TRENDS IN U. S. COPYRIGHT LAW: ADAPTING TO THE CYBERREVOLUTION

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Since its inception, the Internet community has prided itself on its lack of formal regulation, promoting instead the notion that the Internet would remain an international self-regulating body.[1] While the Internet was still relatively unpopular, the concept of self-regulation worked. Now, however, as e-commerce is ever expanding and the Internet is the forum not only for the technological elite but also for business, the Web community is finding regulation of the Internet not only preferable but also mandatory to keep it a credible medium. This regulation is emerging in nongovernmental bodies such as ICANN[2] and also in governmental venues.

That recognition for the need for governmental involvement in the Internet of course includes the U.S. court system. Copyright issues soon became prime subjects for U.S. judicial decisions in about the Internet. In 1993, *Playboy Enterprises, Inc. v. Frena*[3] became one of the first U.S. civil holdings addressing copyright law in conjunction with Internet-related technology. Since *Frena*, courts have created ways to accommodate the world of copyright law to the Internet and the issues that have arisen because of the medium's exponential growth. While some Internet copyright issues are now the subject of U.S. domestic legislation[4] or international

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[1] *See generally* I. TROTTER HARDY, *Project Looking Forward: Sketching the Future of Copyright in a Networked World – Final Report* 119-20 (U.S. Copyright Office May 1998), available from the U.S. Copyright Office Web site at <http://lcweb.loc.gov/copyright/cpypub/thardy.pdf> (visited Mar. 6, 2000).

[2] The Internet Corporation for Assigned Names and Numbers (ICANN) is a "non-profit corporation that was formed to take over responsibility for the IP address space allocation, protocol parameter assignment, domain name system management, and root server system management functions now performed under U.S. Government contract by IANA and other entities." *See About ICANN*, ICANN <http://www.icann.org/general/abouticann.htm> (visited Mar. 7, 2000).

[3] Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993).

[4] *See*, *e.g.*, the Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified in 17 U.S.C. § 1001 *et seq.*); the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified in 17 U.S.C. § 114(d)); the Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860, 2877-86 (1998) (codified in 17 U.S.C. § 202(a)).

treaties,[5] other issues remain vague, with no firm guidance except various – and at times disparate – U.S. federal court holdings. Recently, U.S. courts have lent temporary guidance to certain issues that will soon require definitive resolution in the U.S. judiciary.

Web Linking

Web "linking" is when an author of a Web site provides a reference link in one of its Web pages to another Web site, allowing the user to activate the link (*e.g*., by clicking on it with a mouse) and gain direct access to the targeted linked-to Web site. The link is usually displayed on the user's browser in some distinguishing way, such as a different color, font, or style. More often than not, it is advantageous for the targeted linked-to Web author to be linked from another's Web site because of the potential increased traffic to the author's site. The enthusiasm of the linked-to author subsides, however, when the link includes not only the domain name address, but also copyrighted material from the site in what is known as a "deep link." In a deep link, the targeted linked-to Web site's home page is bypassed, and the link takes the user directly to a specific page within the targeted site. A deep link can also automatically run a search and retrieve a list of documents located within the targeted site's database. For example, when a user uses a search engine on the Internet to search for a specific topic, the search engine provides the user with a descriptive list of related Web content and a link to the listed content that often takes the user directly to a Web page often found deep within a Web site.

U.S. courts have yet to give a decisive holding on issues of deep linking because most cases have either settled or are still pending.[6] The cases that have been decided, however, reflect careful craftsmanship by the lesser U.S. courts to preserve the integrity of copyrighted works while encouraging the freedom of the Internet and the expansion of new media.

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[5] *See*, *e.g*., the World Intellectual Property Organization (WIPO) treaties and legislative proposals available from the U.S. Copyright Office Web site at (visited Mar. 7, 2000) <http://lcweb.loc.gov/copyright/wipol>; *see also* International Copyright available from the U.S. Copyright Office Web site at <http://lcweb.loc.gov/copyright/fls/fl100.pdf> (visited Mar. 7, 2000).

[6] *See generally* Stefan Bechtold, *The Link Controversy Page* <http://www.jura.uni-tuebingen.de/~s-bes1/lcp.html> at *Cases* (visited Mar. 2, 2000).

For example, in *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*,[7] the Central District of Utah issued a preliminary injunction against the defendant for allegedly posting an e-mail to its Web site that in turn contained three links to other sites containing infringing copies of the plaintiff's copyrighted literary works.[8] The court reasoned that a preliminary injunction was justified because the plaintiff established that the defendant was likely to be liable under direct and contributory copyright infringement for providing links to sites that contained the plaintiff's copyrighted literary works and actively encouraged its users to view and copy them.[9] The court went on to hold that when a user activates a link located within a Web site that thereby displays the copyrighted work on its browser, its browser creates a "copy" within the meaning of U.S. copyright law and the user is liable for direct copyright infringement.[10]

Conversely, in *Kelly v. Arriba Soft Corporation*,[11] the Central District of California found that the defendant's use of thumbnail "deep links" to the plaintiff's copyrighted visual images was justified under the fair use doctrine.[12] In this case, the defendant operated a visual search engine that retrieved the plaintiff's artistic images in thumbnail icons.[13] By clicking on the thumbnail, a user could fully view the artistic work and also receive the Internet address to the originating Web site. The court, applying the fair use doctrine and its four-part balancing test, held that the defendant's use of thumbnail "deep links" was not aesthetic but functional, since its purpose was

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[7] Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., No. 2:99-CV-808C (C.D. Utah Oct. 15, 1999).

[8] *See* Inj. Order at *Discussion*, *Intellectual Reserve* (No. 2:99-CV-808C) <http://www.utlm.org/underthecoveroflight_news.htm#Preliminary> at *Dec. 6, 1999 Preliminary Injunction* (visited Mar. 6, 2000).

[9] *See* Inj. Order at *I (A)-(B)*, *Intellectual Reserve* (No. 2:99-CV-808C) <http://www.utlm.org/underthecoveroflight_news.htm#Preliminary> at *Dec. 6, 1999 Preliminary Injunction* (visited Mar. 6, 2000).

[10] *See* Inj. Order at *I (B)(2)(a)*, *Intellectual Reserve* (No. 2:99-CV-808C) <http://www.utlm.org/underthecoveroflight_news.htm#Preliminary> at *Dec. 6, 1999 Preliminary Injunction* (visited Mar. 6, 2000); *see also* MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993) (holding that the making of even a temporary copy infringes a copyright); Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distrib., 983 F. Supp. 1167, 1179 (N.D. Ill. 1997) (noting that the person who causes the display or distribution of the infringing material onto their computer is liable for copyright infringement); Nimmer on Copyright § 8.08(A)(1) (explaining that liability for copyright infringement may occur when "loading copyrighted material … into the computer's random access memory (RAM)").

[11] Kelly v. Arriba Soft Corp., 77 F. Supp. 2d 1116 (C.D. Cal. 1999).

[12] *See id*. at 1121.

[13] *See id.* at 1117. In *Kelly*, the "thumbnail icon" was a graphic image of a photograph that was displayed on a user's computer display screen and functioned similarly to a deep link. *See id.* When a user clicked on the thumbnail icon with its mouse, "two windows open[ed] simultaneously. One window contain[ed] the full-size image; the other contain[ed] the originating Web page in full." *Id*.

not to be artistic, but "comprehensive."[14] The court reasoned that under the *Campbell* doctrine,[15] the defendant's visual search engine and thumbnail deep links were transformative in nature, that is, they were designed to create a comprehensive catalog of images and improve user's access to these images on the Internet.[16] Moreover, the photographs located on the plaintiff's Website were artistic and used for illustrative purposes.[17] The court also noted that "as a new use and new technology are evolving, the broad transformative purpose of the use weighs more heavily then the inevitable flaws in its early stages of development."[18] The court also found, however, that if the defendant had used the plaintiff's images without authorization in advertising for the defendant's site, a finding of fair use would be unlikely.[19]

Both the *Intellectual Reserve* court and the *Kelly* court found that when a user activates a link that makes its computer browser display a copyrighted work on its computer screen, its browser has created a "copy" within the meaning of U.S. copyright law. A Web site that provides this link, however, may not be liable for contributory infringement if: (1) it does not encourage its users to view and make copies of the copyrighted work; and (2) the use of links is functional in order to achieve a comprehensive purpose. This reasoning also assumes that the linked-from Web site is not seeking a financial gain from its users for providing such use, and that the linked-to site is not a site based on a subscription fee.

Web Posting, Scanning and Derivative Works

The process of placing material on a Web site and making it available to the global Internet audience is known as Web posting. Under copyright law, federal courts have clearly held that an unauthorized posting of copyrighted material on a Web site does infringe the copyright

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14 *See id.* at 1119.

15 Campbell v. Acuff-Rose Music, 510 U.S. 569, 579 (1994). In *Campbell*, the United States Supreme Court reasoned that if the new work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative,'" then a finding of fair use is just. *Id.* Moreover, "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Id*.

16 *See Kelly*, 77 F. Supp. 2d at 1119.

17 *See id*.

18 *Id*. at 1121.

19 *See id* at 1119 n.5.

owner's rights.[20] In *Scanlon v. Kessler*,[21] the Southern District of New York held that the defendant infringed the plaintiff's photographs by posting them on its Web site, even though the plaintiff took the photographs at the defendant's organizational event.[22] Similarly, in *Michaels v. Internet Entertainment Group, Inc.*,[23] the Central District of California enjoined the defendant from displaying the plaintiff's copyrighted videotape on its subscription Web site.[24]

With these decisions, courts seem to take the position that as technology continues to improve and provide new mediums to display or copy copyrighted works, these improvements do not give unauthorized users the legal right to abuse the copyrights. Another area where this position is evident is scanning, which allows users to transform an artistic work in a traditional tangible medium into an image on a user's computer display screen. In *Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc*.,[25] the District of Nevada found copyright infringement when the defendant scanned copyrighted digitized photographs for graphic manipulation and insertion into its new work in a Web site.[26] The court held that even if an unauthorized reproduction exists in a computer's memory banks only briefly, the digitizing of any copyrighted work may support a finding of copyright infringement.[27]

As these cases support the notion that traditional copyright principles are able to counteract new ways of infringement, courts also turn to the traditional exceptions. For example, in *Bridgeman Art Library v. Corel Corporation*,[28] the Southern District of New York held that the

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[20] *See* Marobie-FL, Inc. v. National Assoc. of Fire Equip. Dists., 1997 U.S. Dist. LEXIS 18764 (N.D. Ill. 1997); Central Point Software, Inc. v. Nugent, 903 F. Supp. 1057 (E.D. Tex. 1995); Sega Enterprises Ltd. v. MAPHIA, 857 F. Supp. 679 (N.D. Cal. 1994); Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993).

[21] Scanlon v. Kessler, 11 F. Supp. 2d 44 (S.D.N.Y. 1998).

[22] *See id*.

[23] Michaels v. Internet Entertainment Group, Inc., 5 F. Supp. 2d 823 (C.D. Cal. 1998).

[24] *See id*. For additional decisions addressing Web posting issues, *see* RT Computer Graphics, Inc. v. United States, 44 Fed. Cl. 747 (Fed. Cir. 1999); Berkla v. Corel Corp., 66 F. Supp. 2d 1129 (E.D. Cal. 1999); Storm Impact, Inc. v. Software of the Month Club, 13 F. Supp. 2d 782 (N.D. Ill. 1999); Veeck v. S. Building Code Congress Int'l, Inc., 49 F. Supp. 2d 885 (E.D. Tex. 1999).

[25] Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc., 55 F. Supp. 2d 1113 (D. Nev. 1999).

[26] *See id*. at 1121.

[27] *See id.* This and other recent decisions of U.S. courts interpreting Internet-related copyright reaffirm the longstanding wisdom of seeking a license before using copyrighted material. For recent decisions addressing copyright licensing, *see* Kepner-Tregoe, Inc. v. H. Vroom, 186 F.3d 283 (2d Cir. 1999); Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115 (9th Cir. 1999); Gemisys Corp. v. Phoenix Am., Inc., 186 F.R.D. 551 (N.D. Cal. 1999); Hicinbothem, *et al*. v. Natural Golf Corporation, 697 N.Y.S.2d 760 (A.D.3d N.Y. 1999).

[28] Bridgeman Art Library v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

defendant did not infringe the plaintiff's copyright when it scanned the plaintiff's color transparencies of paintings located in CD-ROMs.[29] The court found that the paintings contained in the plaintiff's CD-ROMs were reproductions of art already in the public domain.[30] Therefore, the CD-ROMs themselves were not sufficiently original to qualify for copyright protection.[31] Many copyright activists, however, criticize the *Bridgeman* holding because compilations, arguably such as the *Bridgeman* plaintiff's CD-ROMs, are subject matter protected under the U.S. Copyright Act.[32]

Advanced technology has also created new means to combine materials, thereby creating new forms of derivative works. In virtual media, copyright law still demands valid ownership of a copyright for a valid ownership claim in a derivative work. The plaintiffs in *Tasini v. New York Times*[33] were freelance writers who owned a collective work copyright in articles previously published in the defendant's daily newspaper.[34] The plaintiffs claimed that the defendants were liable for copyright infringement because the defendants republished their collective work in electronic form without their permission.[35] The U.S. Second Circuit Court of Appeals, reversing summary judgment in favor of the defendants, ordered the district court to enter an infringement judgment for the plaintiffs.[36] The court reasoned that Section 201(c) of the U.S. Copyright Act entitled the defendants only to make later editions to the writers' collective work and not to republish the collective work in electronic databases such as CD-ROMs.[37] The decision did not address the work-for-hire doctrine because the articles were freelance authors who registered a copyright in each of their articles, and the defendants had not sought an express transfer of these rights.[38]

Downloadable Music and DVDs

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29 *See id.* at 199.
30 *See id*. at 197, 199.
31 *See id*.
32 *See generally* 17 U.S.C. § 103 *et seq*.
33 Tasini, *et al*. v. New York Times, *et al*., 192 F.3d 356 (2d Cir. 1999).
34 *See id.* at 357.
35 *See id*.
36 *See id.* at 364.
37 *See id*. at 365.

Computer files can contain sound recordings playable on personal computers and other portable devices. The delivery of these files over the Internet creates the problem of downloadable music.

Under the Audio Home Recording Act (AHRA) of 1992, a party is not liable for copyright infringement for making, importing, or distributing a "digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium," or for using any of these devices or media for personal, noncommercial recording.[39] The U.S. Ninth Circuit Court of Appeals clarified the scope of AHRA's application to Internet-related technology in *Recording Industry Association of America, Inc. v. Diamond Multimedia Systems, Inc*.[40] The plaintiff, an association of recording companies and artists, sought to enjoin the defendant from manufacturing its RIO portable music player, a hand-held device capable of receiving, storing and re-playing digital audio file stored on the hard drive of a personal computer.[41] The plaintiff claimed that under the AHRC, the defendant's RIO player was a "digital audio recording device"[42] and was therefore unlawful. The Ninth Circuit held that under the AHRA, the defendant's hand-held device was not a "digital audio recording device" because the music selections it played from a user's computer hard disk were indirect reproductions of transmission and not "digital musical recording" under AHRA.

The motion picture industry has encountered similar problems with digital versatile disks (DVDs), "the latest technology for private home viewing of recorded motion pictures."[43] DVDs contain encryption software designed to allow appropriately configured hardware to play the motion picture, but not to copy it. However, the encryption technology failed, and evidence of

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38 *See id*. at 356. For one of the latest work-for-hire decisions, *see* Kirk v. Harter, 188 F.3d 1005 (8th Cir. 1999).

39 17 U.S.C. § 1008.

40 Recording Industry Assoc. of Am., Inc. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072 (9th Cir. 1999).

41 *See id*. at 1073.

42 *See* 17 U.S.C. § 1001(3). Under the AHRC, a "digital audio recording device" is "any machine or device of a type commonly distributed to individuals for use by individuals, whether or not included with or as part of some other machine or device, the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use …" *See id.* at § 1001(3) (*emphasis added*).

unauthorized copying soon surfaced. Unlike its music industry counterpart, the motion picture industry had better results in the U.S. court system. In *Universal City Studios, Inc., et al. v. Reimerdes*,[44] the Southern District of New York enjoined the defendants from providing a computer program on their Web site that permitted users to decrypt and copy copyrighted motion pictures from DVDs.[45] The court reasoned that the defendant's computer program was highly likely to violate Section 1201(a)(2)(B) of the Digital Millennium Copyright Act of 1998 (DMCA) because it was designed and produced to circumvent a technological measure.[46] Moreover, it was undisputed that a user could not obtain access to the copyrighted works without the defendant's computer program, which decrypted copyrighted works without the owners' authority.[47]

Webcasting

Webcasting is the process of digitally transmitting musical recordings, radio and television broadcasts over the Internet, "whether to the public at large or directly to individuals upon requests."[48] In *National Football League, et al. v. iCraveTV.com,*[49] major U.S. and Canadian motion picture and broadcasting companies sued iCraveTV.com for allegedly operating a Web site that rebroadcasted copyrighted television programs. The plaintiffs claimed that iCraveTV.com violated their exclusive right to perform and display their copyrighted broadcast television programs by rebroadcasting their works through its Web site to its users.[50] The Western District of Pennsylvania issued a permanent injunction against iCraveTV.com that prohibited it from its webcasting activities.[51] The parties thereafter entered into a settlement

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[43] *See* Mem. Op. at *Facts*, Universal City Studios, Inc. v. Reimerdes (No. 00-CV-0277) <http://www.eff.org/ip/Video/MPAA_DVD_cases/20000202_ny_memorandum_order.html> (visited Mar. 6, 2000).

[44] Universal City Studios, Inc., *et al*. v. Reimerdes, *et al*., No. 00-CV-0277 (S.D.N.Y. Jan. 14, 2000) (Mar. 6, 2000).

[45] *See* Mem. Op. at *DMCA Violation*, *Universal City Studios, Inc*. (No. 00-CV-0277) <http://www.eff.org/ip/Video/MPAA_DVD_cases/20000202_ny_memorandum_order.html> (visited Mar. 6, 2000).

[46] *See id.*

[47] *See id.*

[48] *See generally* Bob Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, WWW.KOHNMUSIC.COM <http://www.kohnmusic.com/articles/newprimer.html> (visited Mar. 7, 2000).

[49] National Football League, *et al*. v. iCraveTV.com, No. 00-CV-121 (W.D. Pa. Jan. 20, 2000).

[50] *See* Complaint, *National Football League* (No. 00-CV-121) MOTION PICTURES ASSOCIATION OF AMERICA <http://www.mpaa.org/Press/icrave_complaint.htm> (visited Mar. 7, 2000).

[51] *See* Order, *National Football League* (No. 00-CV-121) MOTION PICTURES ASSOCIATION OF AMERICA <http://www.mpaa.org/Press/iCrave_Permanent_Injunction.htm> (visited Mar. 7, 2000).

agreement whereby iCraveTV.com agreed not to rebroadcast copyrighted television programs through its Web site.[52]

Under the DMCA, Congress addressed webcasting and created three categories of digital transmissions: (1) broadcast transmissions made by a FCC-licensed terrestrial broadcast station, "which were exempted from the performance right are transmissions; (2) subscription transmissions, which were generally subject to a statutory license; and (3) and on-demand transmissions, which were subject to the full exclusive right."[53] Section 405 of the DMCA has also expanded the statutory license for subscription transmissions to include webcasting as a new category of "eligible nonsubscription transmissions."[54] However, the U.S. Copyright Office has acknowledged that "digital transmissions of sound recordings over the Internet using streaming audio technologies" do not squarely fall within any of the three categories mentioned above.[55]

Currently, there is no pending litigation addressing webcasting; however, as personal software becomes more advanced and accessible to the public, it is certain that new controversies will arise.[56]

Conclusion

As the Internet continues to provide some of the most egalitarian media invented as well as one of the greatest democratic tools for the twenty-first century,[57] the U.S. courts are cautiously providing guidance to interpreting copyright law in conjunction with Internet and future technology related to advanced media. While the courts recognize the policy of encouraging the developing media, the expansion of ways to infringe is leading to an increased need to curtail infringing activity. Copyright owners will necessarily have to develop advanced and innovative

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[52] *See* Settlement Agreement, *National Football League* (No. 00-CV-121) MOTION PICTURES ASSOCIATION OF AMERICA <http://www.mpaa.org/Press/iCrave_Agreement.htm> (visited Mar. 7, 2000).

[53] *The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary*, U.S. COPYRIGHT OFFICE <http://lcweb.loc.gov/copyright/legislation/dmca.pdf> at *p. 16* (visited Mar. 7, 2000).

[54] *Id*.

[55] *Id*.

[56] To avoid webcasting controversies, *see generally*, *ASCAP Internet Licensing*, THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS <http://www.ascap.com/weblicense/webintro.html> (visited Mar. 7, 2000).

[57] *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 851 (1997).

supervision of their original works in order to discover potential infringers. With the decisions about the issues discussed here, authors of works manipulated by Internet-related technology currently have an ally in the U.S. court system. But, consistent with seminal U.S. copyright fair use holdings[58] as just one example, and evidenced by decisions such as *Kelly*[59] and *Bridgeman*,[60] increased pressure and regulation may soon shift the attention of the U.S. judiciary toward the expansion of the exceptions rather than the consistent application of the rule.

[58] Internet-related derivative works, like other derivative works, are permissible if they legitimately provide their users with the ability to actively pursue, discuss and distribute interoperability solutions to the general public. *See, e.g., Sony v. Universal City Studios*, 464 U.S. 417 (1984) (holding that the sale of copying equipment for video tapes does not constitute contributory copyright infringement if the product is widely used for legitimate purposes); *Sega v. Accolade*, 977 F.2d 510, 527-28 (9th Cir. 1993) (holding that the disassembly of copyrighted object code is fair use of copyrighted work if such disassembly provides the only means of access to that copyrighted code and copier has a legitimate for seeking access); *Sony Computer Entertainment, Inc. v. Connectix Corporation*, No. 99-15852, 2000 WL 144399 (9th Cir. Feb. 10, 2000) (holding that reverse engineering by copying functional elements of programming to create alternative playback platform for computer game constitutes fair use), available from the BNA Web site at <http://pub.bna.com/ptcj/9915852.htm> (visited Feb. 24, 2000).

[59] Kelly v. Arriba Soft Corp., 77 F. Supp. 2d 1116 (C.D. Cal. 1999).

[60] Bridgeman Art Library v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999).