

# COPYRIGHT INFRINGEMENT AND INTERNET SERVICE PROVIDERS

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## I. What is Copyright?

A. Rights of Copyright Holder Under U.S. Copyright Act: A copyright is a right given to authors of “original works” which gives them the exclusive right to reproduce (i.e., copy) the work, to prepare derivative works based on the copyrighted work, to distribute copies of the work to the public, and, for some types of works, to perform and display the work publicly.<sup>1</sup>

## B. Types of Infringement

### 1. Direct

- for violating any of the exclusive rights of the copyright owner, e.g. by copying another’s copyrighted work
- “strict liability” offense — does not require intent or any particular state of mind, or even knowledge of the act of copying
- willfulness is relevant to the award of statutory damages

2. Contributory: liable for participating in the infringing acts of others where one (1) with knowledge of the infringing activity, (2) induces, causes or materially contributes to the infringing conduct of another

3. Vicarious Liability: when (1) one has the right and ability to supervise the infringer or control the infringer’s acts, combined with (2) a direct financial interest in the exploitation of copyrighted materials

4. Criminal: infringe copyright willfully and for purposes of commercial advantage or private financial gain

## C. Types of Damages

1. Civil (for direct, contributory, or vicarious): may include injunctions, impounding and disposition of infringing articles, damages and profits or statutory damages, costs and attorneys’ fees

2. Criminal: imprisonment and fines

## II. Caselaw on Whether ISPs Are Liable for Copyright Infringement for Acts of Their Subscribers

- A. Law is Still Developing
- B. Several Cases are Illustrative
- C. *Playboy Enterprises, Inc. v. Frena*<sup>2</sup>, *Sega Enterprises Ltd. v. Maphia*,<sup>3</sup> *Central Point Software, Inc. v. Nugent*<sup>4</sup>. Held BBS operators liable for direct infringement for uploading and downloading of copyrighted works onto BBS. BBS operators knew of, encouraged, or solicited copyright violations.
- D. “Scientology” Case: *Religious Technology Center v. Netcom On-Line Communications Services Inc.*<sup>5</sup>
  - 1. Direct infringement. BBS and ISP should not be liable for direct infringement since they did not “cause” the copying. Act of designing or implementing a system that automatically and uniformly creates temporary copies of all data sent through it is not unlike that of the owner of a copying machine who lets the public make copies with it. Direct liability would result in liability for every single Usenet server in the worldwide link of computers transmitting the infringing message to every other computer
  - 2. Vicarious Liability. Vicarious liability exists where the defendant (1) has the right and ability to control the infringer’s acts, and (2) receives a direct financial benefit from the infringement. (1) The ISP may have had the right and ability to exercise control over the activities of its subscribers; but (2) since the ISP received a fixed fee for its services and its services are not enhanced by the acts of infringement, it did not receive a direct financial benefit from the infringement.
  - 3. Contributory Infringement. Liability may exist where the ISP, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.
    - a. “If plaintiffs can prove the knowledge element, Netcom will be liable for contributory infringement since its failure to simply cancel Erlich’s infringing message and thereby stop and infringing copy from being distributed worldwide constitutes substantial participation in Erlich’s public distribution of the message.”

- b. However, "Where a BBS operator cannot reasonably verify a claim of infringement, either because of a possible fair use defense, the lack of copyright notices on the copies, or the copyright holder's failure to provide the necessary documentation to show that there is a likely infringement, the operator's lack of knowledge will be found reasonable and there will be no liability for contributory infringement for allowing the continued distribution of the works on its system."
- c. Fair Use: Under the fair use defense, "the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."<sup>6</sup>
- d. Sum: After allegation of copyright infringement, attempt to "reasonably verify" the claim; once reasonably verified, take reasonable measures to prevent the continued distribution of the works on ISP's system.

### **III. Future Directions of the Law**

- A. Still some risk ISPs will be held directly liable for acts of their subscribers.
- B. "Scientology" case seems better reasoned and more likely to be followed in the future.
- C. Legislation could change the results in either direction.
- D. Managing Risks

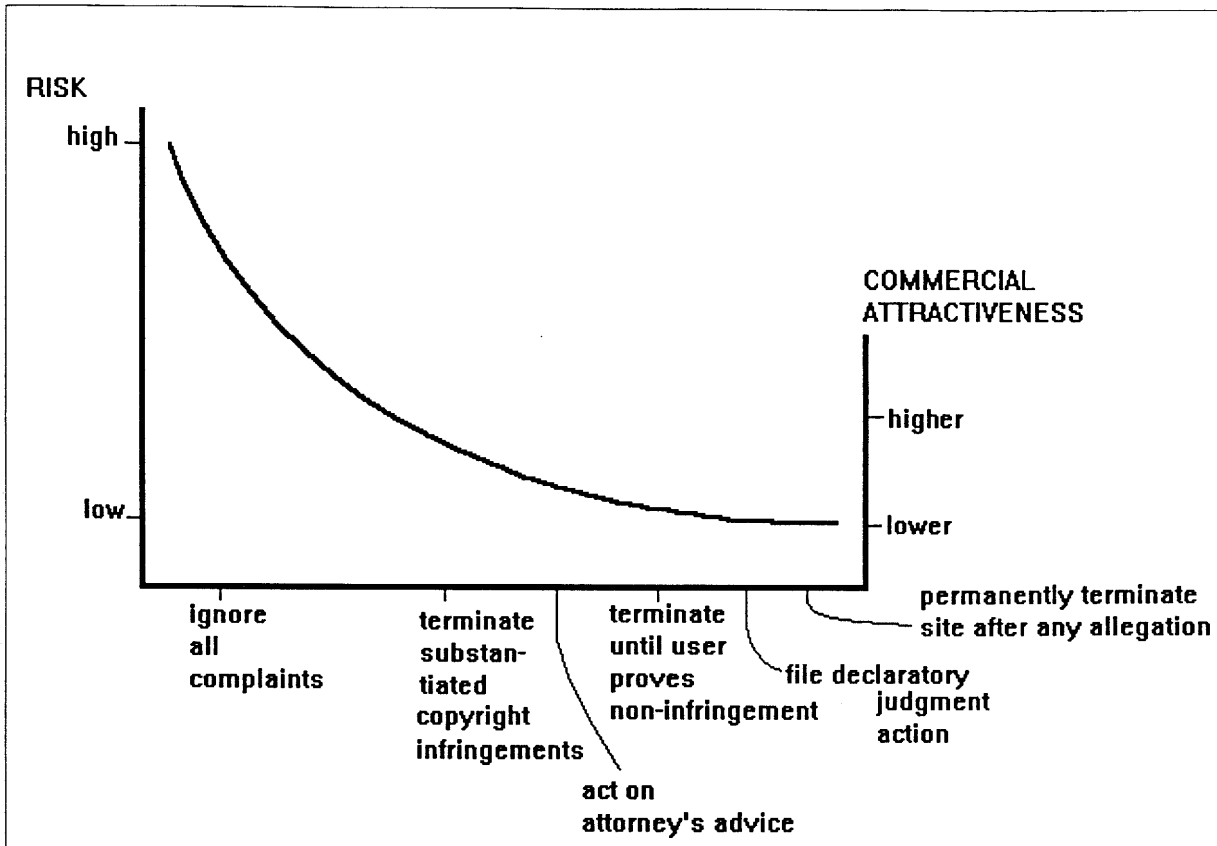


Figure 1. ISP Options

E. Final Tips:

- ☛ Never infringe a copyright willfully or for purposes of commercial advantage or private financial gain, to avoid criminal liability and liability for direct infringement.
- ☛ Avoid fee systems where a direct financial benefit is received based on subscribers' acts of copyright infringement, especially where you have the right and ability to control the infringer's acts, to avoid vicarious liability.
- ☛ Similarly, try to avoid enhancing the value of your services to subscribers or attracting new subscribers by allowing or encouraging copyright infringement or by becoming known as a good forum for obtaining bootlegged works.
- ☛ Take allegations of copyright infringement seriously, and request documentation from the alleged copyright holder to verify the claim.
- ☛ Take reasonable steps to stop verified acts of infringement by a subscriber.
- ☛ Consider consulting an attorney for legal advice when such claims are received or before taking actions that might have detrimental legal consequences.
- ☛ Keep abreast of new legislation and cases that affect the law in this and related areas.

## NOTES

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1. 17 U.S.C. §§ 102 & 106.
2. 839 F.Supp. 1552 (M.D. Fla. 1993).
3. 857 F.Supp. 679 (N.D. Cal. 1994).
4. 903 F.Supp. 1057, 37 U.S.P.Q.2d 1051 (E.D. Tex. 1995).
5. 907 F.Supp. 1361, 37 U.S.P.Q.2d 1545, 1548-49 (N.D. Cal. 1995).
6. 17 U.S.C. § 107.

**“ARE YOU LIABLE AND WHAT  
CAN YOU DO ABOUT IT”**

**A Colloquium for Internet  
Service Providers**

**June 11, 1996**

**Presented by**

**The Internet and Computer  
Networking Practice Group**

**SCHNADER, HARRISON, SEGAL & LEWIS**

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