Bulletin boards and Net sites

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Should a bulletin board or net access provider be liable for copyright infringement when a user posts infringing material on a user newsgroup or forum?

Several recent court decisions have addressed the liability of bulletin board operators and related organizations for copyright infringement as a result of user postings of copyrighted material. The most recent decision (Nov. 1995) is the first to address the copyright liability of on-line service providers, at all. It is also the first to address in depth the liability of bulletin board operators who gain Internet access via such on-line service providers.

The Netcom case

The latest decision (Religious Technology Center v. Netcom On-Line Communications Services, Inc., US District Court for Northern Dist. of Calif. (as yet unreported), Order of 21 November 1995) involves a copyright infringement suit by the Church of Scientology. The plaintiff Church objected to postings of its teachings that one of its ex-members and detractors, defendant Dennis Erlich, placed on alt.religion.scientology, an unmoderated on-line newsgroup (forum) for discussion and criticism of Scientology and the Church. (An unmoderated forum is one without an umpire to censor or modify inappropriate postings.)

Erlich’s postings reached the Usenet aspect of the Internet via defendant Tom Klemesrud’s bulletin board at support.com, which Klemesrud runs out of his house for the benefit of 500 subscribers (including Erlich). The bulletin board reaches the Usenet via the facilities of defendant Netcom, a major US commercial provider of access service to the Internet. (Klemesrud has a net access contract with Netcom.)

Erlich is a vocal critic of Scientology and of the plaintiff Church, which in return regards him as an apostate. The Church, doing business as Religious Technology Center, owns copyrights in the writings of late science fiction author L. Ron Hubbard, the founder of the Church.

In substance, the Church teaches that accumulations of bad karma in this or previous existences create engrams in the minds of those persons now associated with the karma. In stressful situations the engrams cause mentally engrammed persons to engage in counterproductive behavior. In addition, now-deceased beings (so-called thetans) transported to Earth 75 million years ago from another planetary system cause further problems for present-day earthlings by misdirecting their mental processes. For a substantial fee, the Church teaches its members its advanced technology for erasure of mental engrams and for editing out (so-called auditing) destructive thetan energies. The copyrighted Hubbard writings embody, among other things, this technology and its historic background, all of which the Church contends is not only copyrighted but also a trade secret.

Erlich dedicated himself to persuading others that the Church’s technology is a fake and to mocking the Church’s teachings. As part of his campaign of criticism of Scientology, Erlich posted portions of the copyrighted works on alt.religion.scientology via support.com. The Church demanded that Erlich remove the postings, and he of course refused.

The Church then demanded of Klemesrud that he keep Erlich off his system, because he was posting the Church’s copyrighted writings. Klemesrud counter-demanded that the Church prove its copyright ownership of the material, on the ground that otherwise its demand was
Erlich decides he wants to post some material (such as text authored by Hubbard) on a Usenet newsgroup—in this case, on a group designated alt.religion.scientology. Erlich has a file or files (say, hubbard.txt) on his hard disk or other memory unit, in which the material is stored. Erlich sends his posting to Usenet by transmitting hubbard.txt to Klemesrud’s support.com bulletin board. He uses a telephone and modem to transmit the material from his computer to Klemesrud’s computer. That computer stores the hubbard.txt data in its memory for a few days, and at once automatically relays the hubbard.txt data to Netcom via modem and telephone.

Netcom’s computer automatically stores the hubbard.txt data in its memory for one or two weeks. Netcom’s computer also automatically sends the hubbard.txt material at once as e-mail to every person who has subscribed to alt.religion.scientology. It transmits the hubbard.txt material to other net access providers (the neighboring access providers shown in Figure A) that have decided to support alt.religion.scientology. The material is stored in the e-mail files of all of the members of the alt.religion.scientology newsgroup. The e-mail files are located in the memories of the net access providers via which the members access the net. These providers might be such access providers as compuserve.com, aol.com, netcom.com, dgsys.com, computer.org, gwu.edu, and so on.

From there, the hubbard.txt material automatically becomes available to the newsgroup members. They can then download the material via telephone and modem to their own computers, and store the hubbard.txt material in RAM (for browsing) or in nonvolatile memory. As a result, thousands of identical hubbard.txt files may be distributed throughout the world within hours of Erlich’s initial posting. (According to one witness, there are at least 20,000 to 60,000 readings per month for alt.religion.scientology.)

Figure A. The Usenet aspect of the Internet.

unreasonable. The Church then demanded of Netcom that it keep Erlich off the Internet (if necessary, by kicking off the 500 users of the Klemesrud bulletin board). Netcom rejected these demands as unreasonable. The Church then sued all three defendants.

The Church first succeeded in getting a preliminary injunction against Erlich, despite his argument that his posting of the Scientology texts was a fair use. (Fair use is a defense to a charge of copyright infringement, designed to facilitate scholarly and educational use of copyrighted material. To determine whether a use is fair, courts consider several factors. They include the extent of the taking, the kind of use, the kind of work, and whether the allegedly fair use acts as a market substitute for the sale of the original work.) The court felt that the copying was too extensive, and that Erlich accompanied it with too little comment or criticism of his own, to excuse the copying as fair use.

The Church sought a similar preliminary injunction against the bulletin board operator (Klemesrud) and the on-line service provider (Netcom). They countered with motions to dismiss the copyright infringement case as legally insufficient. A preliminary hearing established a record that primarily showed the mechanics of the operation (see accompanying box and figure).

Was there reproduction of a copy?

The court record was mostly directed to the mechanics because of legal controversy over whether any “reproduction of a copy” of the Hubbard works (the notional hubbard.txt) was made. Section 106(1) of the US Copyright Act prohibits reproduction of copies of works. The statute defines copies as embodiments of a work that exist for more than a transitory duration—screen displays and paper print-
ous being polar examples of transitory and nontransitory embodiments. The court found that in this case, nontransitory reproductions were made as a result of Erlich's conduct. The court apparently focused on the copies (see lower right-hand part of Figure A) made in the newsgroup subscribers' computer memories.

However, in principle these hubbard.txt copies are not appreciably less transitory than the other hubbard.txt copies in the chain of distribution of this material shown elsewhere in the figure. The Ninth Circuit has already held in the MAI case (MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993), cert. dism d, 114 S. Ct. 671 (1994)) that even loading a computer program into RAM is sufficiently nontransitory to be a reproduction of a copy of the computer program.

In any event, the Netcom court believed that somebody (such as the newsgroup members) made enough of a reproduction of a copy for somebody to be liable for copyright infringement. The question then was, who is liable? Erlich was probably liable, but other than the satisfaction of hounding him, the plaintiff Church had little to gain from naming him.

**Liability of net access providers**

The court therefore turned to the more interesting and important issue of whether bulletin board operators and providers of on-line access service to the Internet (Usenet sites) should be liable for copyright infringement resulting from the conduct of users such as Erlich. But the evidence was relatively fragmentary.

Although the court did not definitively rule the case before it because the facts were still too murky, it extensively discussed what legal standards should apply in such cases. The court refused to grant a preliminary injunction in favor of the Church, because it had not established a strong enough likelihood that it would prevail on the merits. On the other hand, the court did not throw the case out altogether, because it seemed possible that the Church might prove that the bulletin board and on-line access provider were responsible for copyright infringement.

Netcom emphasized that it took no specific affirmative action to reproduce the material. Also, it did not hold itself out as a content provider or forum moderator (acting instead as a mere conduit to the Usenet). However, the court considered that not dispositive. Netcom designed and implemented a Usenet site system that automatically and uniformly created temporary copies of material that its users (newsgroup posters) sent it by modem. Other users (newsgroup subscribers) could then copy the material to their own computers. Netcom thus provided a facility or conduit that, like a copy machine or VCR, its customers may use to commit copyright infringement.

(A possible flaw in the copy machine or VCR analogy is that customers don’t just make copies and take them away. Carrying the analogy closer to the facts, Netcom has programmed its notional copy machine or VCR to make a copy of anything that anyone puts into the machine. Netcom then places the copy into its own files and keeps it. Why isn’t Netcom, in those circumstances, deliberately making an at least potentially infringing copy of whatever customers put into its programmed machine?)

To be sure, the court said, it would be inappropriate to find Netcom liable for direct infringement merely because it provided such a conduit for potential infringement. (That is, a point that likely will be challenged on appeal.) The court’s reason not to do so was that this conduit has considerable other social utility, which Internet access providers to the public. It would be inappropriate to find Netcom liable only if the character of its conduct made it “just to hold it accountable” for the actions of its users.

The court ruled that the proper legal test for such “just” accountability was whether the access provider or bulletin board acted with actual or constructive knowledge of the infringing activity and caused, or materially contributed to, the directly infringing activity of the newsgroup subscribers. Resolving this question involved a number of subsidiary issues, most of which the court could not resolve on the fragmentary record before it. A full trial was therefore needed.

One important issue was whether Netcom knew or should have known of the copyright infringement. Netcom denied knowledge of infringement, despite the Church’s notice and demands. Netcom argued that:

- it did not know of Erlich when it initially leased its service to Klemesrud,
- it was unable to screen out the infringing postings before they were made, and
- it could not reasonably ascertain whether the copyright registrations were valid and whether Erlich’s conduct was a fair use.

The court found the record before it on these points to be too inconclusive to permit summary disposition of the case. The court pointed out, however, that Netcom was focusing on the wrong point in time as to its knowledge. The time at which knowledge was important was when Netcom knew or should have known of infringement after the Church complained to it, not when Netcom initially leased its service to Klemesrud. At trial, Netcom’s absolution would depend on whether, at all later times when Netcom knew or should have known of infringement, it was too late or infeasible for Netcom to do anything about the infringement.

Also, Netcom—once the Church gave it actual notice of alleged copyright infringement—had more of a duty to make inquiry than it conceded, even though it was a Usenet conduit rather than a content provider. For example, the works about which the Scientology Church complained had its copyright notices located within them, which obliged Netcom to make some inquiry. On the other hand, the court recognized that it would have been difficult for Netcom to ascertain whether Erlich’s use of the works was fair. That was so, despite the fact that when the matter subsequently came before the court it ruled against Erlich on fair use.

(The court considered Erlich’s use probably not fair, because he posted large amounts of copyrighted material verbatim and added very little com.)

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merely condemn blatant piracy.

In the Playboy case (Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993)), the court held an operator of a bulletin board liable for copyright infringement. The operator allowed a subscriber to upload digitized files of pictures of playmates taken from Playboy magazine, which made the files available to other subscribers for downloading. The court held that the bulletin board operator's conduct amounted to distribution of the copyrighted pictures, but the court failed to find reproduction on the part of the bulletin board operator. The court apparently considered that only the downloading subscribers made unlawful reproductions. Hence, the court in the Playboy case by no means ruled on the issues that concerned the court in Netcom.

(Alternatively, however, the Frena bulletin board could have been said to have reproduced copies of the pictures on Frena's server, by setting it up to accept in memory the uploaded picture files. The Playboy court did not address this. The Netcom court expressly refused, given the perceived social utility of Internet access, to hold that a bulletin board's or net server's storage in memory or retransmission to other memory units was direct infringement. The court considered that it was not enough that the bulletin board and Netcom had automatically permitted Erlich to upload infringing material to their systems for retransmission to other computers. More was needed before the Netcom court was prepared to find that conduct a directly infringing reproduction of a copy, on the part of Netcom or the bulletin board.)

In the MAPFA case (Sega Enterprises Ltd. v. MAPFA, 857 F. Supp. 679 (N.D. Cal. 1994)), a bulletin board operator had actively solicited its users to upload pirated video games for other users to download. That amounted to an overt conspiracy among the operator of the MAPFA bulletin board and its users (the video game Mafia) to commit copyright infringement. The Netcom court properly pointed out that, given these facts, the MAPFA decision cannot be extrapolated as a precedent governing relatively passive, or at least nonconspiratorial, conduct of other bulletin boards or net access providers.

The Netcom decision thus blazes a completely new trail in electronic and telecommunications copyright infringement law. The court's reliance on contributory infringement standards represents an interesting attempt to devise a compromise between two policies. One favors recognition of property rights of copyright owners. The other policy favors unfettered public discourse on the Internet (or at least on its Usernet newsgroups).

From a purely policy standpoint, the decision makes a great deal of sense. But viewed solely from the standpoint of traditional copyright law doctrine, the Netcom decision may well be questioned. The court's refusal to find direct infringement is inconsistent with earlier copyright precedents. Indeed, it may provoke reversal on appeal. The bulletin board and on-line server defendants each have deliberately set up their operations in a way that automatically stores in memory whatever uncopyrighted or copyrighted material users send over their modems. The court seems to be rewriting copyright law, albeit in an area where traditional copyright law simply does not fit the needs of the situation. Admirable as the court's intent may be, some may question the court's authority to play such a legislative role.

The Netcom decision, after trial in early 1996, is surely headed for an appeal to the Ninth Circuit.
Church of Scientology, not known as a quitter in litigation, has promised as much. It termed the court's decision, in a WWW posting, "a very sad day for intellectual property owners." At the same time, Netcom overtly bases its main business strategy (relative to content-providing competitors such as CompuServe and America Online) on not censoring postings. It considers that not censoring posting makes it more attractive to some users. Accordingly, whoever loses at the trial of this case is very likely to appeal. Indeed, the case may be headed for the US Supreme Court. (In theory, either the Church or Erlich, or both, could appeal right now because of the court's rulings on preliminary injunction. But that would probably be unsound tactically.)

**Will the decision withstand appeal?**

It is appropriate to ask, therefore, whether the Ninth Circuit is likely to agree with the district court's policy-oriented approach. Based on earlier Ninth Circuit copyright precedents, that is quite open to question.

The main issue in this case is comparable to that involved in deciding whether downloading and disassembly for purposes of reverse engineering a computer program involves the reproduction of an infringing copy of the computer program. In the NEC-Intel case (NEC Corp. v. Intel Corp., 10 U.S.P.Q.2d 1177 (N.D. Cal. 1989)), the district court held that NEC's intermediate copy (the downloaded microcode from the Intel 8086 microprocessor chip) was not automatically an infringing reproduction. It could not infringe unless the final NEC microprocessor chip based on the reverse engineering itself contained infringing microcode. Since NEC's microcode took only functional aspects of the Intel microcode, along with a de minimis amount of other code, the commercial NEC product was noninfringing. Thus the court legally excused NEC's intermediate copying. Intel did not appeal this decision.

Later, the issue of intermediate copying in reverse engineering reached the Ninth Circuit in the Accolade case (Saga Enterprises, Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992), cert. denied, 115 S. Ct. 1582 (1995)). The Ninth Circuit refused to adopt a standard holding intermediate copying excusable when the final commercial product to which it related was itself noninfringing. Instead, it held Accolade's intermediate copying conduct to be prima facie copyright infringement, but then excused it on the basis of the fair-use defense.

Sega had used a lockout system to keep video game software vendors such as Accolade out of Sega video game hardware platforms that Sega had sold to the public, unless the vendors paid a large fee to Sega. The Ninth Circuit held that, in those circumstances, reverse engineering was a fair use. Probably, that approach is more consistent with traditional copyright law's concept of what is a reproduction of a copy. A decision by the Ninth Circuit to adopt in Accolade the common-sensical, but nonlegalistic, approach of the NEC-Intel court—no sale of an infringing product, no infringing copy—would have flooted copyright precedent.

If the Ninth Circuit took a parallel approach here to that which it took in Accolade, it would accept the Church's contention that Netcom and Klemesrud each engaged in unauthorized reproduction of copies of Hubbard's writings. That in turn would lead to a finding that Netcom and/or the bulletin board each made infringing copies of the Hubbard works when their respective computer systems accepted the Erlich-posted material and wrote it into their system memory. That would be a direct infringement, excusable, if at all, only on grounds of fair use.

**Does the legal theory matter?**

To be sure, the Ninth Circuit could then base a conclusion of fairness of the defendants' use on the same social utility considerations that led the district court to find no copying by Netcom or Klemesrud and no direct infringement by them. Hence, it might seem that the result would necessarily be the same whether one called the defendants' conduct direct infringement, subject to the fair-use defense, or called it at most contributory infringement, subject to the fair-use defense.

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**We may need a special statute (Federal Net Law) that gives the Internet enough room to breathe.**

That would not be correct. Direct infringement is subject to strict liability; good faith or bona fide ignorance is no excuse. Contributory infringement, however, can be established only when the party charged with contributory infringement knew or should have known of infringement. Good faith or bona fide ignorance is a complete excuse to a charge of contributory infringement. The court does not even need to get to the fair-use defense if the defendant is bona fide ignorant.

Under the legal theory adopted by the Netcom court, Netcom and the bulletin board get two bites at the legal apple—once on knowledge and once on fair use. Even if a defendant has only a 40 percent probability of success at each bite, success of either bite is good enough. Hence, the overall probability of Netcom success in the litigation is now approximately 75 percent, or 3:1 in favor of Netcom and against the Church. (Note: $1 - (1 - 0.40)(1 - 0.40) = 1 - 0.36 = 0.74$.)

On the other hand, under a theory of strict liability for direct infringement, and assuming the same probabilities, the overall probability of Netcom success in the litigation would be simply 0.4, or about half as good. Accordingly, if on the Church's appeal the Ninth Circuit follows traditional copyright law principles, the odds of the opposing parties' winning will flip dramatically. It therefore does make a difference which legal theory prevails. Moreover, the theory that looks better from an Internet policy standpoint seems less likely to prevail under a doctrinally rig-
orous copyright law analysis. That may suggest that a doctrinaire rigorous copyright law analysis is not the best way to resolve Internet controversies. If all you have is a hammer or a screwdriver, everything has to be treated as a nail or a screw. We may need a special statute (Federal Net Law) that gives the Internet enough room to breathe.

The advantage of the approach of the district courts in Netcom and NBC-Intel is clear. The courts used a simple, bright-line copyright infringement test that lends itself to predictability and greater business certainty. Much of the time it would never be necessary to reach the complex issue of fair use, the other apple bite being enough to dispose of the case.

The advantage of the “copying but perhaps fair use” approach is that it is more nuanced. Thus it permits adjustment of outcome in each case to be tailored or calibrated to the particular fact pattern and total equities of the case. But this occurs at greater administrative expense (in terms of public costs of operating the judicial system as well as suitors’ paying their legal bills), less predictability, and thus less security of expectation.

It may also result in subordinating the general interest of the public in robust development of the Internet to the protection of interests of copyright owners. Copyright law may draw on a hierarchy of values in which intellectual property rights count more heavily than net users’ interests in unconstrained exchange of their ideas. Presumably, a Federal Net Law would reverse that hierarchical order.

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Micro Review

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number of ways in which advertising will be better targeted, more effective, and less annoying on the information highway than it is currently. Finally, he offers the possibility that the rich may have to pay more for the same services than the poor. He likens this to the income tax. His tax burden last year was four orders of magnitude greater than mine, for essentially the same government services.

Throughout the book Gates advocates governments to adopt a laissez faire approach to the development of the information highway. He considers censorship impractical. He takes a dim view of attempts to legislate standards or compatibility. He points out the quixotic nature of the US government’s positions on exporting cryptography and on ensuring its own ability to tap encrypted communications.

Gates acknowledges the anxiety many people have over the dislocations that advancing technology can bring. He reassures us that the reassignment of resources (workers) from failing areas of the economy to thriving ones leads to an overall rise in the society’s standard of living. On the other hand he recognizes that workers trained for one thing can’t always just go out and learn something else. He offers no resolution of these conflicting positions.

Another critical issue Gates raises is the tension between privacy and security. By letting Big Brother watch over us, we can feel secure in the knowledge that there is no place for criminals to hide. On the other hand, the technology is at hand to give us greater privacy than ever before, and that same technology can also protect those who would prey on us. The same cryptographic technology that allows us to protect our privacy with anonymous electronic transactions is vulnerable to a mathematical discovery that would enable undetectable counterfeiting. That could cause a complete collapse of the world monetary system.

Whatever you think of any of these issues, the day will soon be at hand when you can instantly make your views known to your elected representatives. Gates does not believe this will lead to direct democracy. He feels we will always need people whose job is to study and understand the issues and make informed decisions.

Finally Gates addresses the question of whether or not the information highway will lead to a single world culture. Again he sees influences in both directions. The highway will give us worldwide access to the same content and will push us in the direction of common values. At the same time it will provide more opportunity for diversity, because physically scattered groups can gather electronically to share common interests and preserve cultural traditions.

This is not a highly technical book. Gates writes for any intelligent and aware member of modern society. Nonetheless, few people could have written this book. Gates shares with us insights he derives from his special position in the computer industry. Don’t pass up the chance to study this uniquely informed vision of the future.

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