which could help build key publication business models on the Internet.[5] While much of the FWIA makes it easier for users of copyrighted information to use copied works, this clause brings power back to the copyright owner. By placing the burden of evidence on the copier, this helps the copyright holder prove to the courts that their materials were copied even when they were never published on a web page. For example, if a reader of online magazine copied a whole article

[5] Schlachter, Eric, The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet, 12 Berkeley Technology Law Journal 15 (1997)

onto their website without permission of the copyright holder, and they did not provide a hyperlink citation on their web page that showed the material was unrestricted, they could be held liable for damages. Assuming other areas of fair use were not achieved by the copier, such use of copyrighted material would not constitute fair use.

**Current Legal Support for the FWIA**

Internet copyright issues have so far been dealt with much like tangible printed works. As I have stated earlier, much like the enactment of copyright laws during the radical changes created by the printing press, a reincarnation of that period of legal wrangling will very likely occur over the next five to ten years with respect to copyrights on the Internet. In order to keep a strong line of legal logic, the FWIA should both conform to past copyright laws as well as cover new grounds in this uncharted area of law.

To help bridge the gap between current laws and the changes made by the FWIA, I identify three main areas of copyright law that support this act: fair use doctrine, contributory copyright infringement, and the exclusive rights of the copyright owner. The fair use doctrine is one of the few areas of copyright law that protects the users of copyrighted work rather than the owners. Though I base an whole argument on the idea that copyright laws are often too strict on the rights of users, with respect to this policy, I simply need to make a clear relationship between it and fair use. Supporting the use of someone else's copyrighted work for, "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,"[6] promotes exactly what the founding fathers desired, promotion of the sciences and the arts. The FWIA simply adds to the increased promotion of the sciences and arts by extending fair use to the digital world. Nothing in the FWIA would take a user's power away from the fair use doctrine. Additionally, the policy would simply be an addition to the fair use doctrine, by which a defendant could use as part of a defense for use of a copyrighted work, but not exclusively.

In the past, new technologies that could be used for copyright infringement have been scowled upon by copyright holders. Many times, an argument has been made that the new technological device

[6] 17 U.S.C. §107

could lead to contributory copyright infringement. A case could be made against the WWW as a whole for being a device that allows people to perfectly duplicate copyrighted materials. Of course, since the WWW is a global entity of its own, it would be difficult to legislate laws that could enforce the disuse of such a viral community. More importantly, businesses have found that the WWW is a wonderful new marketplace, where additional customers can be attracted and many barriers to entry crumble. As corporate America came to grips with the positive and negative values of the Internet, it decided not to pursue actions against web browser makers (such as Netscape and Microsoft) for allowing people to possible pursue copyright infringing actions. Clearly, a case could have been made similar to Sony v. Universal. In the Sony case, the court found if a device is, "capable of substantial noninfringing uses,"[7] stifling of such an invention should not occur. The court went on to say, "…sale of such an article which though adapted to an infringing use is also adapted to other and lawful uses, is not enough to make the seller a contributory infringer. Such a rule would block the wheels of commerce."[8] Most importantly, such an amendment as proposed by the FWIA would clear up the issue of what copyright infringement on the WWW is without needing to worry about the devices used to permit such copying.

While the 9th Circuit Federal Appellate Court tries to deal with the legal wrangling over the *Napster v. A & M Records, Inc. et al*, such an issue could have been avoided (if it were to occur on a WWW page) if FWIA was in effect. In a brief to the court, the Digital Media Association makes an interesting point. It writes that the lower courts have created a "primary purpose" test to determine why the material is being copied and also ignored the word "capable" in the ruling for the Sony case with respect to non-infringing uses.[9] The purpose of the FWIA is to avoid the confusion we are seeing the Napster case on the WWW. Instead, by creating a law that both bridges the gap between the physical and digital mediums, while also protecting the rights of WWW browser makers to continue their developments, we can uphold the ideals of the founding fathers while also avoiding contributory copyright infringement.

[7] *Sony v. Universal City Studios*, 464 U.S. at 417 (1984)
[8] *Sony v. Universal City Studios*, 464 U.S. at 441 (1984)
[9] Brief of Digital Media Association as Neutral Amicus Curiae,*Napster v. A&M Records et al* (2001): 13, 14.

Finally, when implementing a law such as the FWIA, we must make sure that the exclusive rights of the copyright holder are upheld. These include the exclusive rights to reproduction, modification, distribution, public performance, and public display.[10] In a complete clarification to copyright law, Congress passed the Copyright Act of 1976, which delineated each of the above rights of the copyright holder. The spirit of the FWIA upholds all these rights of the copyright holder while realizing a similar situation that Congress discovered in 1976: technology forces us to change the way we think about copyrights. Arguments will surely arise on the side of copyright holders against the FWIA with respect to one's exclusive rights to reproduction and distribution. Shouldn't the copyright holder be the one to determine how their work will be reproduced and distributed over the WWW? Why should this be any different than in the physical world? In response, I acknowledge that the similarities between the WWW and physical world disappeared when the court found that whenever someone visits a WWW page, they are duplicating and distributing the information on the web page by holding that information in their local computer's RAM.[11] If this is the case, the FWIA places the burden on the copyright holder to make a decision as to how she wishes to have her information duplicated and distributed. If she wishes to keep full control of the copyrighted information, then she must not place her materials on a web page that falls under the FWIA standards. Users of the WWW should not be held responsible for copyright infringement if the authors have made a determination to place their work in an area where duplication is *necessary* for reading.

**Public Policy Considerations**

Any changes to laws regarding copyright and the Internet must lead towards an ultimate goal. Our nation's democratic system demands full support of the 1st Amendment Rights of all Americans in order to promote the public good. Copyright laws protect the inventors, writers, and dreamers of our country. Without such laws, some would say that we would see a stifling of creative works in both the arts and sciences. While the protection of the creators is important, so are the rights of the readers and users of such works. As Chief Justice Hughes said in the Supreme Court ruling of U.S. v. Paramount Pictures, Inc., "The copyright law, like the patent statuettes, makes reward to the owner a secondary

[10] 17 U.S.C. §106

[11] *MAI Systems Corp. v. Peak Computer, Inc.*, 991F.2d 511, 519 (9th Cir. 1993), cert. dismissed, 114 S.Ct. 671 (1994)

consideration…the sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors."[12] If copyright protection for publishers were stricter, would educators and researchers be able to promote advancements in the arts and sciences as is being done in our nation's campuses? I simply argue that any policies regarding the restriction of speech on the WWW should follow the basic principles of the founding fathers.

The Internet has forced us to deal with issues on a global level, and while it is impossible for the US to enforce worldwide laws, Congress can and should take firm steps forward in promoting the freedom of speech on the Internet. The WWW provides us with a marketplace of ideas never seen before by mankind. Early legislation should not be created to restrict this marketplace, but rather to enhance it. Lines between the desires of corporations and the public good are currently blurred in cyberspace.[13] If, as some have argued, we leave the structure of the Internet in the hands of businesses, does that necessarily mean the public good will be achieved? Rather than trying to reenact the homesteading of the American West, the federal government must take steps to promote the public good in such areas of education, free speech, and innovation on the WWW.

The real question is whether or not legislation will happen any time soon. If true copyright changing legislation like the PWIA occurs, it will most likely need the support of big businesses, especially the recording industry and the book publishing industry. Copyright issues are normally not a topic that the public responds with grassroots organizing or civil revolts. Normally, it is those who have the most at stake who lead the government in their "right" direction. Even more generally, would passing such a statute actually affect anything happening on the Internet today? As Jessica Litman wrote in 1994, "So long as nobody proposed to sue the nation's teenagers for copying music onto audio cassette tapes, or copying computer games onto floppy disks, what did it matter that some folks argued that if they chose to sue they could win?"[14] Unless members of Congress can push aside their many connections with large

[12] *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).
[13] see The Digital Dilema, National Academy Press (2000): 107.
[14] Litman, Jessica, The Exclusive Right to Read, 13 Cardozo Arts & Entertainment Law Journal 29 (1994)

corporations with strong interests in copyright protection (campaign contributions), passage of an amendment to copyright law such as the FWIA will be difficult.

**Impact of the FWIA on the Online World**

The Internet as a whole is currently in a state of anarchy. Each day, thousands of software files, music, videos, and other creative works pass electronic hands in direct violation of copyrights. The effects of the FWIA on this chaotic situation will be minimal out of the blocks. Stronger effects will hit the content distribution industry, which will have to make a decision on how they wish to have content distributed on the WWW. Most importantly, I would expect the transmission of copyrighted work that could fall under this new area of fair use would continue to be duplicated on the Web. The goal of the statute is to promote the creativity and intellectual thought without fear of being reprimanded. Long-term impacts of this legislation could provide new business models to help smaller publication industries leap over typical barriers to entry in the market, increasing competition and promoting interest in the arts and sciences.

**Conclusion**

All this, of course, is hypothetical. We really lack any previous model to follow from human history. The ability to exactly duplicate intellectual property quickly and at zero marginal cost is a feat that just twenty years ago people could not have imagined. Though we may not know the exact direction these new technologies will lead us, we do know that they are here to stay. Older print models of copyright will be with us for years to come, but very likely will not last more than five more years trying to regulate speech on the WWW. Careful, but swift first steps must be taken to protect intellectual property on the Internet with both the public and private market's best interests in mind.