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Column

Copyright Liability of Bulletin Board Operators for Infringement by Subscribers

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1. As people move onto the information superhighway in increasing numbers, novel legal issues arise that challenge the adequacy of existing common law and statutory authority to address new uses of information technologies. In particular, legal actions involving the liability of electronic bulletin board system operators for acts of their subscribers have begun to proliferate.

2. An electronic bulletin board, or BBS, bears some resemblance to its non-electronic counterpart in that a subscriber may post messages or read and perhaps comment on those posted by others. In addition, many BBSs also allow subscribers to upload and download files, including text files and digital copies of pictures, songs, software, and other types of information. A BBS is often comprised of a number of bulletin boards each pertaining to a different topic. The paradigm for information dissemination over BBS and related technologies is "narrowcasting" as opposed to "broadcasting." In the narrowcasting distribution model, subscribers access only that information of interest to them. Generally, a host BBS handles subscriber transmissions by: (1) automatically sending postings to all who have subscribed to the topic; or (2) sending postings to subscribers only upon their request; or (3) adopting an approach combining the first two methods.

3. Distribution of subscriber postings is potentially very broad, with the breadth of distribution dependent only on the number of subscribers and the method of distribution. The size of a BBS may vary dramatically. A BBS may be operated by one system operator, or "sysop," with a single modem and computer processing relatively few messages daily. Large commercial services such as America Online (AOL) are sophisticated networks of computers with thousands or millions of subscribers, processing thousands or millions of messages daily. In addition, some services allow subscribers to set up and run their own bulletin boards, allowing for multiple sysops within a service. BBS services may be available to subscribers with or without fee.

4. Many of the services offered by BBSs have counterparts on the Internet. Although the Internet is not itself a BBS, it is a planet-wide network of networks connecting over four million individual "servers," or host computers, throughout the world. Each server is linked to and accessible from any other point on the Internet over a matrix of more than 40,000 interconnected networks. By means of standard protocols and application-specific client-server software such as ftp, Gopher, World Wide Web, Usenet News, and Internet Relay Chat, Internet servers provide to over 30,000,000 Internet users many of the same services offered by more

traditional dial-up BBSs accessible by standard telephone and modem connections. Typical services include the ability to post and read messages and to upload and download digital files of all types. While no single person or entity controls the Internet, individual server owners do have control over who accesses their public file areas and for what purpose. Because Internet servers provide many of the same services offered by BBSs, owners and operators of Internet servers must confront the same legal issues as BBS operators.

5. The proliferation of information available on BBSs and over the Internet together with the ease with which it may be copied and disseminated has triggered a virtual explosion of litigation. For example, Frank Music Corp. has filed a class action suit on behalf of a number of music publishers against the CompuServe information service, claiming that CompuServe violated the publishers' copyrights by allowing subscribers to upload and download digitized versions of copyrighted songs. In addition, in a widely publicized action, the U.S. Attorney for the District of Massachusetts indicted an MIT student, David LaMacchia, charging him with conspiracy to commit wire fraud by operating a BBS that allowed users to upload and download copyrighted business and entertainment software without permission of the copyright owners. The district court subsequently dismissed the charges. Recently, the same U.S. Attorney's office charged the operator of the Davy Jones Locker bulletin board with copyright infringement and conspiracy to commit wire fraud for operating a commercial service that encouraged subscribers to upload and download copyrighted software. Finally, in October 1994, unidentified persons uploaded copies of early, unauthorized versions of IBM's OS/2 and Microsoft's Windows 95 and other proprietary programs to a publicly accessible Internet server at Florida State University. An unestimated number of users accessed the site through the Internet and downloaded the pirated copies before the system administrator discovered and erased the software.

6. Each of these situations raises the question of whether liability should be imposed on a BBS operator for unauthorized copying by subscribers. Precedent on this issue is scarce. Two recent decisions, however, provide BBS operators with some guidance as to the circumstances under which they are likely to be held liable for copyright infringement based on their subscribers' conduct. From these decisions it is possible to evaluate what practical steps BBS operators should take to minimize potential liability.

7. In *Sega Enterprises Ltd. v. MAPHIA*,[1] the District Court for the Northern District of California upheld a preliminary injunction against a BBS to which subscribers uploaded and downloaded unauthorized copies of Sega video games. The court held the BBS operator had directly infringed Sega's exclusive right to reproduce the copyrighted video games. Unauthorized reproductions resulted when subscribers uploaded and downloaded the games. The facts of the case are unclear as to whether the sysops themselves ever engaged in uploading or downloading the games, however, they clearly encouraged subscribers to do so. Pointing to the sysops' role in their subscribers' actions, which included providing encouragement, facilities for copying, and directions for uploading and downloading, the court also found the sysops might be liable for contributory infringement. In addition, the court rejected the sysops' fair use defense, noting that all four factors in the fair use inquiry weighed against them.[2] The court found the purpose of the use was commercial; that the copyrighted work was creative, involving elements of fiction and fantasy; that the entire game programs were copied; and that if unauthorized copying of Sega's video games were to become widespread, the market for those games would be adversely affected.

8. In *Playboy Enter., Inc. v. Frena (PEI)*,[3] a subscriber uploaded unauthorized digital copies of *Playboy* magazine photographs to a BBS. Other subscribers in turn downloaded the images. The sysop, defendant Frena, never uploaded any of Playboy's photographs himself and was unaware that the photographs had been uploaded. On service of the summons, he removed the photos and began monitoring the BBS to prevent subscribers from uploading additional photographs. The court held Frena had violated Playboy's exclusive rights to display and distribute its photos publicly. Because copyright infringement is a strict liability offense, for which no intent to infringe need be shown, Frena's lack of knowledge of his subscribers' conduct was irrelevant. The court rejected a fair use defense for reasons analogous to those in the *Sega* case.

9. The *Sega* case stands for the proposition that a bulletin board operator may be liable for either direct or contributory copyright infringement when sysops actively encourage subscriber infringement. The *PEI* case stands for the broader proposition that a BBS operator may be liable for copyright infringement even without knowledge of a subscriber's infringing conduct. Taken together, the *Sega* and *PEI* cases stand for the proposition that when a subscriber uploads an infringing copy to a BBS, the BBS operator will be liable for infringement of one or more of the copyright owner's exclusive rights, regardless of whether the BBS

operator knew of the infringement. The holdings in the *Sega* and *PEI* cases seem to be in accord with the approach taken by the Clinton Administration in its intellectual property proposals as part of its National Information Infrastructure (NII) initiative. The draft report of the NII's U.S. Working Group on Intellectual Property Rights recommends that Congress clarify the Copyright Act to provide that the exclusive distribution right of the copyright owner encompasses public distribution by electronic transmission.

10. The question remains as to whether the *Sega* and *PEI* results make sense from a policy perspective. Intuitively, it seems unfair to hold a sysop liable for copyright infringement by subscribers when the sysop has no knowledge of or reasonable opportunity to discover the infringement. In both *Sega* and *PEI*, however, the copyright owner was harmed, and that harm may be significant given the almost unlimited scope of potential dissemination. An action for copyright infringement against a subscriber is unlikely to compensate the copyright owner fully. Subscribers are more likely to be judgment proof" than potentially "deep pocket" bulletin board operators. In deciding among alternative liability regimes, the analysis should focus on whether the *Sega* and *PEI* rules will actually increase the incentive to create copyrighted works, because authors know their rights will be protected even in an electronic forum. This potential increase in creative incentive must be balanced against the chilling effect a strict liability rule may have on the quality and quantity of data BBS operators make available.

11. As a practical matter, BBS operators cannot wait for the outcome of the theoretical debate. They must make adjustments now in light of the *Sega* and *PEI* cases. Several alternatives are available to the BBS operator. For example, America Online requires subscribers to agree that: (1) by posting information in public board areas they consent to placement of that material in the public domain; and (2) placement of copyrighted material in any public posting area or elsewhere without the consent of the copyright owner violates the terms of service. In addition, America Online subscribers must agree to indemnify AOL for any losses, costs, or damages arising out of any breach of these obligations. While AOL may be liable to the copyright owner in an infringement action if a subscriber places infringing material on an AOL bulletin board, AOL may recover its damages in a breach of contract action against the infringing subscriber. Two important limitations to this approach must be considered. First, recovery under an indemnity clause may be limited by the solvency of the subscriber. Second, and from a legal

perspective more significantly, a court may find the contract itself or the indemnification clause unenforceable.

12. Many on-line services require the subscriber to agree electronically to a standard form contract. Whether such contracts are enforceable under either common law contract or the Uniform Commercial Code, however, is unclear. Even if such contracts are enforceable, a court may still hold a boilerplate indemnification clause unenforceable as an unconscionable term. Subscribers are unlikely to read the contract closely and to understand the nature and extent of the liability that they are agreeing to assume. Before setting aside such a clause, however, courts should consider whether a competitive market exists for BBS services. To the extent that a competitive market for BBS services does exist, the mere fact that subscriber contracts are boilerplate does not mean their provisions are unconscionable. In a competitive market, form contract terms may simply reflect the terms the parties would have agreed to had they expressly negotiated a contract.

13. In addition to using contract to shift liability to subscribers, BBS operators may take preventive measures, such as scanning files for copyright infringement. This type of policing, however, may be impractical, depending on the daily upload volume of the particular BBS. Reliably determining which postings are infringing may also be difficult, because posters may remove the copyright notice or, in fact, may secure permission from the copyright owner to upload and distribute.

14. A BBS operator might also seek to insure against potential copyright infringement liability. Whether a market for such insurance exists is questionable. One may develop, however, as BBS cases become increasingly common. Even so, a court may find such insurance void as against the public policy of the Copyright Act.

15. Finally, it seems inevitable that some party — whether the government, the BBS operator, or copyright owners — must begin to educate the public, reminding them that the same copyright principles subsisting in a print context also apply in the electronic world. For instance, it seems likely that few people would believe that in exchange for the price they pay for a *Playboy* magazine, they have the right to make photocopies of the magazine photos and distribute them widely. It stands to reason then, that neither do they purchase the right to make digital copies of such photos and distribute them electronically.

16. While the BBS poses some new and interesting questions for the law, the existing copyright regime can be adapted to deal with the problems raised by electronic

copying. BBS operators may have to make adjustments in their practices and procedures to account for potential infringement liability as a cost of doing business. The legal system should, however, periodically assess the impact of legal rules on the market. To the extent that BBS services become increasingly expensive or unavailable because of the legal system's liability rules, it may be worthwhile to consider alternatives to traditional copyright liability that would protect the rights of the copyright owner while at the same time maintaining a viable market for BBSs.

ENDNOTES

1 857 F. Supp. 679 (N.D. Cal. 1994).

2 *See* 17 U.S.C. § 107 (1988) for a listing of the statutory factors.

3 839 F. Supp. 1552 (M.D. Fla. 1993)