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ARTICLES

ARE YOU CONTENT WITH THE CONTENT? INTELLECTUAL PROPERTY IMPLICATIONS OF WEBLOG PUBLISHING

ATTIYA MALIK†

I. INTRODUCTION

WEBLOGS!! From the New York Times to National Public Radio, the media is abuzz with this latest and greatest trend to hit Cyberspace.¹ Weblogs, more commonly known as blogs, chronicle whatever events, ideas, or opinions, whether personal, social, political, or religious, the authors choose to discuss. Much like diaries or journals, they are a reverse chronological account of the authors' thoughts and viewpoints. The popular media is describing weblogs as: "a new type of expression,"² "there has never been a better way to let your voice be heard,"³ "less intrusive than a webcam but somehow more revealing,"⁴ and a "compelling alternative."⁵ While they started out as personal diaries, weblogs are rapidly being adopted for journalism, education, and business activities and are

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1. Bob Tedeschi, *Internet Experts Wonder if Weblog Technology is a Powerful New Media Species, or Just Another Fad*, N.Y. Times C6 (Feb. 25, 2002); *All Things Considered: Popularity of Weblogs DP* (National Public Radio broadcast, Feb. 13, 2002) (radio broadcast); Chris Taylor, *Pssst. Wanna See My Blog? Impromptu Online Journals are Popping Up All Over the Web. If I Can Figure Out How to Build One, You Can Too*, Time 68 (Feb. 11, 2002); Howard Kurtz, *Who Cares What You Think? Blog, and Find Out*, Wash. Post C01 (Apr. 22, 2002).

2. Tedeschi, *supra* n. 1, at C6.

3. Taylor, *supra* n. 1, at 68.

4. *Id.*

5. Kurtz, *supra* n. 1, at C01.

serving as an alternative platform from which to communicate at the global level.

The beauty of weblogs is that they are completely do-it-yourself! Unlike web pages that require knowledge of computer code or programming language, such as HyperText Markup Language ("HTML"), even the most technologically challenged user can have their blog up and running in no time at all. With the aid of any number of weblog software programs now available and by following the built-in templates and prompts, you too can start blogging about the topic of your choice. You choose the content, whether text or images, click the requisite buttons, and, voila!, instant publishing! Your posting is available on your weblog within seconds for all Internet viewers to read. You can add to or edit your blog as often as you please, whether daily, hourly, or even minutes apart. Adding links to your weblogs or following the links contained in others' weblogs will introduce you to the growing communities of bloggers. These communities develop around common interests and topics, thereby making it easier to find and join the ranks of like-minded bloggers.

The publicity about weblogs has neglected to warn against the risks of legal liability. Whether you want to impart words of wisdom or copy something that caught your interest, the temptation to "borrow" is too great and too easy in Cyberspace. Whereas the typical Internet user may have heard of "copyright" or "trademark," they are unaware of the complexities and nuances of these areas of law. The legal tests and standards may be too sophisticated for the average user. Even practitioners and courts are grappling with what legal standards and interpretations are to be applied in Cyberspace, thus, leading to irregular and unpredictable results.

Whether innocent or intentional, infringement of intellectual property rights poses serious consequences. As the Internet continues to impact daily life, intellectual property owners are stepping up monitoring and enforcement efforts in order to preserve their rights. Technological advancements are making it easier to track, identify, and hold liable, individual users who are directly responsible for the infringing conduct. Weblogs, too, will be subject to scrutiny. Legal discussions of Web sites and web pages abound and, while these discussions could be applied to weblogs, they would not adequately address all the issues.

The importance of weblogs lies in the fact that they differ from traditional web pages in several crucial ways. First, as mentioned, there is no special computer language or code, such as HTML, necessary to post or publish content on the Internet. The weblog software programs eliminate the need to learn computer programming that is necessary for the construction of web pages. Second, whereas web pages require an intermediary, like a webmaster, systems administrator, or web content man-

ager to maintain presence on the Internet, there is no one standing between you and your blog and there is no delay in posting your communication. Third, webloggers have direct and immediate access to the weblog content so they can add, delete, or modify their postings as often as they wish. Fourth, there is no one to monitor, filter, or censor what you publish in your blog. What you want to say and when you want to say it is all within your direct control. The significance of these critical differences is that there is no one to screen weblog activities and, therefore, no one to warn webloggers against intellectual property rights violations. Moreover, the elimination of an intermediary means that there is no one to shield webloggers from liability should intellectual property owners find infringing content on weblogs.

The unexplored legal dimensions of the burgeoning cultural and technical phenomena of weblogs are ripe with pitfalls for the uninformed. As a potential author or reader of weblogs, be aware that yours and others intellectual property rights are at stake. As someone who supplies software, equipment or facilities, or provides Internet access or space for weblog hosting that enables others to create and maintain weblogs, be alert because your participation may be viewed as contributing to the direct infringement of intellectual property rights by webloggers. As an advertiser or promoter of products or services on weblogs, including fundraising activities, know that you too are exposed to liability. Finally, be advised that even something as innocuous as linking to or from weblogs could lead you into trouble.

While cases like *A & M Records, Inc. v. Napster, Inc.*⁶ have brought intellectual property infringement liability to the forefront, the average Internet user is unlikely to pay much attention because, after all, what harm can a single individual cause, or more likely, they were not aware that their actions amounted to violations of someone else's rights. To assist legal scholars, the judiciary, and intellectual property and Internet experts, this paper attempts an analysis of intellectual property law as it applies to weblog content. This paper may also serve as a guide for all entities associated with weblogging and help them become familiar with key issues affecting their legal rights and responsibilities.

An examination of the parties that are being named as defendants, the nature of their online conduct, and the mechanics of how information is posted on the Internet may guide webloggers as they participate in Internet activities. Although several areas of law may be triggered when addressing weblog issues, including trade secrets and the First Amendment, this paper will focus on trademark and copyright law. Part II begins with an explanation of the concept, technology and uses of weblogs. Parts III and IV provide a framework for theories of liability and de-

6. *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

fenses under trademark and copyright law, respectively. Part V concludes with an overview of the future of weblogs, as they mature and gain a firm foothold in Cyberspace.

II. THE TECHNOLOGY

A. DEFINITION

A weblog is a personal web page⁷ or Web site⁸ on the Internet⁹ that covers single or multiple topics that are of personal, professional, or social interest to its creator or author.¹⁰ In December 1997, Jorn Barger came up with the name "weblog," which today is commonly known as a "blog."¹¹ A weblog is "web-based writing space," much like a real-world diary or journal, which is used to write in as frequently as the author desires and which grows over time as entries are added, deleted, or modi-

7. "Web Page" Webopedia, *Online Dictionary for Computer and Internet Terms* <<http://www.webopedia.com>> (accessed Mar. 14, 2002). A "web page" is a document on the World Wide Web that is identified by a unique URL (Uniform Resource Locator). *Id.* A URL is the global address of a document or other resource on the World Wide Web. For example, www.gwu.edu is the Internet address of George Washington University; "www" denotes World Wide Web, "gwu" indicates the domain name or Internet protocol address where the resource is located, and "edu" denotes that the site belongs to an educational institute. "URL" Webopedia, *Online Dictionary for Computer and Internet Terms* <<http://www.webopedia.com>> (accessed Mar. 14, 2002).

8. "Web Site" Webopedia, *Online Dictionary for Computer and Internet Terms* <<http://www.webopedia.com>> (accessed Mar. 14, 2002). A "Web site" is a collection of web pages and additional documents and files located on the World Wide Web that is owned and managed by an individual, company or organization. *Id.*

9. *Reno v. ACLU*, 521 U.S. 844, 849 (1997) (defining "Internet" as "an international network of interconnected computers . . . now enabl[ing] tens of millions of people to communicate with one another and to access vast amounts of information from around the world"); the "Internet" is a global network of computers that may be accessed via Internet Service Providers (ISPs) such as America Online or Prodigy. It is a decentralized network in which each Internet computer, called a host, is an independent unit. The operator of the independent computer can select which Internet services to use and make available to the global Internet community. Not all Internet servers are part of the World Wide Web. "Internet" Webopedia, *Online Dictionary for Computer and Internet Terms* <<http://www.webopedia.com>> (accessed Mar. 14, 2002). A "server" is a computer or device on a network that manages the resources of the network. "Server" Webopedia: *Online Dictionary for Computer and Internet Terms* <<http://www.webopedia.com>> (accessed Mar. 14, 2002). For example, a file server stores files of any user on the network, a print server runs the network printers, a network server directs the traffic on the network, and a database server processes database queries. A single server can execute several programs and functions at once but, often, a server is dedicated to perform a specific task. *Id.*

10. *eTopics*, Computer Research & Technology ¶ 1-2 <<http://www.crt.net.au/etopics/blogs.html>> (accessed Feb. 8, 2002).

11. Rebecca Blood, *Weblogs: A History and Perspective*, Rebecca's Pocket ¶ 1-2 <http://www.rebeccablood.net/essays/weblog_history.html> (accessed Sept. 7, 2000). The terms "weblog" and "blog" are used interchangeably. *Id.* The terms "weblogger" and "blogger" are also used interchangeably and refer to one who creates or authors a weblog. *Id.*

fied.¹² Its content can be composed of text, graphics, and photographs, as well as links¹³ to other weblogs and Web sites. The original definition of weblog, a Web site containing links and personal commentary, has evolved into the current description of weblog as a Web site that is constantly updated in reverse chronological order, with the newest material posted at the top of the page and the oldest at the bottom.¹⁴

B. HISTORY

Weblogs have a short but very active history. Tim Berners-Lee, who designed and created the World Wide Web (“the Web”),¹⁵ wanted the Web to serve as a platform for reading and writing and came up with the concept of the Web site as a way of enabling users to do so.¹⁶ He created the first Web site, which was also the first weblog as it included his comments and provided links to other Web sites.¹⁷ The Web was seen as a tool to connect to and communicate with people and as a forum in which the free-flow of ideas and information could take place.¹⁸ Initially, progress toward this vision was very slow. The early weblogs could only be produced by individuals who had knowledge of computer code, like

12. Chris Ashley, *A Place to Write, Nothing Fancy, Weblogging: Another Kind of Web Site* ¶ 5 <[http://interactiveu.Berkeley.edu:8000/ca/stories/storyreader\\$192](http://interactiveu.Berkeley.edu:8000/ca/stories/storyreader$192)> (accessed July 20, 2001).

13. “Hypertext Link” Webopedia, *Online Dictionary for Computer and Internet Terms*, <<http://www.webopedia.com>> (accessed Mar. 14, 2002). A “link” (also called hypertext link) is highlighted text, picture, program, logo, etc. on a web page that, when selected, enables instant access to another web page. Links are useful for navigating the Internet because they allow a user to jump from one document to another simply by clicking on the highlighted object. *Id.* For example, while reading the description for the Constitution Law course offered at the George Washington University Law School, I can link to faculty profiles to read about the professors who teach the course, link to the bookstore for the price of the required textbook, or link to an organization or publication about the course.

14. Blood, *supra* n. 11, at ¶ 17.

15. *eTopics*, *supra* n. 10. World Wide Web is a system of Internet servers that support documents specifically formatted in the HTML (HyperText Markup Language) script. Web browsers or software applications such as Microsoft’s Internet Explorer and Netscape Navigator enable access to the World Wide Web. World Wide Web is synonymous with the Internet. See “World Wide Web” Webopedia, *Online Dictionary for Computer and Internet Terms* <<http://www.webopedia.com>> (accessed Mar. 14, 2002).

16. *Id.* (stating that the Web is the “best known category of communication over the Internet . . . which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites” and that it “consists of a vast number of documents stored in different computers all over the world”).

17. Dave Winer, *The History of Weblogs* ¶ 4 <<http://newhome.weblogs.com/history-ofweblogs>> (accessed Oct. 12, 2001). Berners-Lee’s first Web site, <http://info.cern.ch/>, has been archived at the World Wide Web Consortium to preserve its content. *Id.* Examples of early weblogs include NCSA’s What’s New, Netscape’s What’s New, Scripting News, Robot Wisdom, Realm, and CamWorld.

18. Blood, *supra* n. 11, at ¶ 24.

HTML, and knew how to make a Web site.¹⁹ They used weblogs to publicly convey thoughts, opinions, essays, and commentary on a wide variety of subject matter. Links and personal commentary in weblogs enabled people to reference, emphasize, or criticize particular points they were making.²⁰

Technological advancements have significantly revolutionized the process of setting up and using weblogs. Knowledge of programming code or installation of server software or scripting languages is no longer required.²¹ Modern weblog tools give a user complete control over the total look and feel of the weblog, from the writing and editing to its location and, best of all, the results are instantaneously posted on the weblog for all to see.²² Anyone with access to the Internet can publish information and make it available to the general public or limit it to those willing to pay for it.²³ Examples of publishers include individuals, commercial and non-commercial entities, educational institutions, and government agencies.²⁴

Today's weblog is usually community-based, meaning that it "takes place within a community of other bloggers who share a common interest."²⁵ The community can be small and consist of only a few individuals, or it can be large and include hundreds of people. For example, a community may be composed of family, friends, or work colleagues. The "community is the primary audience, and the blogger quite likely has two roles, being both a writer for this community and an audience member of the community members' weblogs, which point to, comment on, and reference each other."²⁶

C. TYPES OF WEBLOGS

Original weblogs were filter-style weblogs that "included a mix of links, commentary, and personal notes."²⁷ The Web is such a vast and overwhelming source of information that this style served "a valuable filtering function for the readers" because "the web has been, in effect, pre-surfed for them."²⁸ The blogger "filters through the mass of infor-

19. *Id.*

20. *Id.*

21. *eTopics*, *supra* n. 10.

22. Ashley, *supra* n. 12.

23. *ACLU*, 521 U.S. at 853.

24. *Id.* (discussing, in footnote 9, how the Court recognized that "individual users and small community organizations are using the Web to publish their own personal 'home pages,' the equivalent of individualized newsletters about that person or organization").

25. Ashley, *supra* n. 12, at ¶ 6.

26. *Id.*

27. Blood, *supra* n. 11, at ¶ 12.

28. *Id.* at ¶ 14.

mation packaged daily for our consumption and picks out the interesting, the important, the overlooked, and the unexpected.”²⁹ The filter method helped readers save the time and hassle of sorting through the maze of Internet Web sites and guided them toward topics of interest that have been pre-selected and organized into a weblog.

The filter-style weblogs and developing technology gave way to the journal-style or blog-style weblogs.³⁰ This style “has a more free-form interface combined with absolute ease of use.”³¹ The free-form functioned as a vehicle for self-expression and gave individuals a voice on a global level. “These blogs, often updated several times a day, were instead a record of the blogger’s thoughts: something noticed on the way to work, notes about the weekend, a quick reflection on some subject or another.”³² Links enabled webloggers to connect to and converse with other webloggers on a number of subjects.³³

D. HOW WEBLOGS WORK

The weblog concept was slow to catch on but exploded with full force with the advent of do-it-yourself technology. According to one source, the number of weblogs has grown steadily from a reported handful in 1998 to twenty-three in 1999 to thousands today.³⁴ In July 1999, the first free build-your-own-weblog tool called Pitas was introduced, followed by the launch of Blogger, Gorksoup, and other services that made publishing quick and easy.³⁵

An individual starts by registering and opening an account with one of the many weblog service providers or hosting services, such as Blogger or Manila, and constructing a weblog at the host’s site.³⁶ The individual can use the built-in templates or pre-designed formats offered by most hosting services or create their own templates to build every page of a weblog and give it the look and feel they desire.³⁷ The pages are then

29. *Id.* at ¶ 19.

30. *Id.*

31. *Id.* at ¶ 16.

32. Blood, *supra* n. 11, at ¶ 12.

33. *Id.*

34. *eTopics*, *supra* n. 10, at ¶ 3.

35. Blood, *supra* n. 11, at ¶ 4. Other services include Edit This Page, Velocinews, Metafiler, Manila, Radio UserLand, Weblogger, and LiveJournal.

36. “Host” Webopdia, *Online Dictionary for Computer and Internet Terms* <<http://www.webopedia.com>> (accessed Mar. 14, 2002). A “host” is a computer system that containing data which is accessed by a user working at a remote location or terminal. *Id.* The host has a unique Internet address to which the user connects via a modem and telephone or cable lines. *Id.* For example, a company that hosts a web server provides the hardware, software, and communication lines necessary to access the server, but the content on the server may be supplied by another.

37. Ashley, *supra* n. 12, at ¶¶ 8-9.

automatically archived and sequentially linked, which makes it easy to navigate the site and eliminates the need to know the programming code necessary to manually create and upload a traditional web page.³⁸ A weblog creator also has the option of designing the weblog to be interactive “so that others can join and leave comments or ask questions in the discussion area.”³⁹

Once setup, the weblogger can start writing. “Typically, each day the writer flips the front page (“flip” is Manila-speak for archiving the current front page and starting with a new day’s fresh, clean space to write in), writes in a form within the browser window and clicks the Submit button. Voila, instant publishing!”⁴⁰ Along with text, one can also incorporate images, graphics, photographs, and links into the weblog. A web browser⁴¹ manages the weblog at anytime from anywhere, and as often as preferred, the weblogger can log on to the service provider’s site, locate their weblog and add, delete, revise, or update the content.⁴²

Some weblog service providers neither impose restrictions on the content being posted on weblogs nor require linking.⁴³ For example, Blogger presents an empty box into which a writer types and then, with the click of a button, Blogger posts the material exactly as written, archives the entry in the proper place, and presents the writer with another empty box for the next entry. There is no ongoing monitor of the weblog content or any voluntary investigation of potentially infringing content unless a complaint has been made to the service provider.

E. HOW WEBLOGS ARE USED

Weblogs originated as personal journals to write about whatever the heart desired. Soon thereafter, weblogs were being applied in other ways. Several areas have been identified in which weblog technology is being incorporated to significantly impact the use and growth of the Internet.

One area of weblog use is content, information and knowledge management. Weblogs can manage the content of a Web site, serve as a vehicle for gathering, organizing, and analyzing information, as well as warehouse knowledge to be accessed and shared by many.⁴⁴ For example, a public school may use a weblog service provider to host weblogs on

38. *Id.* at ¶ 8.

39. *Id.* at ¶ 9.

40. *Id.*

41. “Web Browser” Webopdia, *Online Dictionary for Computer and Internet Terms* <<http://www.webopedia.com>> (accessed Mar. 14, 2002). A “web browser” is a software application, such as Microsoft Internet Explorer, that is used to locate and display web pages.

42. Ashley, *supra* n. 12, at ¶ 9.

43. Blood, *supra* n. 11, at ¶ 16.

44. Ashley, *supra* n. 12, at ¶ 9.

specific topics and provide resources for teachers, or a public library may have a weblog of stories and Web sites about technological advancements in library services. Work colleagues may use a weblog for a variety of work-related tasks such as exchanging ideas and information, providing feedback, and delegating and organizing assignments.

A second area is community building. Weblogs can encourage community development and participation by giving members immediate access to each other and connecting readers and writers who have common interests.⁴⁵ Weblogs give members the ease and flexibility of moving from topic to topic, of controlling the direction and flow of the topic, and of storing the ideas generated. “[L]inking from one weblog to another is a way of creating threads and building community.”⁴⁶ Many tools are available to track links, provide lists of the most read and recently updated weblogs, and automatically provide current information on topics or searches. The purpose of this technology is to save time by bringing to readers and writers the content and trends on the Internet that are of specific interest to them.

The third area of weblog use is publishing and journalism. The Internet has enabled everyone to voice their opinion and to be heard. Weblogs are a new platform for writers to write and publish while having a worldwide audience of readers at their disposal. The low cost and ease of self-publishing has revolutionized journalism. It has led to the examination of how news is produced, the impact amateur journalists will have on news reporting, and the rising popularity of peer-to-peer journalism in which the members of the weblog community write for each other so that, over time, expertise and reputations are established.⁴⁷

Weblog journalists are free to choose their topics, determine quality and quantity of the writing, update and change viewpoints as often as they please, and remain in constant communication with their readers. More importantly, weblogs are unedited and unmediated, and the journalist, whether professional or amateur, is the ultimate reporter, columnist, analyst, and publisher.⁴⁸ Due to the ease and speed of publishing, weblog journalism often tends to be raw, opinionated, honest, and passionate, sometimes at the expense of accuracy.⁴⁹

A fourth use of weblogs has been in teaching and learning. Educators are devising ways to incorporate weblogs into the classroom to discuss topics, post questions and answers, and share news.⁵⁰ Teachers

45. *Id.* at ¶¶ 6-7.

46. *Id.*

47. *Id.* at ¶ 10.

48. J.D. Lasica, *Blogging as a Form of Journalism*, Online Journalism Review ¶ 4 <<http://ojr.usc.edu/content/cfm?request=585>> (accessed May 24, 2001).

49. *Id.* at ¶ 18.

50. Ashley, *supra* n. 12, at ¶ 11.

and students may use weblogs to post assignments and announcements, research and write, plan and maintain projects, and engage in peer-to-peer journalism between classes or schools. Teachers can exchange news about education and teaching and students can learn about and discuss school subjects, extra-curricular activities, and social issues. Parents too can use weblogs to keep up with a child's education and interests. Educators are even using weblogs to manage their courses as an alternative to formal course management systems, which have been criticized as "rigid, top-down, hierarchical, and follow[ing] the paradigm of desks in a row with the teacher in front," and lacking in flexibility for collaborative, interactive, and inquiry-based learning.⁵¹

Whether it is education, work, journalism, or research, weblogs are already affecting how we communicate with others. The business community is also awaking to the potential of weblogs. Companies that currently have official Web sites may incorporate weblogs into their overall marketing and sales strategy to attract customers.⁵² Traditional methods of building web pages and Web sites, requiring knowledge of programming code and assistance of systems administrators and webmasters to facilitate posting of content on the Internet, may soon be a thing of the past. Given the simplicity and ease of use, weblogs are paving the way for the technologically challenged to participate in Cyber activities.

The concept of weblogs has far reaching implications and the full potential and application of weblogs remain to be seen. Also unexplored are the legal ramifications of weblog activity. The two major intellectual property topics of future concern are trademarks and copyright. As with traditional web pages and Web sites, weblog content is also susceptible to infringing the rights of intellectual property owners. The following sections explore the boundaries of acceptable and unacceptable conduct that weblogs must respect and the level of judicial scrutiny that may be applied should an infringement action be filed against a weblog.

III. TRADEMARKS

A. INTRODUCTION

The Internet, as the modern forum for the marketplace of ideas, enables participation in the free-flow and exchange of information at virtu-

51. *Id.* WebCT and Blackboard are two course management systems that have been criticized by educators.

52. Time <<http://www.time.com/time/columnist/mideastmonitor/article/0,9565,349412,00.html>> (accessed Dec. 17, 2002). *Time Magazine* columnist, Tony Karon, has a weblog that is used to update readers about various issues. *Id.*

ally no cost.⁵³ Weblogs are the newest medium of communicating with the global community. Media attention is piquing people's curiosity such that Internet users are experimenting with weblogs. With this increased use comes the potential for references to trademarks. A trademark is a word, name, symbol, or device that is used to identify and distinguish the source of goods or services.⁵⁴ Trademarks are a shorthand method of conveying information about a specific product or service.⁵⁵ Trademarks may be incorporated into weblogs for a variety of reasons. Some references to trademarks are permitted by law, while others are authorized by trademark owners upon request. When trademarks are included in weblogs, they may create the impression that the weblog and its content are somehow associated with the trademark and that a relationship exists between the owners of the mark and the weblog. If this association is not approved by law or by the trademark owner, then the use of the mark in the weblog may cause confusion among some visitors to the weblog.

Trademark owners' lack of control over the unauthorized use of their marks has led many to take legal action and vigorously defend their marks. Trademark law has two main objectives. The first is to reduce consumer confusion as to the origin, affiliation, or sponsorship of products or services by preventing the unauthorized use of trademarks that the public has come to associate with specific goods or services.⁵⁶ The second is to recognize and protect the investment businesses make in developing and promoting their trademarks and provide remedies for infringement.⁵⁷ Trademarks are recognized as property in and of themselves, separate from the products and services they are associated with, and are protected by federal and state law, regardless of whether the marks are registered or unregistered.⁵⁸

Since the weblog concept is still in its infancy, no lawsuits have been reported against authors, owners, or service providers of weblogs. Therefore, legal analysis is aided by analogies to such Internet cases as the liability of Internet service providers, software developers, web hosts, linking Web sites, consumer opinion Web sites, and banner advertisers. In balancing the competing interests of protecting the rights of trademark owners while preserving the public's right to freely access informa-

53. Leslie C. Rochat, "I See What You're Saying:" *Trademarked Terms and Symbols as Protected Consumer Commentary in Consumer Opinion Web sites*, 24 Seattle U. L. Rev. 599, 600 (2000).

54. 15 U.S.C. § 1127 (2000).

55. Rochat, *supra* n. 53, at 600.

56. Bryce J. Maynard, *The Initial Interest Confusion Doctrine and Trademark Infringement on the Internet*, 57 Wash. & Lee L. Rev. 1303, 1310-11 (2000).

57. *Id.* at 1309, 1311.

58. Rochat, *supra* n. 53, at 606.

tion, courts apply the same traditional tests and standards for determining trademark causes of action in Internet cases as those that are used in real-world cases. A weblog may incorporate any or all of these issues and will be bound by the same judicial precedence.

B. SPOTTING THE ISSUES IN WEBLOGS

When constructing weblogs, there are several pitfalls to be aware of. Weblogs may use text, images, graphics, photographs, and links that contain trademarks that have not been authorized for use. References to the names of products or services must be distinguished from references to the trademarks themselves. For instance, in discussing consumer preference for Coke versus Pepsi, it's one thing to use the names "Coke" and "Pepsi" and another to use the trademarked symbols associated with each product. Linking consumer opinion Web sites, domain names, and banner advertisements are but some examples of how trademarks may be incorporated in weblogs. In analyzing a case involving weblogs, a court is likely to respond by examining how other courts have handled these and other Internet activities before deciding the fate of the case at hand.

Linking has given structure and organization to the disparate types of information available on the Web and has made navigating the Internet simpler and quicker. The Internet is such an enormous resource that finding the right information can be a time consuming and tedious process. Once a user locates Web sites that are on point, the search becomes easier because the sites accessed usually contain links to other related Web sites. Weblogs are primarily supported by links to other weblogs. In fact, linking is the hallmark of weblogging and contributes to the growth and expansion of weblog communities.⁵⁹

The routine use of linking has raised legal questions about the practice of linking without obtaining the permission of the linked-to Web site's owner. Particular focus has been on the commercial and non-commercial nature of the Web sites involved and whether the links are to a Web site's home page or to some other content buried in the linked-to Web site.⁶⁰ Although trademark law does not explicitly prohibit linking, precautions can be taken to limit liability, such as getting the linked-to Web site owner's consent or disclaiming any affiliation or sponsorship between the linked-from and the linked-to Web sites.⁶¹

59. Ashley, *supra* n. 12.

60. Nicos L. Tsilas, *Minimizing Potential Liability Associated With Linking and Framing on the World Wide Web*, 8 CommLaw Conspectus 85, 87 (2000). A "home page" is the main page of a Web site and serves as a table of contents to other documents on the Web site. "Home Page" Webopedia, *Online Dictionary for Computer and Internet Terms* <<http://www.webopedia.com>> (accessed Mar. 16, 2002).

61. Tsilas, *supra* n. 60, at 90.

Consumer opinion Web sites exist for the purpose of criticizing or commenting about a specific company's products or services and often contain the company's trademarks.⁶² They may be created by disgruntled customers or employees who want to share their views with the Internet public and the company under attack, and they may invite the public to contribute their own experiences and opinions.⁶³ As such, they are similar to weblogs that may also be used to broadcast the authors' views about goods or services and the businesses associated with them. Most consumer opinion Web sites do not rise to the level of trademark infringement and are excused under the fair use defense.⁶⁴ Complications arise when these Web sites engage in commercial activity that benefits their owners or operators.

Domain names identify Internet protocol addresses of particular web pages and Web sites. They can be composed of names, letters, and numbers that can usually help identify the entities to which the web pages and Web sites belong. For example, the domain name "gwu.edu" designates the location of the George Washington University Web site. Disputes arise when non-trademark holders use trademarks as domain names without first obtaining the permission of the marks' owners. There is much case law on domain name disputes, some of which is mentioned below. Bloggers must bear in mind these types of trademark disputes when selecting the names of weblogs. Weblog names must not confuse or mislead Internet viewers as to the source or sponsorship of the weblog nor must they hint at an unauthorized affiliation between the weblog and a trademark.

Banner advertisements are a form of Internet advertising that generate revenue for the Web site owners. A seller of products or services buys advertising space on a Web site by purchasing "keywords" from a commercial entity providing search engine services, like Netscape, Excite, or AltaVista.⁶⁵ When a user types a search word or term, an advertisement for the company that purchased that keyword appears as a banner above the search results.⁶⁶ Keywords that are sold for banner advertisements are often trademarks that are used without the permission of the trademarks' owners.⁶⁷ For example, the word "SONY" may be sold to a competing electronics retailer so that consumers searching for Sony products may get advertisements from competitors of Sony.

62. Maynard, *supra* n. 56, at 1346.

63. *Id.*

64. *Id.* at 1347; see discussion *infra* Part III.F.1.

65. Christine D. Galbraith, *Electronic Billboards Along the Information Superhighway: Liability Under the Lanham Act for Using Trademarks to Key Internet Banner Ads*, 41 B.C. L. Rev. 847, 849 (2000).

66. *Id.*

67. *Id.*

When a trademark is keyed to a banner ad, it is embedded in the software program of the search engine and is never visible to users of that search engine.⁶⁸ This hidden use dictates the results of a search and often diverts visitors to Web sites that otherwise might not be visited.⁶⁹ Weblogs, too, have the capability to incorporate banner advertisements. Whether the weblog sponsors, solicits or promotes a product or service, there is a possibility that if a trademark is infringed, the weblog owner may be a potential defendant in a lawsuit. Although most weblogs currently do not include advertisements, this could change in the future, as weblogging becomes more sophisticated.

C. TRADEMARK INFRINGEMENT

The *Federal Trademark Act*, commonly called the *Lanham Act*, provides a cause of action for trademark infringement of federally registered trademarks.⁷⁰ Under the Act, a defendant may be liable for trademark infringement when she

use[s] in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.⁷¹

The plaintiff must prove (a) the existence of a valid trademark and (b) that the defendant's use causes a likelihood of confusion.⁷² The focus of a trademark infringement claim is on the likelihood of confusion, "whether the similarity of the marks is likely to confuse customers about the source of the products."⁷³ Courts decide whether consumers are likely to be confused about the origin, affiliation, or sponsorship of the allegedly infringing trademark.⁷⁴

The complexity of the Internet has forced courts to acknowledge that the likelihood of confusion analysis must be flexible enough to accommodate the unique problems of trademark use in Cyberspace. In *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, the Ninth Circuit held that "[w]e must be acutely aware of excessive rigidity when applying the law in the Internet context; emerging technologies require a

68. *Id.* at 849-50.

69. *Id.*

70. *Federal Trademark Act of 1946*, 15 U.S.C. § 1114 (2000).

71. *Id.* § 1114 (1)(a).

72. *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1163 (D.C. Cal. 1998).

73. *Brookfield Commun., Inc. v. W. Coast Entertainment Corp.*, 174 F.3d 1036, 1053 (9th Cir. 1999); 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 2:8 (4th ed. 1996) (describing likelihood of confusion as keystone of trademark infringement).

74. *Id.* at § 23:1 (explaining the likelihood of confusion test).

flexible approach.⁷⁵ Should a weblog creator, owner, or hosting service be sued, the legal analysis will entail the application of the following standards for determining trademark infringement.

1. *Valid Trademark*

Federal registration of a trademark is *prima facie* evidence of the validity of the mark.⁷⁶ This presumption may be rebutted by proof of prior use of the mark in commerce by the defendant.⁷⁷ “The first to use a mark is deemed the ‘senior’ user and has the right to enjoin ‘junior’ users from using the confusingly similar marks in the same industry and market or within the senior user’s natural zone of expansion.”⁷⁸ Unregistered trademarks are also protected by the *Lanham Act* upon proof that significant financial investment has been made in developing and promoting the mark over an extended time period.⁷⁹ In the case of weblogs, this element may be easily proved by the plaintiff and may not be much of an issue.

2. *Likelihood of Confusion*

The most frequently used test for evaluating likelihood of confusion is the Second Circuit’s “Polaroid Factors” test.⁸⁰ That court announced an eight-factor analysis for determining the likelihood of confusion between two marks: (1) the strength of the mark; (2) the degree of similarity between the two marks; (3) the competitive proximity of the products or services; (4) the likelihood that the plaintiff will bridge the gap between the products or services; (5) evidence of actual confusion; (6) the defendant’s good faith in adopting its own mark; (7) the quality of the defendant’s product or service; and (8) the sophistication of the buyers.⁸¹

a. *Strength of the Mark*

This factor generally favors the plaintiff when the trademark is in continuous use over time, the mark is registered and thus considered nationally recognized, or a significant financial investment has been made in developing and promoting the mark.⁸² Where a mark is a com-

75. *Brookfield Commun.*, 174 F.3d at 1054.

76. *Id.* at 1047.

77. *Id.*

78. *Id.*

79. *Washington Speakers Bureau, Inc. v. Leading Authorities, Inc.*, 33 F. Supp. 2d 488, 494 (E.D. Va. 1999); Maynard, *supra* n. 56, at 1311.

80. Maynard, *supra* n. 56, at 1312.

81. *Polaroid Corp. v. Polaroid Elecs. Corp.*, 287 F.2d 492, 495 (2nd Cir. 1961).

82. *Bally Total Fitness*, 29 F. Supp. 2d at 1164. Plaintiff owned federally registered trademarks “Bally,” “Bally Total Fitness,” and “Bally’s Total Fitness” that were used in connection with its health club business. *Id.* Defendant created a Web site called “Bally

bination of words such that consumers come to associate the combination with the plaintiff, the use of the individual words alone may be sufficiently weak and unlikely to cause consumer confusion, since consumers would not attribute the individual words to the plaintiff.⁸³ A trademark used in a weblog will be analyzed to determine whether it is strong enough to be recognized by consumers as belonging to the plaintiff.

b. Degree of Similarity Between the Two Marks

This element “will always be an important factor.”⁸⁴ “The more similar the marks in terms of appearance, sound, and meaning, the greater the likelihood of confusion” and the marks “must be considered in their entirety and as they appear in the marketplace.”⁸⁵ A weblogger might use the plaintiff’s mark identically or with sufficient modifications so as to make the two marks dissimilar. If the two trademarks are different or if they are similar but the parties are in different geographic locations, the likelihood of confusion is doubtful.⁸⁶ Depending on the defendant’s use, this element may benefit either party.

In *Brookfield Communications*, this factor weighed in plaintiff’s favor because “moviebuff.com,” the protected mark, and “MovieBuff,” the accused mark, were “for all intents and purposes, identical in terms of sight, sound, and meaning.”⁸⁷ The Ninth Circuit determined that the two marks: (a) only varied slightly in appearance, (b) were pronounced the same way, and (c) were likely to cause consumers to think that the company “Moviebuff” operated the Web site “moviebuff.com.”⁸⁸ However, in *Bally Total Fitness Holding Corp. v. Faber*, the accused mark “Bally sucks” was held not to be similar to plaintiff’s mark “Bally,” where the defendant superimposed the word “sucks” on plaintiff’s logo “Bally” such that it was “impossible to see Bally’s mark without seeing the word

sucks” that was dedicated to criticizing plaintiff’s business and that stated “Bally Total Fitness Complaints! Un-Authorized.” *Id.*

83. *Washington Speakers Bureau*, 33 F. Supp. 2d at 491, 498. Plaintiff owned and used an unregistered trademark “Washington Speakers Bureau” and the defendant used a substantial portion of this combination of words in their domain names “www.washingtonspeakers.com,” “www.washington-speakers.com,” “www.washingtonspeakers.net,” and “www.washington-speakers.net.” *Id.* at 491.

84. *Brookfield Commun.*, 174 F.3d at 1054.

85. *Id.*

86. *Id.*

87. *Id.* at 1042, 1055. Plaintiff was a developer and marketer of software for the professional entertainment industry and owned federal trademark registration for “MovieBuff.” *Id.* at 1056. Defendant was a national video rental chain of stores and owns the trademark “The Movie Buff’s Movie Store.” *Id.* Defendant started a Web site under the domain name “moviebuff.com” that contained information about the entertainment industry and included the terms “moviebuff” and “moviebuff.com” in its metatags. *Id.*

88. *Id.* at 1055.

'sucks,'” therefore, the modification “cannot be considered a minor change.”⁸⁹

When trademarks are composed of common or descriptive words, the degree of similarity that is permitted between the protected and the accused mark is greater than that allowed for when uncommon or non-descriptive words are used.⁹⁰ “When common words that are likely to be chosen to describe similar products form part of a mark, use of those words in a competing product’s mark will not cause confusion unless the secondary meaning of the first mark is so extensive in the relevant market that any use of these terms will lead to consumer confusion as to the source of the product.”⁹¹

For example, the trademark “Washington Speakers Bureau” consists of common words that may be used individually to describe services offered by someone else such that using a portion of this combination is not likely to cause consumers to associate the individual words with plaintiff’s mark.⁹² “Washington,” “speakers,” and “bureau” are separate words in the English language that may be used in any order to sell products or services without risking the likelihood of confusion. Other common words such as “playboy” and “playmate,” which have independent dictionary meaning, may be used where they are not intended to identify the source of products or services and are not used as trademarks.⁹³ Distinguishing a trademark that contains common words by different font, size, color, and style, without using logos or symbols associated with the plaintiff, will amount to dissimilarity of the marks.⁹⁴

89. *Bally Total Fitness*, 29 F. Supp. 2d at 1164.

90. *Washington Speakers Bureau*, 33 F. Supp. 2d at 498.

91. *Id.*

92. *Id.* at 499.

93. *Playboy Enter., Inc. v. Netscape Commun. Corp.*, 55 F. Supp. 2d 1070, 1073 (1999). Plaintiff was an adult publishing and entertainment company that owned the federally registered trademarks “Playboy” and “Playmate.” Defendants sold advertising space for banner ads to which defendants “keyed” or linked certain search terms so that when a user typed in a specific search, advertisements keyed to those search terms popped up on the screen. Defendants keyed many commonly used search words related to adult entertainment to numerous adult entertainment advertisements. Court allowed use of “playboy” and “playmate” because there was no evidence to support plaintiff’s contention that the words were used for their trademark value.

94. *Playboy Enter., Inc. v. Welles*, 78 F. Supp. 2d 1066, 1082-83 (S.D. Cal. 1999). Plaintiff owned federally registered trademarks “Playboy,” “Playmate,” “Playmate of the Month,” and “Playmate of the Year” and maintained the Web sites “playboy.com” and “cyber.playboy.com.” Defendant, a self-employed model and spokesperson, operated a Web site “terriwelles.com” and used the marks “Playboy Playmate of the Year 1981,” “Playmate of the Year 1981,” and “PMOY ‘81” in the visual title, metatags, banner advertisements, and as watermarks. The court held that the defendant’s version of the trademarks was not similar to that of the plaintiff’s.

Uncommon or made-up words that are used as trademarks have a stronger argument for likelihood of confusion if used by others because they were coined specifically to identify the trademark owner's goods or services. Trademarks such as "Kodak," "Rolex" and "Exxon" have no meaning separate from the products or services they represent. In the minds of consumers, these marks become so associated with particular goods or services of certain suppliers that it would be difficult to justify their use by anyone else, regardless of whether distinguishing color, font, logos, or symbols are used.

c. Competitive Proximity of the Products or Services

This factor analyzes whether the parties offer related products or services and whether they use similar marketing channels. If the trademark is used on competing goods or services, then the likelihood of consumer confusion is high and this element weighs in the plaintiff's favor.⁹⁵ Alternatively, if unrelated products or services are involved, then the likelihood of consumer confusion is less and this factor benefits the defendant.⁹⁶

Courts recognize that the use of the Internet as a marketing and advertising tool gives rise to many types of consumer confusion.⁹⁷ Entering a Web site takes minimal effort, thus, "Web surfers are more likely to be confused as to the ownership of a [W]eb site than traditional patrons of a brick-and-mortar store would be of a store's ownership."⁹⁸ A customer may mistakenly believe that the defendant's site is affiliated with or authorized by the plaintiff, that the defendant and plaintiff are related companies, or that the plaintiff's site does not exist and is replaced by the defendant's site, in which case, the customer may remain and look around.⁹⁹ This "initial interest confusion" gains the defendant a customer who would have never reached the defendant's site had they not

95. *Brookfield Commun.*, 174 F.3d at 1055. Defendant's use was held to create a likelihood of consumer confusion because both parties: (a) offered competing products and services that related to movies in the entertainment industry, (b) provided databases that were searchable by consumers looking for details on films, and (c) competed for business from overlapping consumers. In *Washington Speakers Bureau*, the parties were also found to offer identical services, plaintiff represented speakers exclusively, while defendant acted as a "broker" with other agencies to arrange speakers for events it helped organize. *Washington Speakers Bureau*, 33 F. Supp. 2d at 499.

96. *Brookfield Commun.*, 174 F.3d at 1055; *Bally Total Fitness*, 29 F. Supp. 2d at 1164. The court did not find the parties marketed competing services because the plaintiff was in the health club business and operated a commercial Web site that advertised its services, whereas, the defendant's site only offered consumer opinion about the plaintiff's business.

97. *Brookfield Commun.*, 174 F.3d at 1057.

98. *Id.*

99. *Id.*

been looking for the plaintiff's site to begin with.¹⁰⁰ Thus, the defendant may be held to have misappropriated the plaintiff's goodwill by using the plaintiff's mark to lure consumers to defendant's own Web site.¹⁰¹

If the purpose of the defendant's Web site is to provide consumer commentary, rather than to market goods or services, a defendant may not be found to have appropriated the plaintiff's mark.¹⁰² Parties that are not in the same line of business are not competitors and the use of a trademark may be appropriate, even though both use the Internet as a marketing channel for their respective businesses.¹⁰³ But, a court may find that parties who have Internet presence are in close proximity to each other and contribute to the likelihood of consumer confusion because their Web sites compete for the same audience on the Internet.¹⁰⁴

Currently, most weblogs do not involve the purchase or sale of products or services so the competitive proximity of products or services is not much of an issue. However, this could change once it is fully realized that weblogs are an alternative form of sales and marketing. Entities that lack the resources to participate in electronic commerce using traditional methods, such as purchasing sophisticated hardware and software and hiring computer programmers or systems administrators to install and maintain an online business, are likely to turn to weblogging. The do-it-yourself technology of constructing weblogs may be an economical enticement for establishing a Web presence.

d. Likelihood that Plaintiff Will Bridge the Gap Between the Products or Services

This element examines whether the plaintiff will undertake activities that the defendant is involved in and offer products or services to consumers in that same market. It favors the plaintiff if there is a strong likelihood that plaintiff will expand its business to include the defendant's market.¹⁰⁵ If the parties already offer competing products and services or they do not intend to enter each other's markets at all, then

100. *Id.*

101. *Id.*

102. *Bally Total Fitness*, 29 F. Supp. 2d at 1164.

103. *Netscape Commun.*, 55 F. Supp. 2d at 1086.

104. *Planned Parenthood Fedn. of Am., Inc. v. Bucci*, 1997 U.S. Dist. LEXIS 3338 at *37 (S.D.N.Y. Mar. 19, 1997). Plaintiff was a non-profit, reproductive health care organization that owned the registered trademark "Planned Parenthood" and operated a Web site "ppfa.org." Defendant, the host of the radio program "Catholic Radio" and an anti-abortion activist, operated several Web sites including "plannedparenthood.com." The home page of the Web site first greeted visitors with the message "Welcome to the PLANNED PARENTHOOD HOME PAGE!," then showed the cover of a book entitled *The Cost of Abortion*, by Lawrence Roberge, followed by other information about the Web site.

105. *Brookfield Commun.*, 174 F.3d at 1060.

they will not bridge the gap and this factor becomes irrelevant.¹⁰⁶ Weblogs have the ability to offer products and services that overlap with those associated with a trademark. The potential that a trademark owner will bridge the gap to include the Internet market or operate its own weblog to sell goods or services may be sufficient enough to warrant this element in the plaintiff's favor.

e. Evidence of Actual Confusion

This factor benefits the plaintiff if it can be shown that the consuming public is likely to mistake that specific products or services are affiliated with particular sources. Evidence of actual confusion gives presumption to the likelihood of confusion.¹⁰⁷ "[A] mere possibility is not enough: 'There must be a *substantial* likelihood that the public will be confused.'"¹⁰⁸ There is evidence of consumer confusion if the domain name and the welcoming message on the home page of a Web site indicate that the user has accessed the plaintiff's Web site when, in fact, they have entered the defendant's site.¹⁰⁹ For instance, someone looking for the Pepsi Web site using the domain name "pepsi.com" expects to arrive at Pepsi's official Web site and be greeted with the familiar Pepsi colors and logos. Actual confusion may result if, instead of providing information about Pepsi products, the Web site advertises alternative or competing beverages or contains anti-Pepsi sentiments.

If there is no evidence of actual consumer confusion during all the time that the trademark is used, then this element favors the defendant.¹¹⁰ A consumer opinion Web site is not expected to cause actual consumer confusion if, for example, the mark is superimposed with the word "sucks" or the Web site states that it is an "unauthorized" site. In these scenarios, a reasonably prudent user would not mistake the site as the plaintiff's official Web site.¹¹¹ Weblogs are analogous to consumer opinion Web sites in that webloggers are often relaying personal views and opinions about the topic of their choice, whether it is critiquing the newest movie, discussing anti-terrorism policy, or blasting multinational corporations' accounting practices. A reasonably prudent visitor to a

106. *Id.* (both parties already offered competing products and services to the entertainment industry); *Bally Total Fitness*, 29 F. Supp. 2d at 1166 (plaintiff did not intend to operate an anti-Bally Web site or offer web page design services and defendant did not plan to open a health club business); *Netscape Commun.*, 55 F. Supp. 2d at 1086 (neither party anticipated entering the other's market).

107. *Washington Speakers Bureau*, 33 F. Supp. 2d at 501.

108. *Welles*, 78 F. Supp. 2d at 1083 (quoting *WSM, Inc. v. Hilton*, 724 F.2d 1320, 1329 (8th Cir. 1984)).

109. *Planned Parenthood*, 1997 U.S. Dist. LEXIS at *27.

110. *Netscape Commun.*, 55 F. Supp. 2d at 1084.

111. *Bally Total Fitness*, 29 F. Supp. 2d at 1164.

weblog is unlikely to mistake the source or sponsorship of the products or services addressed since the content of the weblog will serve to convey the personal opinion nature of the subject matter discussed.

f. Defendant's Good Faith in Adopting Its Own Mark

This element examines whether or not the defendant intended to confuse consumers when it selected its own mark. Similar to consumer opinion Web sites, bloggers generally do not intend to mislead consumers into thinking that the trademark owners sponsor the weblogs. The information contained in weblogs will usually inform consumers that no association is intended with the plaintiff. However, this element may benefit the plaintiff if the defendant adopts its mark knowing that it is someone else's trademark or with intent to capitalize on the reputation of the plaintiff by attracting customers to the defendant's own products or services.¹¹²

Bad faith may be inferred if no plausible reasons are provided for adopting another's trademark where the trademark owner is a known competitor of the accused infringer at the time the mark was adopted.¹¹³ A defendant who selects the plaintiff's mark knowing that some Internet users looking for the plaintiff's Web site will be diverted to his own site is also acting in bad faith.¹¹⁴ While it is not a specific element of trademark infringement, intent only goes to the issue of the good or bad faith of the defendant in selecting the mark and whether it affects the likelihood that consumers will be confused by the defendant's use of the mark.¹¹⁵

Conversely, good faith is evidenced if the use of another's trademark fairly and accurately describes defendant's own products or services, does not confuse or mislead the public, does not imply sponsorship or affiliation with the plaintiff, and the defendant further takes measures against the unauthorized use of the mark.¹¹⁶ Defendants in *Playboy Enterprises, Inc. v. Netscape Communications Corp.* acted in good faith because there was no evidence that they intended to confuse users of their Web portals or capitalize on plaintiff's reputation, since defendants "charge their advertisers according to the number of times a banner advertisement is displayed to users, regardless of how many users 'click' on the banner ad."¹¹⁷ Similarly, the *Bally* Court determined that defendant's purpose in adopting the mark was only to "publish critical com-

112. *Brookfield Commun.*, 174 F.3d at 1059.

113. *Washington Speakers Bureau*, 33 F. Supp. 2d at 500.

114. *Planned Parenthood*, 1997 U.S. Dist. LEXIS at *30.

115. *Brookfield Commun.*, 174 F.3d at 1059.

116. *Welles*, 78 F. Supp. 2d at 1083.

117. *Netscape Commun.*, 55 F. Supp. 2d at 1082, 1086.

mentary about Bally . . . [and] he cannot do this without making reference to Bally.”¹¹⁸

g. Quality of the Defendant's Product or Services

This factor considers whether the defendant's use of the mark will adversely affect the plaintiff's business. This will be relevant where defendant's goods or services are unsavory or are of inferior quality such that the consuming public will associate negative characteristics with the plaintiff. It will also be pertinent where divergent or opposing views and messages are publicized. For example, in *Planned Parenthood Federation of America, Inc. v. Bucci*, the Court noted that since the parties offered very different services and communicated opposing messages, “any ensuing confusion resulting from defendant's use of plaintiff's mark as his domain name and home page address is likely to be destructive to the image that plaintiff, the senior user of the mark, has established.”¹¹⁹

Due to the personal nature of most weblogs, this element is unlikely to have any impact because weblog content is usually viewed as the author's personal opinions and expressions. However, where the purpose of a weblog is to engage in commercial activity or solicit funds and donations, the weblogger should be wary of the possible adverse impact upon the plaintiff's reputation that may arise from the use of a mark that is identical or similar to the plaintiff's trademark. For instance, weblogs may become an alternative or supplemental vehicle for marketing and moneymaking schemes. Depending upon the product or service being promoted, advertisers may look to weblogs to target consumers by specific age, gender, interests, opinions, demographics, etc., to optimize their selling opportunities.

Since blogs and bloggers may be viewed as pioneers and innovators, advertisers may want to tap into this buying power to market products or services that strive to fit the same hip and trend-setting image. For example, a recent marketing campaign by Dr. Pepper and Seven Up identified and recruited some of the most popular bloggers to test a new drink that is targeted for teenagers and young adults who are avid bloggers or followers.¹²⁰ While no formal fees were paid for their service, the bloggers were offered merchandise for their participation and cooperation and were left to decide whether to discuss the drink in their weblogs.¹²¹ This scenario may influence a court to find that sufficient commercial activity exists, whether direct, as in monetary compensation,

118. *Bally Total Fitness*, 29 F. Supp. 2d at 1165.

119. *Planned Parenthood*, 1997 U.S. Dist. LEXIS at *31.

120. *Blogging Goes Mainstream*, CNN News <<http://www.cnn.com/2003/TECH/internet/03/10/bloggers.ap>> (Mar. 10, 2003).

121. *Id.*

or indirect, as in non-monetary rewards of fame and notoriety of the weblogs.

h. Sophistication of the Buyers

Here, the focus is on the degree of care a “reasonably prudent consumer” is likely to exercise when searching for and arriving at Web sites.¹²² When products or services are offered to sophisticated buyers or when the purchase price is high, a reasonably prudent purchaser is more discerning and not as easily confused.¹²³ But, where the products or services are inexpensive or if the purchaser is less discerning, the likelihood of consumer confusion is higher.¹²⁴ In some cases, consumers with frequent Internet access are perceived to be more sophisticated.¹²⁵ This element is likely to benefit weblog defendants as most Internet users are well accustomed to the fact that they may have to sort through lots of irrelevant information before finding what they are looking for. A visitor to a weblog is unlikely to assume a relationship by the mere fact that the weblog contains someone else’s trademark.

The average Internet user may want to access everything regarding a particular trademark or product or service, whether positive or negative, but may not be able to retrieve all the information unless the trademark is included in weblogs. Confusion is less likely where precautions are taken to disassociate the weblog from the trademark. The defendant in *Bally* took measures to inform consumers that his Web site was not affiliated with the plaintiff: he did not use Bally’s domain name, the mark was used for criticism and commentary, the site stated it was “unauthorized,” and the site did not add to the large volume of information an average Internet user already sifts through.¹²⁶ Completely preventing the defendant from using the Bally name blocks his message from being communicated to the public.¹²⁷ However, as evidenced in *Planned Parenthood*, even sophisticated Internet users can be confused upon arriving at the defendant’s Web site and seeing the welcoming text: “Welcome to the PLANNED PARENTHOOD HOME PAGE!” and some users are likely to remain confused even after reading the information in the defendant’s Web site.¹²⁸

Based upon the Polaroid Factors, it can be gleaned that there is no sure fire way to predict which factors will benefit which party. What is apparent is that the analysis is extremely fact-intensive and certain

122. *Brookfield Commun.*, 174 F.3d at 1060.

123. *Id.*

124. *Id.* at 1059.

125. *Planned Parenthood*, 1997 U.S. Dist. LEXIS at *31.

126. *Bally Total Fitness*, 29 F. Supp. 2d at 1165.

127. *Id.*

128. *Planned Parenthood*, 1997 U.S. Dist. LEXIS at *31.

characteristics, such as the content of the weblog, the intent of the author and creator, the commercial or non-commercial purpose of the weblog, and the competing or non-competing nature of the products or services addressed in the weblog and the trademark, will be particularly examined. The ultimate query will be whether using a trademark in a weblog is likely to cause consumer confusion or create initial interest confusion. Unfortunately, the average weblogger may not readily know that a particular use of someone's trademark amounts to a likelihood of confusion. Since creators and authors of weblogs are directly responsible for posting content on their weblogs, they are likely to be held to a higher standard of care. The greater the advantage that is generated from using another's trademark, the more likely a court will find against the weblogger.

D. UNFAIR COMPETITION

Weblog activity is also subject to claims of unfair competition for the unpermitted use of another's trademark. The *Lanham Act* protects trademarks against unfair competition and prohibits use in commerce of any term or false designation of origin that "is likely to cause confusion . . . as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person."¹²⁹ The statute exempts cases where the mark is used in comparative commercial advertising, non-commercial use, and news reporting and commentary.¹³⁰

The Act protects trademarks regardless of federal registration, but the plaintiff must prove: (a) the existence of a valid trademark and (b) that defendant's use is likely to cause confusion as to source or sponsorship of the products or services.¹³¹ The likelihood of confusion test for determining unfair competition is the same as that for establishing trademark infringement and the same "Polaroid Factors" apply.¹³² Not all factors will be relevant or receive equal weight in all cases and the court will apply those factors that seem most appropriate.¹³³ The court may even find that the Polaroid Factors do not provide much guidance where the defendant does not sell a competing product or service such as

129. 15 U.S.C. § 1125(a)(1)(A) (2000).

130. *Id.* § 1125(c)(4)(B).

131. *Bihari v. Gross*, 119 F. Supp. 2d 309, 317 (S.D.N.Y. 2000); *The N.Y. State Socy. of Certified Pub. Accountants v. Eric Louis Assocs., Inc.*, 79 F. Supp. 2d 331, 339 (S.D.N.Y. 1999).

132. *N.Y. State Socy. of Certified Pub. Accountants*, 79 F. Supp. 2d at 340; *Prime Publishers, Inc. v. Am. Republic, Inc.*, 160 F. Supp. 2d 266, 283 (D. Conn. 2001).

133. *Strick Corp. v. Strickland*, 162 F. Supp. 2d 372, 375 (E.D. Pa. 2001).

in a consumer opinion Web site or a weblog.¹³⁴

The existence of a valid trademark requires the same analysis as that for a protectable mark under trademark infringement. The brunt of unfair competition analysis is determining the likelihood of confusion. For the *Lanham Act* to apply to an unfair competition claim, the defendant's use of the plaintiff's mark must be in connection with commercial activities.¹³⁵ Additionally, the only uses that are actionable are those likely to cause consumer confusion as to "origin, sponsorship, or approval of the defendant's goods, services, or commercial activities."¹³⁶

The defendant's conduct was held to be "use in commerce" where: (a) his Web site interferes with the plaintiff's ability to provide its services throughout the United States, (b) he uses interstate telephone and cable lines to establish presence on the Internet, (c) while the defendant does not solicit funds from Internet users, his site does advertise the sale of a book written by another, (d) his use of the mark helps him promote his own informational services in direct competition with the plaintiff's, and (e) his Web site prevents some people from reaching the plaintiff's Web site because "[p]rospective users of plaintiff's services who mistakenly access defendant's [W]eb site may fail to continue to search for plaintiff's own home page, due to anger, frustration, or the belief that plaintiff's home page does not exist."¹³⁷ While no actual sales or advertising activity is required, it is sufficient that the defendant's use of the trademark interferes with potential customers of the plaintiff from accessing the plaintiff's Web site such that they abandon their search for the plaintiff's site.¹³⁸

There is little likelihood of confusion where a consumer opinion Web site comments on and criticizes a plaintiff's services because, once the site is accessed, it takes little time to realize that it is not the official site of the plaintiff.¹³⁹ For instance, there is no mistaking the message of a

134. *Bihari*, 119 F. Supp. 2d at 319.

135. *Id.* at 318.

136. *Id.*

137. *Planned Parenthood*, 1997 U.S. Dist. LEXIS at *15.

138. *People For The Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 365-66 (4th Cir. 2001). Plaintiff was an animal rights organization and defendant a former Internet executive. Defendant registered the domain name "peta.org" for his Web site that was a "resource for those who enjoy eating meat, wearing fur and leather, hunting, and the fruits of scientific research." His site also contained a link to plaintiff's official site.

139. *Bihari*, 119 F. Supp. 2d at 319. Plaintiffs Marianne Bihari and Bihari Interiors, Inc. provided interior design services in New York City, New Jersey, Connecticut, California, and Florida. Defendant was a dissatisfied client who created the Web sites "bihari.com," "bihariinteriors.com," "designscam.com," and "manhattaninteriorsdesign.com," all of which were devoted to criticizing the plaintiffs business. All of the Web sites contained "Bihari Interiors" metatags that ensured that these sites would be retrieved by any user searching for the plaintiffs' site using plaintiffs' name.

Web site that has the domain name "Bally Sucks" and that contains negative remarks about the Bally company. Similarly, registering a long-time nickname, "Strick," as a domain name for a personal Web site does not result in unfair competition with the plaintiff's business, "Strick Corp.," where the parties are not in the same line of work and the defendant's adoption of the name is not an intent to deceive the plaintiff's customers.¹⁴⁰

Where no sales activity is involved and no actual consumer confusion is evidenced, as is the case for most weblogs, a claim of "initial interest confusion" may be raised by trademark owners. The crux of initial interest confusion is that "potential customers of one [Web site] will be diverted and distracted to a competing [Web site]," resulting in harm to the trademark owner due to the fact that "the potential customer believes that the competing Web site is associated with the Web site the customer was originally searching for and will not resume searching for the original Web site."¹⁴¹

Providing links to and from a weblog is one area where this may come into play. Linking to Web sites that engage in commercial activities constitutes use of plaintiff's trademark in connection with the sale of products or services.¹⁴² A court may find that, while no direct commercial use is made of a trademark, the mere act of providing links to other Web sites that promote commercial activity may be sufficient "commercial use" of the mark.¹⁴³ The defendant's site may be viewed as "a conduit, steering potential customers away from [plaintiff] and toward its competitors, thereby transforming [defendant's] otherwise protected speech into a commercial use."¹⁴⁴ This reading of the law is particularly unfavorable to bloggers because linking is the hallmark of weblogs. Inserting links to other weblogs or Web sites that sell products or services or solicit funds or donations may expose the linked-from weblog to liability if consumers mistakenly believe an affiliation between the weblog and the trademark.

Using the plaintiff's trademark as a domain name and as metatags is another area that creates initial interest confusion and increases the likelihood of confusion constituting false designation of origin, thus

140. *Strick*, 162 F. Supp. 2d at 376-77. Plaintiff was a manufacturer of transportation goods and operated several Web sites including "strickcorp.com" and "strickparts.com." Defendant was an independent computer consultant who was commonly known as "Strick," a nickname he had used since childhood, and operated a Web site "strick.com" to communicate with his clients.

141. *Bihari*, 119 F. Supp. 2d at 319.

142. *People for the Ethical Treatment of Animals*, 263 F.3d at 366.

143. *Bihari*, 119 F. Supp. 2d at 318.

144. *Id.*

amounting to unfair competition.¹⁴⁵ Including a disclaimer is insufficient where use of a mark causes initial interest confusion for visitors who expect to arrive at the plaintiff's Web site but, instead, find themselves on the defendant's Web site.¹⁴⁶ Alternatively, there is little likelihood of initial interest confusion where the defendant's Web sites do not divert people looking for information about the plaintiffs because the plaintiffs do not operate a Web site of their own, the defendant's Web sites actually provide information about the plaintiffs' business, and the defendant's Web sites' domain names and content make it clear that the sites are not sponsored by the plaintiffs.¹⁴⁷

An emerging and problematic weblog setting is where a corporation operates a weblog that is open to its employees and consumers and to which the employees can post content. There may be instances in which the employees, while being ignorant of trademark law, reference trademarks belonging to other businesses. Is such use "likely to cause confusion" among consumers who visit the corporation's weblog, see another company's trademark and mistakenly conclude that the two businesses are affiliated? Could such use satisfy the "use in commerce" requirement? Would the corporation be liable for this erroneous assumption? It is difficult to predict the result but the total look and feel of the weblog and the context in which the trademark is used within the weblog will control the outcome.

Unfair competition will focus on whether a weblog that incorporates an unauthorized trademark engages in commercial activity such that it causes a likelihood of confusion or creates initial interest confusion among Internet consumers. The extent of interference with the trademark owner's business and reputation will also be a critical factor in de-

145. *N.Y. State Socy. of Certified Pub. Accountants*, 79 F. Supp. 2d at 342. Plaintiff was a non-profit organization that offered various services in connection with the accountancy profession, including employment opportunities, and maintained a Web site under the domain name "nysscpa.org." Defendant was a for-profit employment agency that placed professionals, including accountants, in temporary or permanent jobs and offered its services on the Internet at "nysscpa.com." Both parties covered the New York state region in their marketing and advertising campaigns. Plaintiff owned the trademark "NYSSCPA" and registered the domain name "nysscpa.org" for its Web site. Defendant subsequently used "nysscpa.com" as a domain name and "NYSSCPA" as a metatag in its own Web site which included a link to the plaintiff's site. A "metatag" is a special HTML tag that provides information about a web page such as who created it, how often it is updated, description of the page, and any keywords used to represent the content of the page. "meta tag" Webopedia, *Online Dictionary for Computer and Internet Terms* <<http://www.webopedia.com>> (accessed Mar. 14, 2002). Metatags are not visible on the web page accessed and are often used by search engines for indexing purposes. *Id.*

146. *N.Y. State Socy. of Certified Pub. Accountants*, 79 F. Supp. 2d at 342. Defendant's Web site included a disclaimer stating that the defendant was not affiliated with the New York Society of CPAs.

147. *Bihari*, 119 F. Supp. 2d at 320.

cluding weblog accountability. As weblogs expand to include activities that may qualify as “commercial” under unfair competition laws, the risks of liability increase unless precautions are taken to assure against confusion.

E. DILUTION

Dilution is another theory that may be brought against weblogs. The *Federal Trademark Dilution Act* provides a cause of action for dilution of registered and unregistered trademarks.¹⁴⁸ The owner of a trademark may sue another for unauthorized use of the mark upon proof that: “(1) his mark is famous; (2) Defendant’s use of the mark is commercial use in commerce; (3) Defendant’s use of the mark began after it became famous; and (4) Defendant’s use dilutes the mark’s distinctive quality by lessening the capacity of Plaintiff’s mark to identify and distinguish goods or services.”¹⁴⁹ The goal of this statute is “to prohibit the unauthorized use of another’s trademark in order to market incompatible products or services.”¹⁵⁰

a. Famous Trademark

The initial requirement is that the trademark be distinctive *and* famous before dilution can be claimed.¹⁵¹ The *Lanham Act* lists factors for determining whether a mark is distinctive and famous.¹⁵² Where the plaintiff can prove that the mark is distinctive and famous, this factor is not an issue, but where the mark is deemed distinctive but not famous, the dilution claim will not stand.¹⁵³

148. *Federal Trademark Dilution Act of 1995*, 15 U.S.C. § 1125(c) (2000).

149. *Strick*, 162 F. Supp. 2d at 378.

150. *Bally Total Fitness*, 29 F. Supp. 2d at 1167.

151. 15 U.S.C. § 1125(c)(1).

152. Section 1125 (c)(1) lists the following factors in deciding whether a mark is distinctive and famous:

- (A) the degree of inherent or acquired distinctiveness of the mark;
- (B) the duration and extent of use of the mark in connection with the goods or services with which the mark is used;
- (C) the duration and extent of advertising and publicity of the mark;
- (D) the geographical extent of the trading area in which the mark is used;
- (E) the channels of trade for the goods or services with which the mark is used;
- (F) the degree of recognition of the mark in the trading areas and channels of trade used by the marks’ owner and the person against whom the injunction is sought;
- (G) the nature and extent of use of the same or similar marks by third parties; and
- (H) whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1995, or on the principal register.

Id.

153. *Prime Publishers*, 160 F. Supp. 2d at 282 (noting that the mark “Voices” was not famous); *Avery Dennison Corp. v. Sumpton*, 189 F.3d 868, 877 (9th Cir. 1999) (noting that the marks “Avery” and “Dennison” were distinctive but not famous).

b. *Commercial Use*

Another criteria is that the trademark be used in commerce by the defendant.¹⁵⁴ If a mark is used commercially to promote a competing product or service or to somehow capitalize on the mark, a finding of infringement is likely. Courts have interpreted "in commerce" to mean not only doing business in or soliciting customers from multiple states, but also doing business in a single state but with customers from multiple states.¹⁵⁵ A home page on an Internet Web site, which is accessible to the general public, qualifies as use in commerce.¹⁵⁶ The "in commerce" standard is also met when defendant's interstate or intrastate activities over the Internet affect plaintiff's services and where interstate communication lines (telephone, cable) are used to access defendant's Web site.¹⁵⁷ Commercial activity is also evidenced when a trademark is used in domain names and metatags to lure customers to defendant's Web site and when the defendant offers to sell the domain name to the plaintiff.¹⁵⁸

Where the use of a trademark is not commercial and is not for the purpose of financial gain, a court may still find dilution, depending upon the facts and circumstances surrounding the use of the mark. Some courts have determined that fund-raising activities fall within "commercial use."¹⁵⁹ Commercial use is also found where a defendant promotes the sale of a book, solicits funds for non-profit political activities, and intends to harm plaintiff's business activities by diverting visitors to the defendant's Web site.¹⁶⁰ Furthermore, even if a defendant does not solicit funds from visitors to his Web site, the inclusion of a hypertext link to another Web site that is commercial in nature because it solicits donations may constitute commercial use of the trademark.¹⁶¹ Additionally, a defendant's intentional use of a Web site to disparage the plaintiff's business and prevent visitors from learning about the plaintiff can cause commercial harm because the plaintiff is deprived of the opportunity to exploit the trademark to its own advantage.¹⁶²

154. 15 U.S.C. § 1125(a).

155. David Yan, *Virtual Reality: Can We Ride Trademark Law to Surf Cyberspace*, 10 *Fordham Intell. Prop., Media & Ent. L.J.* 773, 841 n. 510 (2000).

156. *Planned Parenthood*, 1997 U.S. Dist. LEXIS 3338, at 11.

157. *Id.*

158. *N.Y. State Socy. of Certified Pub. Accountants*, 79 F. Supp. 2d at 344.

159. *Planned Parenthood*, 1997 U.S. Dist. LEXIS at *19; *Jews for Jesus v. Brodsky*, 993 F. Supp. 282, 308 (D.N.J. 1998). In *Jews for Jesus*, plaintiff was a nonprofit international outreach ministry that teaches that Jesus is the messiah of Israel and savior of the world. Defendant was a member of The Outreach Judaism Organization and created a Web site "www.jewsforjesus.org" that espoused views contrary to those of Jews for Jesus.

160. *Planned Parenthood*, 1997 U.S. Dist. LEXIS at *16.

161. *Jews for Jesus*, 993 F. Supp. at 308.

162. *Id.*

These results show that if a weblog is affiliated with an organization that engages in fundraising activities, it may be held liable for the unauthorized use of a trademark. Moreover, using a trademark without permission in a non-commercial or not-for-profit weblog that posts links to another for-profit Web site may constitute sufficient commercial use. The implications of these decisions are significant for weblogs because, like consumer opinion Web sites, they communicate the author's personal viewpoints and those viewpoints may influence consumer opinion about the trademark's goodwill and reputation.¹⁶³ In addition, consideration must be given to the possibility that bloggers may achieve fame and notoriety through their weblogs that may lead to paid speaking or publishing engagements. Would these benefits, fame and fees, qualify as "commercial use" for purposes of determining liability? Would testing or critiquing products or services for advertisers and marketers who compensate bloggers, either monetarily or non-monetarily, be sufficient commercial activity?

Weblogs may find some protection in a line of cases holding that a defendant's use of a trademark is not for commercial purposes nor for the mark's trademark value where the mark is not used to sell products or services or solicit funds. In *Ford Motor Co. v. 2600 Enterprises*, the defendants' use of the "FORD" trademark was deemed not commercial because they neither used the mark to sell goods or services nor solicited any donations.¹⁶⁴ Similarly, the *Bally* defendant was found to have not used the trademark for commercial gain because he was neither selling products or services nor involved in fundraising, and he operated several Web sites, including the "Bally sucks" site, to exhibit his skills as a web designer.¹⁶⁵

In the context of Cyberspace, the "mere use of another's name on the Internet, however, is not per se commercial use."¹⁶⁶ The Ninth Circuit in *Avery Dennison Corp. v. Sumpton*, held that the trademarks were not used for commercial purposes or for their trademark value because evidence showed that the defendants only registered common surnames as domain names, including "Avery" and "Dennison," that were then incorporated into vanity e-mail addresses and licensed to interested Internet

163. Rochat, *supra* n. 53, at 614.

164. *Ford Motor Co. v. 2600 Enter.*, 177 F. Supp. 2d 661, 663 (E.D. Mich, S.D. 2001). Plaintiff was a corporation that operated a company Web site "ford.com." Defendants were the registered owners of the domain name "fuckgeneralmotors.com." An Internet user conducting a search using the defendants' domain name was automatically linked to the plaintiff's site instead of remaining on the defendants' site.

165. *Bally Total Fitness*, 29 F. Supp. 2d at 1166.

166. *Id.* at 1163, 1166.

users.¹⁶⁷ These cases are particularly favorable to weblogs because they offer the flexibility to incorporate trademarks into weblogs for discussion, commentary, or even commercial activity, as long as there is no consumer confusion as to affiliation or sponsorship with the trademark.

c. Trademark Was Famous Before Defendant Used It

This factor examines whether the trademark at issue became famous before the defendant's use of it. Evidence of federal registration of the mark, the extent and duration of the use of the mark in marketing and advertising, and the geographic boundaries of the use of the mark in the real world as well as on the Internet all go to the issue of plaintiff's trademark being famous.¹⁶⁸ Proof that the mark had achieved fame *before* the defendant started using the same or similar mark supports plaintiff's claim of dilution. This factor is easily satisfied and usually favors the plaintiff by showing the dates and events on which the parties started using their respective trademarks.

d. Dilution of the Trademark's Distinctive Quality

The final element is whether the defendant's use of the trademark causes dilution by lessening the ability of the mark to identify and distinguish between the parties' products or services. Dilution commonly arises through blurring or tarnishment. Blurring happens when "defendant uses the plaintiff's trademark to identify the defendant's goods or services, raising the possibility that the mark will lose its ability to serve as a unique identifier of the plaintiff's services."¹⁶⁹ Furthermore, the defendant's use of the mark "whittl[es] away the selling power and value of a trademark" and prevents the consumer from immediately associating the mark exclusively with the plaintiff's products or services. Instead, the consumer thinks of both the plaintiff *and* the defendant upon seeing the mark.¹⁷⁰ For example, blurring is found when potential customers of the plaintiff's services find themselves on the defendant's Web site instead of the plaintiff's where both the defendant and the plaintiff provide similar services in largely the same geographic area.¹⁷¹

167. *Avery Dennison*, 189 F.3d at 880. Plaintiff sold office products and industrial fasteners and owned the registered trademarks "Avery" and "Dennison." Defendant was president of a company that licensed vanity e-mail addresses to Internet users for a fee. Defendant had registered thousands of domain names most of which were common surnames.

168. 15 U.S.C. § 1125(c)(1).

169. *N.Y. State Socy. of Certified Pub. Accountants*, 79 F. Supp. 2d at 344.

170. Galbraith, *supra* n. 65, at 864 (citing *Jews for Jesus*, 993 F. Supp. at 306).

171. *N.Y. State Socy. of Certified Pub. Accountants*, 79 F. Supp. 2d at 345. Both parties maintained Web sites with similar domain names (plaintiff's site "nysscpa.org" and defen-

Tarnishment occurs when "plaintiff's trademark is linked to products of shoddy quality, or is portrayed in an unwholesome or unsavory context likely to evoke unflattering thoughts about the owner's product."¹⁷² Adverse effects to the reputation and value of the trademark may arise due to consumers associating the low quality of the defendant's products with those of the plaintiffs.¹⁷³ Tarnishment is proven where the defendant's use of a trademark implies a relationship between the defendant and the plaintiff. Where a not-for-profit plaintiff and a for-profit defendant provide similar services in a similar area of commerce and operate Web sites with similar domain names, tarnishment is found because a visitor to the defendant's Web site may mistakenly infer an affiliation between the parties and potentially associate negative qualities of the defendant's business with those of the plaintiffs.¹⁷⁴

A claim of tarnishment will fail if an unofficial Web site devoted to consumer commentary about a plaintiff's business practices must necessarily use a trademark to identify the products or services being criticized and where there is no evidence that defendant's Web site has linked to any unsavory sites so as to tarnish the goodwill of plaintiff's business.¹⁷⁵ Similarly, a reasonably prudent Internet user is unlikely to believe sponsorship or affiliation between an unauthorized Web site which links to another site that does not reference the trademark at all.¹⁷⁶

The *Federal Trademark Dilution Act* does not entitle trademark owners to prohibit links to Web sites that contain content or have domain names that the trademark owner does not like.¹⁷⁷

The essence of the Internet is that sites are connected to facilitate access to information. Including linked sites as grounds for finding commercial use or dilution would extend the statute far beyond its intended purpose of protecting trademark owners from uses that have the effect of lessening . . . the capacity of a famous mark to identify and distinguish goods or services.¹⁷⁸

Even where defendants only use a trademark as metatags, which creates a hyperlink to plaintiff's own official Web site, such use does not interfere with plaintiff's ability to capitalize on its trademark.¹⁷⁹ These

dant's site "nyssepa.com") to assist accountants in obtaining employment in and around the New York area.

172. *Id.* at 346.

173. *Id.*

174. *Id.*

175. *Bally Total Fitness*, 29 F. Supp. 2d at 1167-68.

176. *Id.* at 1168.

177. *Ford Motor*, 177 F. Supp. 2d at 664.

178. *Id.*

179. *Ford Motor*, 177 F. Supp. 2d at 664. Defendants' domain name "fuckgeneralmotors.com" did not entail any use of plaintiff's trademark "Ford" and defendants only

sentiments are particularly encouraging for weblogs since they commonly use links to guide readers to various sources within the weblog communities and on the Internet generally.

F. DEFENSES

Trademarks are property rights in words, terms, or symbols that are used to identify products or services.¹⁸⁰ Trademark law, however, does not permit owners of these property rights to monopolize the marks and completely prohibit their use by anyone else.¹⁸¹ So long as there is no likelihood of confusion by the consuming public about the source of goods or services, the *Lanham Act* does not prevent others from using the trademarks to accurately describe characteristics of their own products or services.¹⁸²

The law exempts from trademark infringement liability certain uses of marks, such as fair use, non-commercial use, and use for news reporting and commentary, so as to allow for the free flow of ideas and expression.¹⁸³ Weblogs greatly benefit from these defenses, given that most engage in sharing opinions, news commentary, and non-commercial activity. However, caution must be exercised where weblogs incorporate or reference trademarks that cause weblog visitors to misconstrue the purpose, identity, or content of the weblog such that they form inaccurate assumptions about the affiliation of the trademarks with creators, owners, or hosts of weblogs. Moreover, as weblogs venture into territory from which fame, fortune or some other benefit is derived, the unauthorized use of trademarks may be viewed as "commercial use" or "use in commerce," thereby making it much more difficult to establish a defense.

1. *Fair Use*

The fair use defense is based upon "the concept that a trademark registrant or holder cannot 'appropriate a descriptive term for his exclusive use and so prevent others from accurately describing a characteristic of their good.'"¹⁸⁴ The *Lanham Act* provides that the use of a trademark is exempt from liability if the mark is "used fairly and in good faith only to describe the goods or services."¹⁸⁵ Furthermore, no liability attaches for "[f]air use of a famous mark by another person in compara-

used the mark in the programming code which caused the user to be linked to plaintiff's official Web site "ford.com."

180. *Netscape Commun.*, 55 F. Supp. 2d at 1081; *Welles*, 78 F. Supp. 2d at 1073.

181. *Id.*; *Id.*

182. *Brookfield Commun.*, 174 F.3d at 1065.

183. 15 U.S.C. § 1125(c)(4).

184. *Welles*, 78 F. Supp. 2d at 1073 (quoting *New Kids on the Block v. New Am. Publg., Inc.*, 971 F.2d 302, 306 (9th Cir. 1991)).

185. 15 U.S.C. § 1115(b)(4).

tive commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark.”¹⁸⁶ The fair use defense applies in the real world as well as in Cyberspace.¹⁸⁷ The defendant has the burden of proving that (1) the mark is not used as a trademark, (2) the mark is used fairly and in good faith, and (3) the mark is only used to describe the defendant’s products or services.¹⁸⁸

a. Non-Trademark Use

The use of a trademark for its non-trademark or non-commercial value is “a different type of fair use that ‘lies outside the strictures of trademark law’ because it ‘does not implicate the source-identification function that is the purpose of trademark’ and because it ‘does not imply sponsorship or endorsement by the trademark holder.’”¹⁸⁹ This use is recognized as “‘nominative use’ of a mark – where the only word reasonably available to describe a particular thing is pressed into service.”¹⁹⁰ Three elements must be met to satisfy a nominative use defense: “(1) the product or service in question must be one not readily identifiable without use of the trademark; (2) only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and (3) the defendant must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.”¹⁹¹ No analysis of likelihood of confusion is required.¹⁹²

In *Playboy Enterprises, Inc. v. Welles*, defendant’s use was deemed nominative when she used the plaintiff’s marks “Playboy” and “Playmate” in various sections of her Web site.¹⁹³ Defendant is a former recipient of the “Playmate of the Month” and “Playmate of the Year” awards and used these titles to refer to herself because they are “part of her identity and add value and ‘prestige’ to her name” and are recognized by the public.¹⁹⁴ Furthermore, no substitute words or terms for the marks were available, the defendant only used as much of the marks as was necessary to identify herself to consumers, the defendant’s Web site content did not imply endorsement by the plaintiff and specifically disclaimed any affiliation, and the site even contained links to information about the litigation between the parties.¹⁹⁵

186. *Id.* § 1125(c)(4)(A).

187. *Bihari*, 119 F. Supp. 2d at 321; *Brookfield Commun.*, 174 F.3d at 1065.

188. *Welles*, 78 F. Supp. 2d at 1074.

189. *Id.* at 1089-90 (quoting *New Kids on the Block*, 971 F.2d at 308).

190. *Id.* at 1075.

191. *Id.* at 1090.

192. *Id.*

193. *Id.*

194. *Id.* at 1078.

195. *Id.* at 1090.

b. *Good Faith*

In order to prove “good faith” use of a mark, the defendant must show that in adopting the mark, the defendant did not intend to capitalize on the reputation and goodwill of the plaintiff and mislead consumers into believing that the defendant and the plaintiff were associated with one another.¹⁹⁶ Actual knowledge of prior use and ownership of the trademark by another or being denied consent to use the mark does not imply bad faith on the part of the defendant in adopting the mark.¹⁹⁷ Evidence that precautions have been taken to ensure against unauthorized use supports a finding that defendant acted in good faith.¹⁹⁸ The defendant in *Welles* was found to have met these standards, particularly since no other words or terms accurately described her titles and profession.¹⁹⁹ The *Bihari* Court acknowledged that inserting trademarks in metatags constituted fair use because metatags were merely a “cataloging system” that enabled a defendant to index the Web site content that could later be efficiently retrieved by search engines.²⁰⁰

c. *Descriptive Use*

This element is satisfied where the “mark is used in an index or catalog, or to describe the defendant’s connection to the business claiming trademark protection.”²⁰¹ Sometimes, there are no viable alternatives and using the trademark is the only way to describe the defendant’s *own* products or services. For example, the *Welles* court determined that, given that there were no substitute words or terms to describe the defendant’s titles, “Playmate of the Month” and “Playmate of the Year,” and since the titles themselves described the products being sold by the defendant, the marks fairly and accurately described the defendant’s goods and services and constituted fair use.²⁰²

The *Lanham Act* permits descriptive use of a trademark to identify products or services of a competitor. Descriptive use of marks can be made in advertisements that truthfully compare the products of the defendant with those of the trademark owner, or where the trademark has meaning in the English language and is used in an advertisement as a

196. *Bihari*, 119 F. Supp. 2d at 323.

197. *Id.*; *Welles*, 78 F. Supp. 2d at 1080.

198. *Welles*, 78 F. Supp. 2d at 1080. Examples of security measures include: removing or changing content upon request of trademark owner, adding disclaimers denying association, linking to plaintiff’s site, different font, size and color, not incorporating trademark in domain name, and not using plaintiff’s logos or symbols.

199. *Id.*

200. *Bihari*, 119 F. Supp. 2d at 323.

201. *Id.* at 322.

202. *Welles*, 78 F. Supp. 2d at 1079.

dictionary word or term.²⁰³ For instance, the court in *Brookfield Communications* stated that West Coast could use "MovieBuff" in advertising "Why pay for MovieBuff when you can get the same thing here for FREE?," or use "Movie Buff" to refer to a "motion picture enthusiast" or movie devotee.²⁰⁴ "A trademark holder may not bar all use on the Internet of words in the English language."²⁰⁵

The fair use defense will fail where a defendant's use of the plaintiff's trademark is for the specific purpose of luring customers to the defendant's own Web site and describing the defendant's own products rather than referencing those of the plaintiff's.²⁰⁶ While not mandated by the *Lanham Act*, courts will consider evidence of likelihood of confusion to overcome a defense of fair use because "a fair use cannot simultaneously be a confusing use" if it misleads consumers about the source or sponsorship of products or services.²⁰⁷ Here, again, the Polaroid Factors are applied to ascertain the likelihood of confusion.²⁰⁸

In the case of consumer opinion Web sites, fair use is found where the defendant's use of a trademark in metatags of a Web site fairly identifies information about the plaintiff's business and reference to the mark is the only way for the defendant to communicate his opinions to Internet users.²⁰⁹ Prohibiting trademark use in metatags would "effectively foreclose all discourse and comment" that might otherwise be protected under the *Lanham Act* and the Constitution.²¹⁰

The primary purpose of trademark law, to prevent the likelihood of confusion in the minds of the consuming public, cannot be sidestepped with a fair use defense. Weblogs must abide by this rule if they are to be protected under this exemption and most may be able to satisfy the fair use criteria quite easily. However, with advanced technology making it simpler and easier to participate in Cyber activities, the potential for other uses of weblogs is great. Entities with limited resources may turn to weblogs to fulfill electronic commerce and other business needs. Others may utilize weblogs to solicit resources to fund social, political, or religious causes. Still others may have agendas that can better be carried out through weblogs. Whatever the use, the court will turn to the traditional standards to establish whether a weblog has made fair use of another's trademark.

203. *Brookfield Commun.*, 174 F.3d at 1066.

204. *Id.*

205. *Netscape Commun.*, 55 F. Supp. 2d at 1081.

206. *Brookfield Commun.*, 174 F.3d at 1066.

207. *Welles*, 78 F. Supp. 2d at 1074.

208. *Id.* at 1081.

209. *Bihari*, 119 F. Supp. 2d at 323.

210. *Id.*

2. Parody

Parody Web sites are created for the purpose of poking fun at specific products or services.²¹¹ Parody is a “simple form of entertainment conveyed by juxtaposing the irreverent representation of the trademark with the idealized image created by the mark’s owner.”²¹² It must “convey two simultaneous – and contradictory – messages: that it is the original, but also that it is not the original and is instead a parody.”²¹³ Although there is a slight risk of initial consumer confusion, an effective parody will diminish this risk by presenting just enough of the original mark to make its point.²¹⁴

Parody standards are not met where a defendant uses the plaintiff’s trademark as a domain name that does not simultaneously convey the dual messages of the parody. There is likelihood of confusion when the defendant incorporates the plaintiff’s trademark “PETA” in the domain name of his own Web site “peta.org” because it is not until after a viewer has used the trademark to enter the Web site and read the content that they realize that the site is not the plaintiff’s official Web site.²¹⁵ Viewing the “domain name alone, there is no suggestion of a parody” and, by itself, the “domain name does not convey the second, contradictory message needed to establish a parody – a message that the domain is not related to PETA, but that it is a parody of PETA.”²¹⁶

A parody claim also fails where neither the domain name of the Web site nor the welcoming text on the home page simultaneously convey the dual messages necessary to suggest a parody or inform the viewer that they have not accessed the plaintiff’s Web site.²¹⁷ Appropriating the plaintiff’s trademark “Planned Parenthood” as a domain name for defendant’s own Web site “plannedparenthood.com” and as an initial greeting “Welcome to the Planned Parenthood Home Page!” misleads viewers into thinking they have reached the plaintiff’s site.²¹⁸ The dual messages of the parody are not readily apparent thus contributing to consumer confusion about the ownership of the trademark.

Weblogs that make unauthorized use of trademarks may also benefit from this defense, as long as the dual messages of the parody are readily apparent to the viewing public. When selecting the domain name of

211. Maynard, *supra* n. 56, at 1347.

212. *People for the Ethical Treatment of Animals*, 263 F.3d at 366 (citing *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 34 (1st Cir. 1987)).

213. *Id.* (citing *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ. Group, Inc.*, 886 F.2d 490, 494 (2d Cir. 1989)).

214. *Id.*

215. *Id.* at 366-67.

216. *Id.* at 366.

217. *Planned Parenthood*, 1997 U.S. Dist. LEXIS 3338 at 33-34.

218. *Id.* at 34.

the weblog and its content, webloggers must take care so as not to mislead or confuse viewers. Viewers must immediately understand whatever parody, humor, or satire the weblog is aiming to convey. The more easily viewers are able to distinguish the weblog from the trademark, the more likely the court will uphold a parody defense.

G. CONCLUSION

Trademark law must balance the rights of intellectual property owners with the public's right to access and use information in non-infringing ways. It must take into account the rapid developments in Internet technology, the conflict between commercial and non-commercial use, the concurrent use of the same trademark on related and unrelated products and services, and the use of the mark in the same or different geographic regions. The potential for trademark infringement liability may have a chilling effect on the growth of the Internet and may deter people from creating weblogs or force them to limit the content of weblogs.²¹⁹

As discussed above, there are many ways in which trademarks can be incorporated into weblogs. From the domain name of the weblog, to its content and messages, to the banners that advertise products or services, and to the links that navigate weblog visitors to other blogs or Web sites, trademarks are a tempting means of luring Internet users to certain weblogs. Fortunately, most current weblog activities do not rise to this level of trademark use and much of the conduct may even be protected by the legal exemptions. However, as weblogs expand into other areas and encompass commercial activity in particular, the issue becomes cloudy as to what acts the defenses will continue to protect and what will amount to trademark infringement, unfair competition and dilution. Cyberspace is becoming a more and more pervasive part of personal and professional life and trademark owners are tightening monitoring and enforcement efforts. Legal interpretations of "commercial use," "likelihood of confusion" and "fair use" may evolve to better protect trademarks and webloggers must stay abreast of the law in order to protect their own interests.

IV. COPYRIGHT

A. INTRODUCTION

Copyright is another major concern with respect to weblog content. The Internet is the modern version of the printing press in that it has revolutionized the cost and speed of disseminating information.²²⁰ It

219. Maynard, *supra* n. 56, at 1343.

220. Matthew Kane, *Copyright and the Internet: The Balance Between Protection and Encouragement*, 22 Thomas Jefferson L. Rev. 183, 185 (2000).

has increased not only accessibility to copyrighted works, but also the potential for copyright infringement.²²¹ Copyright law is aimed at protecting authors' creative works while preserving the public's right to freely access information. These dual goals are severely tested by the ease with which copyrighted material is available for unfettered and unlimited copying on the Internet. This has raised concerns about whether traditional copyright laws can adequately protect intellectual property rights in Cyberspace, while allowing the public to maximize their use and enjoyment of the Internet.

Weblogs are another medium of expression on the Internet and are subject to the provisions of copyright law. They may incorporate text, images, sounds, and links to convey the authors' thoughts, ideas, and opinions about professional, social, political, and religious issues. In composing blogs, bloggers must be careful to avoid unauthorized references to materials that are protected by copyright. Copying a photograph, painting, story, music, or borrowing a protected article or poem to address an issue or make a point may implicate copyright infringement. Failure to obtain prior approval of the copyright owners may subject weblogs to liability, unless an exemption applies under the law.

There is no legal precedent specifically addressing copyright infringement liability of weblogs. It is unclear whether courts will apply traditional legal standards or devise new tests when addressing weblogs. Therefore, it will be helpful to examine other Internet cases, such as those involving Internet Service Providers ("ISPs"), Bulletin Board Service ("BBS") operators, Web site owners, and linking, to decipher the criteria and standards the courts are likely to apply to weblogs.

B. COPYRIGHT PROTECTION

The United States Constitution is the original basis for copyright protection and specifically authorizes Congress to protect authors' works.²²² The idea was that if you protected authors' works, then you encouraged future creative endeavors that would contribute to the intellectual advancement of society as a whole. The *Copyright Act* was enacted to identify the boundaries of copyright protection and infringement.²²³ The owner of a copyrighted work is granted specific ex-

221. *Id.* at 186.

222. U.S. Const. art. I, § 8(8). The Congress shall have the power "[t]o 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. . . ." *Id.*

223. 17 U.S.C. § 102 (2000).

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated,

clusive rights²²⁴ and provided with remedies²²⁵ for the unauthorized use of protected materials. Copyright protection is awarded to any "original works of authorship fixed in any tangible medium of expression."²²⁶ So long as "the work [is] independently created by the author" and "possesses a minimal degree of creativity," it will meet the originality requirement.²²⁷ Pursuant to the advent of the Internet and digital technology, several amendments to the *Copyright Act* have been made to better preserve copyright protection in Cyberspace.²²⁸

One such amendment, the *Digital Millennium Copyright Act* ("DMCA") of 1998, was specifically enacted to address the growing con-

either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

(b) In no case does Copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Id.

224. 17 U.S.C. § 106 (2000).

Copyright owner has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id.

225. 17 U.S.C. §§ 502, 503, 504, and 505 (2000). Remedies for copyright infringement include injunctions, impounding and disposing of infringing articles, damages and profits, and costs and attorney's fees.

226. 17 U.S.C. § 102.

227. *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991).

228. These amendments to the *Copyright Act* are: (1) *Audio Home Recording Act of 1992* which added chapter 10 to facilitate regulation of digital audio recording devices, (2) *Digital Rights in Sound Recordings Act of 1995* which modified § 106 to provide a limited performance right for sound recordings by digital audio transmission, and (3) *No Electronic Theft Act of 1997* which amended § 506 to criminalize certain willful infringements.

cerns about making copyrighted material available on the Internet while preserving the rights of copyright owners, and affording protection against copyright infringement liability to parties who made access to and use of the Internet possible while promoting the growth and efficiency of the Internet.²²⁹ The DMCA “is designed to facilitate the robust development and worldwide expansion of electronic commerce, communications, research, development, and education.”²³⁰ The important changes brought by the DMCA that particularly affect weblogs and the entities associated with weblogs are discussed in the following sections. By way of background, case law preceding the DMCA is examined to show how courts have struggled with similar issues then contrasted with post-DMCA cases to suggest how courts are likely to analyze weblog cases.

C. COPYRIGHT INFRINGEMENT

Copyright infringement arises from the unauthorized use of one or more of the exclusive rights granted to copyright holders.²³¹ The *Copyright Act* states that “anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright or right of the author.”²³² Neither knowledge nor intent is a required element.²³³ Legal precedent recognizes the Internet as a vehicle for copyright infringement.²³⁴ In Cyberspace, the rights commonly affected are the rights of reproduction and distribution of a protected work, either in part or in whole.²³⁵

The Internet makes it simple and easy to transmit written text, graphics, and sounds via telephone and cable wires from one computer to another. “A single act of transmission or browsing on the Net can potentially violate all of the exclusive rights listed in the *Copyright Act*.”²³⁶ For example, posting a favorite poem on a weblog implicates the rights of reproduction (copying of the poem) and distribution (posting and making available to the public). These rights may be violated every time the poem is downloaded or forwarded to another computer, unless a defense

229. Lee Hollaar, Legal Protection Of Digital Information 166-67 (2002); *Digital Millennium Copyright Act*, 17 U.S.C. §§ 512, 1201 (2000).

230. *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1088 (C.D. Cal. 2001) (citing Sen. Rpt. 105-190, at 1 (105th Congress, 2d Session 1998)).

231. 17 U.S.C. § 501(a) (2000).

232. *Id.*

233. *Religious Tech. Ctr. v. Netcom On-Line Commun. Servs., Inc.*, 907 F. Supp. 1361, 1367 (N.D. Cal. 1995).

234. *Michaels v. Internet Ent. Group, Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998).

235. Kane, *supra* n. 220, at 187.

236. Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. Dayton L. Rev. 547, 549 (1997).

excuses the infringing conduct. Copyright issues in weblogs may arise in the text, graphics, pictures, music, sound, and links that comprise the weblog content. Weblogs may contain any combination of these audio and visual features to convey a message or enhance the visitors' enjoyment.

1. *Types of Infringement*

There are three types of infringement liability that may affect webloggers: direct, contributory, and vicarious infringement. The *Copyright Act* specifically holds liable those who directly and actually cause the infringement and courts have borrowed theories of contributory and vicarious liability from other areas of the law to impose liability where it would be fair to hold one responsible for the infringing acts of another.²³⁷ In *Sony Corp. v. Universal City Studios*, the Supreme Court recognized contributory and vicarious liability as applicable theories in copyright infringement lawsuits.²³⁸ These causes of action require that there be direct infringement by someone, which is often easy to prove in the Internet context, before another party can be held liable for supporting or encouraging the direct infringer's activities.²³⁹ This benefits copyright owners because it expands the number of potentially liable parties to include not only individual users but also weblog owners, operators, hosts, Internet access providers, and BBS operators.

a. *Direct Infringement*

A claim of direct infringement requires the plaintiff to prove: (1) ownership of a valid copyright, and (2) copying by the defendant as evidenced by the defendant's access to the copyrighted work and the substantial similarity between the protected and infringing works.²⁴⁰ The *Copyright Act* defines a "copy" as a material object "in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."²⁴¹ The Act states that a "work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of

237. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261 (9th Cir. 1996).

238. *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 435 (1984).

239. Lemley, *supra* n. 236, at 564.

240. *Feist Publications*, 499 U.S. at 361; *Playboy Enter. Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 508 (N.D. Ohio 1997); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1165 (C.D. Cal. 2002).

241. 17 U.S.C. § 101 (2000).

more than transitory duration.²⁴² Neither intent to infringe nor knowledge of the infringing conduct is a required element of direct infringement.²⁴³ Copyright registration is usually prima facie evidence of ownership.²⁴⁴ The major focus of a direct infringement analysis is on whether the defendant copied the protected material.

b. Contributory Infringement

Where a user, whether an individual or a business, is found directly liable for copyright infringement, Web site owners, ISPs, and BBS operators may also face potential liability for contributing to the infringing conduct.²⁴⁵ Contributory infringement "will be established where the defendant, 'with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.'²⁴⁶ In contrast with other theories that impose more of a strict liability, the emphasis here is on whether the defendant had actual or constructive knowledge that infringing conduct was occurring on their facilities and that the defendant induced, caused, or materially contributed to the infringement. Courts often analogize contributory infringement on the Internet with real-world cases. In one case, contributory liability was imposed where the defendant received notice that copyrighted material was illegally sold at swap meets organized and operated by them and the defendant aided and contributed to the infringing conduct by providing space, parking, utilities, plumbing, advertisement, and customers.²⁴⁷ Applied in the Cyberspace context, for example, ISPs may be held accountable because they allow infringing works to pass through their systems and be available to the Internet public. They are an intermediary between the subscribers and the Internet and are an easy target for liability because they are easier to identify and find than are individual users.²⁴⁸

c. Vicarious Infringement

Web sites, ISPs, and BBS operators may also be accountable for copyright infringement on the theory of vicarious liability. To hold one re-

242. *Id.*

243. *Playboy Enter., Inc. v. Frena*, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993); *Netcom*, 907 F. Supp. at 1371.

244. *Sega Enter. Ltd. v. MAPHIA*, 857 F. Supp. 679, 686 (N.D. Cal. 1994).

245. Tsilas, *supra* n. 60, at 89.

246. *Netcom*, 907 F. Supp. at 1373 (quoting *Gershwin Publishing Corp. v. Columbia Artists Mgt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

247. *Fonovisa*, 76 F.3d at 264. Plaintiff owned copyrighted Latin/Hispanic music recordings while defendant operated swap meets where vendors sold various merchandise to customers.

248. Lemley, *supra* n. 236, at 553.

sponsible for the infringing conduct of a direct infringer, the plaintiff must prove that the defendant: "(1) has the right and ability to control the infringer's acts and (2) receives a direct financial benefit from the infringement."²⁴⁹ Knowledge is not a required element and facts and circumstances dictate whether sufficient "control" was exercised and "direct financial benefit" derived.²⁵⁰ Conduct amounting to organizing and promoting swap meets, patrolling the facilities, terminating vendors for any reason, and controlling customers' access to the swap meets constituted sufficient control over the direct infringers, customers, and vendors who engaged in the unauthorized purchase and sale of copyrighted materials.²⁵¹ That a substantial direct financial benefit was derived from the infringing activities was evidenced by "admission fees, concession stand sales and parking fees, all of which flow directly from customers who want to buy the counterfeit recordings at bargain basement prices."²⁵² Financial benefit was also found where the infringing activity acts as a "draw" for attracting customers.²⁵³

Depending upon the facts of the case, weblogs may be exposed to any or all of these theories of copyright infringement liability. Direct liability may be found if the blogger is the one to actually initiate and post the infringing content. The potential for contributory and vicarious liability exists particularly if weblogs are designed to be interactive with weblog visitors who are allowed to contribute to the weblog content. Contributory liability may be imposed where the weblogger knows that infringing material is posted by weblog visitors and yet does nothing to stop the infringement, for example, by deactivating the public's ability to add content to the weblog. Vicarious liability may be established if the weblogger fails to terminate the interactive features of the blog so that others cannot post infringing content but fails to do so, and where the blog financially benefits from the infringing material itself such as through improved sales if the weblog markets or sponsors a product or service or increased fees from banner advertisements due to the additional visitors to the blog who are looking for the infringing content.

2. *Background*

Computer and Internet technology have presented many challenges to the enforcement of copyright law. Prior to the enactment of the DMCA, there was much confusion as to what technical and mechanical computer acts constituted copying, who caused those acts to occur, and

249. *Netcom*, 907 F. Supp. at 1375.

250. *Id.*

251. *Fonovisa*, 76 F.3d at 263.

252. *Id.*

253. *Id.*

who should be held responsible if the copying was unauthorized. The problem being that almost anyone in Cyberspace was bound to violate one of the copyright rights without actively and consciously performing actual acts to initiate the copying process. The cases below indicate how courts have grappled with fitting modern technology within the bounds of traditional copyright law.

a. Direct Infringement

A literal interpretation of the *Copyright Act* was applied in *MAI Systems Corp. v. Peak Computers, Inc.* to hold the defendant liable for direct infringement for the unauthorized use of the computer owner's licensed operating system software when defendant's computer repair technician, who was not authorized to use the software, merely turned on the computer that caused the software to be loaded into the computer's random access memory ("RAM").²⁵⁴ A "copy" was generated when the computer program was transferred from the storage device, such as the hard-drive or disk, into RAM and was sufficiently "fixed" to satisfy the statutory requirement.²⁵⁵ Loading data from a storage device into RAM "constitutes copying because that data stays in RAM long enough for it to be perceived."²⁵⁶

Strict liability for direct infringement was also imposed on an ISP for the unauthorized conduct of its subscribers, who actually performed the infringing acts, where the service provider "supplied a product containing unauthorized copies of a copyrighted work" and "[i]t did not matter that [defendant] claims he did not make the copies itself."²⁵⁷ Similarly, in *Sega Enterprises, Ltd. v. MAPHIA*, the BBS operator was directly responsible for the unauthorized copying of video games that were uploaded on their bulletin board by unknown Internet users that caused these protected works to be made available for uploading and downloading by other users.²⁵⁸

Other courts have required a more active role by ISPs that resulted in direct infringement before finding liability. For instance, in *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*, the court found the BBS accountable because it encouraged subscribers to upload files, it screened those files for appropriateness and selected those files it deemed accept-

254. *MAI Sys. Corp. v. Peak Computers, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993).

255. *Id.*

256. *Netcom*, 907 F. Supp. at 1368.

257. *Frena*, 839 F. Supp. at 1556 (a BBS operator was liable because it enabled unauthorized copies of copyrighted photographs to be posted in its system).

258. *Sega Enter.*, 857 F. Supp. at 686. Plaintiff was a manufacturer and distributor of computer video games that are copyright protected. Defendant operated an Internet bulletin board service that was used by users to upload and download unauthorized copies of plaintiff's games.

able, and it further made the selected files available to all users.²⁵⁹ These acts "transformed Defendants from passive providers of a space in which infringing activities happened to occur to active participants in the process of copyright infringement."²⁶⁰ Furthermore, the court in *Playboy Enterprises, Inc. v. Webworld* decided that a Web site operator may be found to actively participate in and directly infringe upon the plaintiff's (a) right to reproduce when it downloaded copyrighted images from newsgroups and reproduced miniature versions onto its own servers, (b) right to distribute when it allowed users to download and print copies of protected materials, and (c) right to display when it enabled copyrighted images to be viewed by paying subscribers while online at the defendant's Web site.²⁶¹

In contrast to these holdings, *Religious Technology Center v. Netcom On-Line Communication Services, Inc.* held that an ISP was not directly liable for copying where it "did not take any affirmative action that directly resulted in copying plaintiffs' works other than by installing and maintaining a system whereby software automatically forwards messages received from subscribers onto the [defendant's storage device], and temporarily stores copies on its system."²⁶² As a provider of Internet access, the defendant's actions were "necessary to having a working system for transmitting [communication] to and from the Internet" and that "the mere fact that [defendant's] system incidentally makes temporary copies of plaintiff's works does not mean [defendant] has caused the copying."²⁶³ The uploading by users of infringing works into an ISP's storage system for retransmission to other computers does not amount to the ISP itself copying or reproducing the protected material.²⁶⁴ "[A]lthough copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party."²⁶⁵

259. *Russ Hardenburgh*, 982 F. Supp. at 513. Plaintiff was the owner of copyrighted adult photograph. Defendants operated a bulletin board service that contained files for uploading and downloading by paying subscribers. As a way to increase its database, defendants offered extra downloading capacity in exchange for users uploading data onto the defendants' network. Some of plaintiff's protected works were reproduced on the defendants' system without the plaintiff's permission.

260. *Id.*

261. *Playboy Enter. v. Webworld*, 991 F. Supp. 543, 551 (N.D. Texas 1997). Defendant operated an adult Web site that contained copyrighted pictures that were downloaded by defendant from various newsgroups, which are an Internet forum for the exchange of ideas on specific topics of interest.

262. *Netcom*, 907 F. Supp. at 1368. Defendant Netcom was an ISP whose services enabled its subscribers and users to gain Internet access. One subscriber, defendant Erlich, posted messages that infringed plaintiff's copyrighted works.

263. *Id.* at 1368-69.

264. *Id.* at 1371.

265. *Id.* at 1370.

Holding an ISP liable would be unreasonable, as it would mean that each separate server in the global network of computers would also be responsible for transmitting the infringing communication.²⁶⁶

b. Contributory and Vicarious Infringement

Courts have also applied theories of contributory and vicarious infringement liability to hold ISPs and BBS operators accountable for their role in making the infringement happen. Contributory liability was imposed on BBS operators where they provided the facilities, knowledge, direction, and encouragement for the infringing conduct to occur, despite lacking knowledge of precisely when unauthorized copies were downloaded from or uploaded to their BBS by Internet users.²⁶⁷ Participation in or contribution to the infringing conduct was satisfied where a service provider knew that infringing material was posted on its network and yet allowed the information to be stored on its servers for distribution to other servers.²⁶⁸ Defendants also induced or materially contributed to the infringement when they encouraged users to upload files and, as a result, benefited from the extensive databank they accumulated for their subscribers to use.²⁶⁹ Notice of infringement to an ISP satisfied the "knowledge" requirement and placed a duty on the provider to conduct reasonable investigation and verification of the claim of infringement.²⁷⁰

Vicarious liability was enforced against a Web site owner and operator where he owned the Web site, held a position of supervisory authority over the Web site operations, had the right and the ability to exercise control over the Web site's infringing activities, and received a direct financial benefit from the Web site business.²⁷¹ However, mere investment in or ownership of the Web site and receipt of profit without some supervisory authority was insufficient for vicarious infringement.²⁷² Another court held that "rent[ing] space or services on a fixed rental fee that does not depend on the nature of the activity of the lessee" was insufficient direct financial benefit from the infringing activity.²⁷³ Furthermore, no liability was imposed where there was no evidence that direct infringement by any user of the ISP "in any way enhance[d] the value of [defendant's] services to subscribers or attract[d] new subscribers," or that the defendant's regulation-free Internet access policies drew

266. *Id.* at 1369.

267. *Sega Enter.*, 857 F. Supp. at 686-87.

268. *Netcom*, 907 F. Supp. at 1375.

269. *Russ Hardenburgh*, 982 F. Supp. at 514.

270. *Netcom*, 907 F. Supp. at 1374.

271. *Webbworld*, 991 F. Supp. at 554.

272. *Id.*

273. *Netcom*, 907 F. Supp. at 1376.

copyright infringers to do business with the defendant.²⁷⁴

Given the complexity of modern technology and the mechanics of how Internet content is posted and by whom, the above cases demonstrate how courts resolved issues of what constituted "copying," who made the unauthorized copy, what level of participation in the infringing activity was required, and who was held responsible for the infringement under the traditional copyright regime. These decisions, however, failed to balance the rights of protection of copyrighted materials with the right of access to that same material and, rather, seemed skewed in favor of copyright owners. The literal application of the law to the workings of the Internet appeared to unfairly burden the pioneers of Cyberspace who were developing, promoting, and enabling personal and commercial use of the Internet. A circular argument arose that if the computer commands that enabled the use of the computer to access the Internet and its many resources by their very nature reproduced and displayed "unauthorized copies," then how could one continue to make available or enjoy the online offerings without fear of legal liability. As a result, Congress stepped in with the DMCA to resolve the conflicting opinions about the role and liability of online activity and, in the process, overruled some cases and codified others.

3. *Digital Millennium Copyright Act* ("DMCA")

As a new platform for the exchange of ideas and information, the Internet proved to be fertile ground for violations of intellectual property rights that authors have in their copyrighted works. Determining who is liable for the infringing conduct has been difficult because the direct infringers are often individual end users who are very hard to find or who are, in many cases, judgment-proof. Other players, such as ISPs or BBS operators, are easier to identify and many have been held accountable for their role in making the infringement happen, particularly since they have the deep pockets to compensate copyright owners whose rights have been adversely affected. This increased the risk of liability for online service providers if their subscribers posted content that violated copyright protection. ISPs bear great economic burden to secure their systems as best as possible, particularly in light of the fact that they cannot possibly monitor all the traffic on their networks and, thus, are usually unaware of infringing activities on their systems. Consumers also share the burden because they ultimately bear the cost in the form of higher fees and charges for Internet connection and other services.

To address these concerns, Congress enacted the DMCA "both to preserve copyright enforcement on the Internet and to provide immunity to service providers from copyright infringement liability for 'passive,'

274. *Id.* at 1377.

'automatic' actions in which a service provider's system engages through a technological process initiated by another without the knowledge of the service provider."²⁷⁵ As such, the DMCA overruled the *MAI* decision that imposed direct infringement liability for unauthorized copying where the copy was the result of an automatic transfer of information from a storage device into a computer's RAM where it could be perceived. The DMCA also codified the *Netcom* decision that held that it would be unreasonable to hold BBS operators directly liable for the infringing acts of their subscribers and end-users merely because the defendant's "system incidentally makes temporary copies of plaintiffs' works."²⁷⁶

To be eligible for protection under the DMCA, the initial criterion is whether the party seeking protection fits into the statutory definition of a service provider. The DMCA specifically defines "service provider" to mean "a provider of online services or network access, or the operator of facilities therefore"²⁷⁷ and includes any "entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received."²⁷⁸ These definitions are broad enough to include such entities as Netcom Communications, MCI WorldCom, America Online, CompuServe, Prodigy, Yahoo!, BBSs, corporate intranets, and media companies that host informational Web sites.²⁷⁹ In addition to providing Internet access services, many service providers also offer online services such as operating homepages, Web sites, chat rooms, and bulletin boards; therefore, the service provider definitions encompass these activities as well.²⁸⁰ Whether providing access to the Internet or supplying online services, service providers are ultimately supplying content to their subscribers and, as such, fall within the DMCA definitions.

Weblogs, too, will be included in this category since service providers are necessary for the establishment and operation of weblogs. Companies that maintain intranets and operate weblogs may also fall within these definitions. Service providers, such as America Online, are starting to offer their own weblog-hosting services as another way for their subscribers to retrieve Internet content, much of which is proprietary, and manipulate it as they wish. The potential for unauthorized use or

275. *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) (citing H.R. Conf. Rpt. 105-796, at 72 (1998)).

276. *Netcom*, 907 F. Supp. at 1368; *ALS Scan*, 239 F.3d at 625.

277. 17 U.S.C. § 512(k)(1)(B) (2000).

278. *Id.* § 512(k)(1)(A).

279. Mitchell P. Goldstein, *Service Provider Liability for Acts Committed By Users: What You Don't Know Can Hurt You*, 18 J. Marshall J. Computer & Info. L. 591, 609 (2000).

280. *Id.*

misuse of the protected content of weblogs may further expose service providers to infringement liability. In terms of individual liability of bloggers, it does not appear that the definitions cover bloggers personally since, at that level, bloggers neither operate facilities nor provide Internet access or other online services. Moreover, bloggers do not control the transmission or routing of online information from one user to another or manipulate the data being exchanged between users.

The DMCA substantially limits the liability of service providers for copyright infringement by conferring four "safe harbors" or exemptions for certain online activities.²⁸¹ These safe harbors are for: 1) transitory communications of the service provider in their role as an intermediary or a "passive conduit" for data as it moves from one point on a network to another, thus enabling users to post content on the Internet;²⁸² 2) system caching whereby temporary copies of frequently requested materials are automatically made to allow for easier and quicker access to information;²⁸³ 3) storage of user's information residing on the service provider's system at the direction of a user;²⁸⁴ and 4) information location tools, such as links, that refer users to other Web sites that contain infringing information.²⁸⁵

Each of these safe harbors has its own conditions and protection may be sought under any one of them. Where the requirements of the safe harbors are not met, the DMCA does not apply and traditional causes of action and defenses may be argued to exempt liability. The safe harbors limit the relief available against service providers who meet the conditions and "do not affect the question of ultimate liability under various doctrines of direct, vicarious, and contributory liability."²⁸⁶ These safe harbors encompass weblog activity because service providers are an intermediary or passive conduit for transporting weblog data, their network allows the maintenance and operation of weblog activity, they store weblog information on their system for efficient future retrieval by blog-

281. 17 U.S.C. § 512. This section is also known as the *Online Copyright Infringement Liability Limitation Act*.

282. *Id.* § 512(a). Section 512 (a) exempts service providers "transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections." *Id.*

283. *Id.* § 512(b)(1). This section refers to the "intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider." *Id.*

284. *Id.* § 512(c)(1). This exempts "storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider." *Id.*

285. *Id.* § 512(d). This part applies to the service provider "referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link." *Id.*

286. *Id.* § 512; *Perfect 10*, 213 F. Supp. 2d at 1174.

gers and visitors, and they enable weblog links to transfer bloggers and visitors from one weblog to another.

The DMCA incorporates elements of contributory and vicarious infringement to designate the circumstances under which liability may arise. It includes knowledge as an element and holds service providers liable once they are aware that infringing material is transmitted to or stored on their networks at the direction of users or that links refer users to other Web sites where infringing material is located.²⁸⁷ The DMCA's notice-and-take-down provisions mandate that a service provider is not liable for copyright infringement if, upon having knowledge of or receiving notice of copyright infringement and where the service provider does not receive a direct financial benefit from the infringing activity, the service provider makes a good faith effort to expeditiously take down or block access to the offending material.²⁸⁸ The DMCA also protects service providers from liability if they respond to a notice of infringement by disabling access to or removing material that, in fact, turns out to be non-infringing.²⁸⁹

These provisions also affect weblogs because, as with Web sites, webloggers and others facilitating blogging, too, can be put on notice that their blogs contain infringing material, either through direct postings or via linking, that must be removed promptly. Taking down or deleting the offending content can be done expeditiously at anytime from anywhere, given the simplicity and speed of posting or editing weblog content. Furthermore, most current blogging activity is non-commercial so that no direct financial benefit at all is derived from it. However, as the

287. 17 U.S.C. §§ 512 (c)(1)(A) and (d)(1).

288. *Id.* § 512(c)(1).

A service provider shall not be liable. . . for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider –

- (A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

- (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

- (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

- (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

- (C) upon notification of claimed infringement. . . responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

Id.

289. 17 U.S.C. § 512(g)(1). No liability for taking down generally – . . . a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing. *Id.*

weblog phenomenon matures, weblogging may assume a more commercial role such that the courts may not be able to easily overlook the revenue being generated from the weblog. Taking care not to use any infringing content to draw revenue-generating visitors to the weblog may alleviate the risk of losing the DMCA's protection. For example, profit from sales or advertisement of clearly infringing content will disqualify the application of the DMCA. Profit from sales or advertisement of non-infringing material may also adversely influence the court and invalidate shelter under the DMCA if the court finds that the commercial activity is primarily due to visitors who are seeking unauthorized and illegal material.

The notice-and-take-down requirements dictate that online service providers qualify for protection under the safe harbors only if they adopt and reasonably implement a policy of terminating the accounts of their subscribers who repeatedly engage in copyright infringement and they notify their subscribers of such policy.²⁹⁰ To protect themselves, service providers should post the statutory provisions on their Web sites to inform subscribers and users of the copyright infringement notice requirements and institute procedures whereby copyright holders may report infringing activities to the service providers.²⁹¹ The DMCA states that "a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes *substantially* the following. . . ."²⁹² Rather than requiring copyright owners to perfectly comply with the statutorily prescribed notice format, this and other language merely requires "substantial" compliance and offers flexibility in terms of what format to follow and how much information to provide.²⁹³

To preserve the privacy of subscribers and users, the DMCA does not require service providers to monitor their services and subscribers' accounts or actively investigate infringing conduct.²⁹⁴ To protect the rights of copyright owners, the DMCA dictates that service providers must "accommodate" and "not interfere with standard technical measures," such as passwords, blocks, encryptions, and firewalls that copyright owners install to restrict access to copyrighted works.²⁹⁵

290. *Id.* § 512(i)(1)(A). The limitations on liability established by this section shall apply to a service provider only if the service provider . . . has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers. *Id.*

291. *Id.* § 512(c)(2).

292. *Id.* § 512(c)(3)(a) (emphasis added).

293. *ALS Scan*, 239 F.3d at 625 (citing various provisions of § 512(c)(3)(A)).

294. 17 U.S.C. § 512(m)(1).

295. *Id.* § 512(i)(1)(B).

Furthermore, the DMCA prohibits circumvention of these technological measures, such as by decrypting, bypassing, removing, or disabling control devices to gain access to protected material and even makes it illegal to make or sell any product or service that may be used to circumvent any copyright protection mechanisms.²⁹⁶ These provisions are designed to protect and keep in place tools that control access to copyrighted material and may restrict the information that weblogs make accessible to or receive from viewers.

4. *Post-DMCA*

The DMCA legislation is an attempt to provide guidance in cases involving the responsibilities of and liabilities arising from Internet activities. Weblog owner and operators, entities providing weblog software and hosting facilities, and online service providers now have a better understanding of the level of participation needed to trigger the DMCA. However, as the courts are finding, questions of statutory interpretation and whether entities and conduct fall within the definitions and safe harbors of the DMCA are surfacing and further challenging Internet experts, practitioners, and courts. Weblogs may rely on the DMCA if they meet the necessary conditions; otherwise, they may use traditional copyright infringement causes of action and defenses to pursue or defend against claims of copyright infringement.

a. *Service Provider*

The threshold inquiry with regard to shelter under the DMCA is whether the party seeking protection meets the statutory definitions of service provider. "The Act defines a service provider broadly" and courts have similarly applied an expansive interpretation of the statutory language.²⁹⁷ Online service providers that enable access to the Internet and Web site operators clearly fall within the definitions.²⁹⁸ It is easily conceivable that entities that enable Internet access or host and facilitate weblog activities may meet the statutory criteria if they are deemed a "provider of online services or network access" or offer "transmission, routing, or providing of connections for digital online communica-

296. 17 U.S.C. § 1201(a)(1)(A). "No person shall circumvent a technological measure that effectively controls access to a work protected under this title." *Id.*; 17 U.S.C. § 1201(a)(3)(A) (2000); 17 U.S.C. § 1201(a)(2) (2000). "No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that . . . is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title." *Id.*

297. *ALS Scan*, 239 F.3d at 623; *eBay*, 165 F. Supp. 2d at 1088; *Costar Group, Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 701 (D. MD 2001).

298. *Id.*; *Id.*; *Id.*

tions.”²⁹⁹ Presently, unlike online service providers, it does not appear that individual webloggers meet the DMCA definitions and, therefore, they are outside the reach of the DMCA. However, this may change if the courts continue to expand the statutory definitions to classify weblog, as well as Web site, owners as service providers such that they would be personally liable under the DMCA.

b. Direct Infringement

Courts next analyze any claims arising under the DMCA to determine whether the service provider’s online activities fall within one of the four prescribed safe harbors such as to limit their liability, as well as examine whatever additional causes of action that have been argued. In *ALS Scan, Inc. v. RemarQ Communities, Inc.*, the court held that the DMCA eliminated the direct infringement liability of the defendant ISP for the passive, automatic acts initiated by the ISP’s subscribers.³⁰⁰ Additionally, *Ellison v. Robertson* decided that direct infringement liability was more appropriately applied against those users who actually do the copying.³⁰¹ Furthermore, the court in *Perfect 10, Inc. v. Cybernet, Inc.* held that the defendant did not directly infringe plaintiff’s copyrighted works because the defendant “does not use its hardware to either store the infringing images or move them from one location to another for display” and evidence did not show that defendant used the protected materials to create its own works.³⁰²

The DMCA is very promising for weblogs because it requires them to actively participate in the infringing conduct, rather than merely supplying space where infringing activity might occur. However, given the technical simplicity of establishing and maintaining weblogs, courts are more likely to impose a greater duty of care upon webloggers. Since webloggers have direct and immediate control over selecting, posting, and editing the content of weblogs, there is an enhanced risk of a finding

299. 17 U.S.C. § 512(k)(1)(B); 17 U.S.C. § 512(k)(1)(A).

300. *ALS Scan*, 239 F.3d at 622. Plaintiff created and marketed copyrighted adult photographs which were available on the Internet to paying subscribers and which were sold via CD ROMs and videotapes. Defendant was an ISP that enabled its subscribers to access and post content on various newsgroups. Some of the postings infringed plaintiff’s copyrights.

301. *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1057 (C.D. Cal. 2002). Plaintiff was the owner of copyrighted works that had been illegally copied on the Internet. Defendant Robertson, a subscriber of the defendant ISP AOL’s service, uploaded unauthorized copies of plaintiff’s works onto the ISP’s servers from which other users could download the infringing copies.

302. *Perfect 10*, 213 F. Supp. 2d at 1168-69. Plaintiff operated a Web site that contained copyrighted adult photos. Defendant offered an online age verification service that comprised of many individual Web sites that paid to be members in the defendant’s network. Some of plaintiff’s copyrighted material appeared on defendant’s member Web sites.

of direct infringement liability. Webloggers may be deemed to be in the best position possible to decide whether what they are about to incorporate into their weblogs is copyrighted such that permission of the owner is needed or whether their use is such that an exemption may apply.

Moreover, bloggers must not tamper with or circumvent any technological control devices instituted by copyright owners to gain unauthorized access to copyrighted material, nor must they "offer to the public, provide, or otherwise traffic in any technology" that circumvents access control measures.³⁰³ For instance, in *Universal City Studios, Inc. v. Reimerdes*, the Web site operators were held liable for violating the anti-circumvention provisions of the DMCA when their Web site posted and offered decryption technology that could be downloaded by users to gain access to encrypted copyrighted materials.³⁰⁴ While the defendants themselves did not circumvent any control mechanisms, the information in their Web site enabled others to do so. Their Web site included links to other Web sites where the illegal decryption software was located for users to download. The defendant's actions of urging others to post the decryption technology, requesting that the defendant be notified of Web sites that contain the infringing material, checking to verify that those Web sites actually post the infringing material, and linking their Web site to those containing the unauthorized copies, amounted to offering, providing or otherwise trafficking in technology that controls access to protected works.³⁰⁵

In examining the nature and context of the links, the court found that where the linked-to Web sites automatically initiate the downloading of the decryption software onto the user's computer or the linked-to Web site only displays or contains information about downloading the decryption code, "defendants are engaged in the functional equivalent of transferring the [decryption] code to the user themselves."³⁰⁶ However, the result is not so clear if, in addition to providing the decryption software, the linked-to Web sites also offer other non-infringing content. In such a case, it would be wrong to presume that, just because the linked-to Web site somehow somewhere contained infringing material, the linked-to site offered, provided, or otherwise trafficked in circumvention technology.³⁰⁷

303. 17 U.S.C. § 1201(a)(1)(A).

304. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 319 (S.D.N.Y. 2000). Plaintiffs were motion picture studios who distributed digitally encrypted copyrighted films on DVDs (digital versatile disks). Defendants operated a Web site on which decryption software was posted for downloading by Internet users and which included hyperlinks to other Web sites that also contained the decryption software.

305. *Id.* at 325.

306. *Id.*

307. *Id.*

Webloggers must be careful about the links they incorporate into their weblogs. Investigating the content of the linked-to weblogs or Web sites before posting the links may extinguish unnecessary liability, especially if the linked-to location clearly contains infringing content. Even where the examination does not immediately confirm that the linked-to blogs or sites contain infringing material, webloggers are still better off because reviewing for non-infringing content and filtering for unauthorized material will support the assertion that the webloggers have acted responsibly in providing links to other locations.

c. Contributory and Vicarious Infringement

Contributory and vicarious infringement liability continues to apply to online conduct, especially where the DMCA is not argued, where the activities do not fall within the DMCA, or even when the DMCA is argued, since certain provisions of the Act contain elements of contributory and vicarious infringement. The Ninth Circuit in *A & M Records, Inc. v. Napster, Inc.*, held a Web site operator liable for contributory infringement because the defendant: (1) had “actual knowledge that specific infringing material is available using its system, that it could block access to the system by suppliers of the infringing material, and that it failed to remove the material” and (2) materially contributed to the direct infringement because defendant “is an integrated service designed to enable users to locate and download MP3 music files” and “provides the ‘site and facilities’” where direct infringement by its users may occur.³⁰⁸ Contributory infringement was also imposed in *Perfect 10* since the defendant had general knowledge of infringement prior to the plaintiff’s filing of the complaint and actual notice of potential and specific infringement upon the plaintiff’s filing of the amended complaint, and the defendant materially contributed to the infringement when it marketed its services, paid commissions, provided content and technical help, monitored online activity, and quality-controlled its services.³⁰⁹

The *Napster* court also held the defendant responsible for vicarious infringement because (1) it had the right and ability to police its system and control its users’ infringing conduct by blocking access to its service and (2) it received a direct financial benefit from the infringing activities

308. *Napster*, 239 F.3d at 1021-22 (citing the district court’s opinion in *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 919-20 (N.D. Cal. 2000)). The lower court stated that the defendant “plays a more active role in facilitating file-sharing than an Internet service provider acting as a passive conduit.” *Napster*, 114 F. Supp. 2d at 920. Plaintiffs were record companies and music publishers who recorded, distributed and sold copyrighted musical compositions and sound recordings. Defendant operated an Internet service that facilitated the transmission and retention of copyrighted music files between and among their users without the permission of the copyright owners.

309. *Perfect 10*, 213 F. Supp. 2d at 1170.

of its users in the form of increased revenues from increased user-base due to the popularity of the Web site as a draw for users wanting free music.³¹⁰ The defendant in *Perfect 10* did not fare any better and was found vicariously liable because it had the right to terminate its arrangement with content providers who posted infringing materials, it controlled users' access to its services and it derived direct financial benefit from the new customers that the infringing materials drew to defendant's business.³¹¹ Furthermore, the court rejected the defendant's claims of protection under the DMCA's safe harbors since defendant had not "reasonably implemented" a policy directed at *terminating* repeat infringers, even in appropriate circumstances," as mandated by the DMCA.³¹²

Alternatively, no vicarious liability was imposed in *Ellison* because the plaintiff failed to establish that the defendant ISP had the right and ability to supervise the infringing conduct and that the ISP derived direct financial benefit from the infringement. The court reasoned that "the DMCA requires more than the mere ability to delete and block access to infringing material after that material has been posted in order for the ISP to be said to have 'the right and ability to control such activity.'"³¹³ The court also determined that, according to the legislative history of the DMCA, any financial benefit to the ISP was too insignificant to be classified as a draw or direct financial benefit because "a service provider conducting a legitimate business would not be considered to receive a 'financial benefit directly attributable to the infringing activity' where the infringer makes the same kind of payment as non-infringing users of the provider's service."³¹⁴

A major issue in Cyberspace is that it is often difficult for ISPs and BBS operators to immediately and accurately determine when a given use is legally permissible. Fortunately, the knowledge requirement of the DMCA reduces liability to only when ISPs and BBS operators have actual or constructive knowledge that their system is used for infringing activities. A BBS operator's lack of knowledge will be reasonable and no liability will be imposed 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."³¹⁵ Monitoring the large volume of users, the immeasurable quantity of Internet traffic, and the speed with which Internet traffic is

310. *Napster*, 239 F.3d at 1023.

311. *Perfect 10*, 213 F. Supp. 2d at 1173-74.

312. *Id.* at 1179 (citing 17 U.S.C. § 512).

313. *Ellison*, 189 F. Supp. 2d at 1061.

314. *Id.* at 1063-64 (citing H.R. Rpt. 105-51(II), at p. 54 (July 22, 1998)).

315. *Netcom*, 907 F. Supp. at 1374; 17 U.S.C. §§ 512(c)(1), 512(g)(1).

added, deleted, and modified would drain the resources of ISPs.³¹⁶ In addition, the current practices of the Copyright Office make it difficult to determine whether copyright exists in a particular work, thus contributing to the uncertainty of whether infringement has occurred.³¹⁷

Weblogs and entities associated with weblogs, such as weblog software providers, corporations running corporate blogs and ISPs enabling Internet access, are a likely target for contributory and vicarious infringement. A significant characteristic of weblogs is that they can be designed to be interactive so that weblog visitors may be able to add their own comments and criticisms. Unfortunately, an unforeseen side effect of this feature is that weblogs may serve as a potential vehicle for the unauthorized reproduction and distribution of copyrighted works. For instance, companies that operate blogs may be risking liability if their blogs are shared with the companies' employees and consumers who may end up contributing content that is copyright protected and not authorized for use by law or the copyright owner. This may add to the heightened scrutiny that webloggers will already be subject to because, since they have enabled others to post potentially infringing content, they will be charged with the duty to review and filter any postings that violate another's copyright protection.

Moreover, unlike ISPs and BBS operators, weblog owners and operators bear a heightened risk of liability. They have more knowledge of and control over the design and content of their weblogs. They are also in a better position to monitor the activities of Internet users who are given access to the weblogs, particularly if the weblogs are designed to be interactive and users are encouraged to make their contribution. The simplicity of weblog editing can quickly and easily remove any infringing material found on weblogs. Webloggers can even utilize various technological control measures, such as blocking or disabling, to prevent infringing activities from occurring on their sites. As such, weblogs will be subject to greater scrutiny should an issue of infringement arise. Failure to take remedial action would run afoul of the mandates of the law.

Contributory or vicarious infringement liability has also arisen in linking cases. In *Bernstein v. J.C. Penny, Inc.*, the copyright owner's complaint of contributory infringement was dismissed against the defendant whose Web site was indirectly hyperlinked to a Web site that posted infringing copies of plaintiff's protected works after the court determined that "multiple linking does not constitute substantial participation in any infringement where the linking Web site does not mention the fact that Internet users could, by following the links, find infringing

316. Kane, *supra* n. 220, at 195.

317. *Id.*

material on another Web site.”³¹⁸ Another case, *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry*, held the defendants liable for contributory infringement because their conduct actively contributed to the direct infringement by Internet users.³¹⁹ While the defendants’ Web site itself did not contain the infringing content, the Web site did inform users that the material was available on the Internet, it provided the Internet addresses of other Web sites that contained the unauthorized copies and it even offered instructions on how to successfully access the infringing material.³²⁰ With the information gleaned from the defendants’ Web site, users were able to browse other Web sites containing the illegal material and, in the process, cause unauthorized copies to be made on their computers so that the infringing works could be viewed.³²¹

These decisions are very significant for weblogs since linking to other blogs or Web sites is a hallmark of weblogs. It appears that linking alone is generally insufficient to trigger copyright infringement. However, links that are accompanied with information or instructions as to the availability or accessibility of infringing content on other weblogs may invoke heightened scrutiny and accountability. Weblogs containing links that transfer weblog visitors to other weblogs on which infringing content is located and where the links automatically start the unauthorized copying process, without any prompts from the visitors are more susceptible to a finding of infringement. In practice, most links are not automatically authorized by the linked-to Web sites and only a few situations exist where linking and cross-linking agreements are executed.³²² Of course, the prudent course of action for bloggers is to initially seek permission from the weblog or Web site to which a link is desired and, at least, scan the content of the linked-to Web site for obvious signs of copyright infringement. Of course, the problem for those unfamiliar with copyright issues, is that it may be difficult to ascertain whether or not the material is copyright protected and whether specific uses are infringing or non-infringing.

318. *Bernstein v. J.C. Penny, Inc.*, 50 U.S.P.Q.2d 1063, 1064 (C.D. Cal. 1998). Plaintiff was the copyright owner of photographs that were reproduced on the Internet without the plaintiff’s permission. Defendants operated a Web site that was indirectly linked to another Web site that contained the infringing material.

319. *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry*, 75 F. Supp. 2d 1290, 1294 (D. Utah 1999). Plaintiffs owned copyrighted materials that were reproduced on various Web sites without the authorization of the plaintiffs. Defendants operated a Web site that offered information to users about accessing the plaintiffs protected works via those Web sites that contained the infringing works and even provided direct links to those sites.

320. *Id.* at 1295.

321. *Id.* at 1294.

322. Simona Kiritsov, *Can Millions of Internet Users Be Breaking the Law Every Day?: An Intellectual Property Analysis of Linking and Framing and the Need for Licensing*, 2000 Stan. Tech. L. Rev. 1, 2 (2000).

Webloggers may not be able to hide behind the false sense of security that the vast expanse of Cyberspace will shield them from being detected and held accountable. Modern technology is making it easier to track, identify, and hold liable individual users who are directly responsible for the infringing activities. Copyright owners are utilizing technological tools to alert users to copyright protection notices and block copying by unauthorized users. They are also becoming more vigilant in the monitoring of and enforcement against infringing actions. Public awareness of copyright laws is also helping Internet users to exercise caution before clicking and copying Internet content. As such, courts may be less likely to excuse Internet-savvy webloggers who may be presumed to know or have the means to know whether their conduct implicates copyright law.

D. DEFENSES

The *Copyright Act* seeks to balance the public and private interests of controlling access to creative works. As such, the law imposes specific limitations on the exclusive rights of copyright owners and provides certain affirmative defenses designed to protect the right of the public to access and use protected materials. As technology has developed, new mediums of expression have been introduced and new opportunities for infringement have been presented. While the law has adjusted to incorporate such changes, Cyberspace cases have not been easily resolved. Where traditional legal standards have proven ineffective, additional laws have been devised to address Internet issues. Defenses applicable in real-world cases have also been applied to online activities involving ISPs, BBSs, Web site owners and operators, and individual users. Weblogs too may benefit from these defenses but caution should be exercised since post-DMCA case law is still in its infancy and decisions have to be monitored to determine how courts are interpreting and applying the DMCA and whether traditional causes of action are subjected to new or different assessment.

1. *Fair Use*

The test for determining whether use of a copyrighted work constitutes fair use is:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.³²³

323. 17 U.S.C. § 107 (2000); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

Excluded from copyright infringement is use of protected material "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."³²⁴

The Supreme Court stated that all of these factors "are to be explored, and the results weighed together, in light of the purposes of copyright."³²⁵ The Court acknowledged that the "fair use doctrine . . . 'permits and requires courts to avoid rigid application of copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'"³²⁶ A fair use defense can only be asserted when the defendant possesses a legitimate copy of a protected work.³²⁷

a. Purpose and Character of Use

Appropriating copyrighted material for commercial purposes alone will not defeat a fair use defense.³²⁸ If, however, financial benefit is derived from the infringing activity, fair use may be denied.³²⁹ For example, a BBS operator, making possible the uploading and downloading of unauthorized copies of video games so that users can avoid purchasing them, is not making fair use of the copyrighted material.³³⁰ Similarly, a Web site operator engages in commercial use when its network enables anonymous users to freely download and upload copyrighted music without authorization of the copyright holders so that they avoid purchasing the music.³³¹ But, where an ISP's purpose is not to supply or solicit Internet content that infringes a copyrighted work, where there is no monetary gain from the Internet content that is available to its subscribers, and where it is nearly impossible to obtain permission for every use of the copyrighted work, a court may find fair use.³³²

Given these holdings, weblogs may have trouble meeting this element because they have the potential for commercial use and some may already be profiting from their online activities. In determining whether direct financial benefit accrues from the infringing conduct, a court may look for monetary gain from banner ads and sponsoring or selling products or services and non-monetary gain from freely offering or making available products or services, linking to other weblogs or Web sites, and soliciting donations. It is likely that commercial use may even extend to where the weblogs' infringing activities make it particularly famous or

324. 17 U.S.C. § 107.

325. *Campbell*, 510 U.S. at 578.

326. *Id.* at 577 (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

327. *Sega Enter.*, 857 F. Supp. at 687.

328. *Campbell*, 510 U.S. at 578.

329. *Netcom*, 907 F. Supp. at 1379.

330. *Sega Enter.*, 857 F. Supp. at 687.

331. *Napster*, 239 F.3d at 1015.

332. *Netcom*, 907 F. Supp. at 1379.

notorious such that its popularity draws many visitors. Bloggers must be mindful of weblog content that may raise suspicions of commercial activity.

In addition to determining whether a profit is gained from the infringing use, a court will look to whether the use of the copyrighted work is “transformative” such that it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”³³³ The more transformative the new work is, the greater the likelihood that fair use will be found. It was recently held that linking to the actual thumbnail-sized duplicates of copyrighted photographs constitutes fair use because the reduction changed the character of the original pictures and was not used for commercial gain.³³⁴ However, linking to the full-sized original photos located on the plaintiff’s Web site was not fair use because the full-sized originals had not been transformed by the defendant into a new creative work and most visitors to the defendant’s Web site who clicked on the link to the full-sized pictures would not know that they had left the defendant’s Web site given that the full-sized originals were formatted by the defendant and surrounded by the defendant’s advertisers.³³⁵

Many purposes of using copyrighted material in weblogs fall squarely within the exemptions of the fair use defense. Most weblogs to date are online journals that contain personal commentary and criticism of the authors. Others are used for education and research purposes. Still others are a modern form of online journalism or news reporting. Most, if not all, weblogs are non-commercial entities that do not derive financial benefit from their online activities. Even if some weblogs were characterized as commercial and did profit from their Internet acts, it is unlikely that the profit would be earned from the infringing conduct itself. Weblog content may also qualify as transformative since the copyrighted works are usually woven into the author’s own commentary or criticism so as to communicate the desired message.

b. Nature of the Copyrighted Work

This factor considers the degree to which the copied work is creative or factual. Works that are fiction, fantasy, and have entertainment or

333. *Campbell*, 510 U.S. at 579.

334. *Kelly v. Arriba Soft Corp.*, 280 F.3d. 934, 942, 947 (9th Cir. 2002). Plaintiff was a photographer who maintained a Web site to advertise, sell, and license his work. Defendant operated a search engine and used a computer program to search the Internet for photographs to place in its database. The photographs were not downloaded to defendant’s own server but were instead copied and then reduced to thumbnail-size before being placed on defendant’s Web site. The thumbnail photos were linked to plaintiff’s Web site where users could view the full-sized originals.

335. *Id.* at 948.

artistic value, such as video games and original photographs, may be accorded copyright protection.³³⁶ Works composed of basic facts, such as historical, scientific, biographical, and daily news, are not subject to protection because they “do not owe their origin to an act of authorship” and are part of the public domain and accessible to all.³³⁷ However, factual compilations may be copyrighted if the data is selected, coordinated and arranged such that it meets the “originality” requirement of the *Copyright Act*.³³⁸ Different uses of weblogs such as education, news, or criticism will dictate what aspects of the protected works will be copied. Facts may be freely borrowed to create new works in weblogs but creative expressions should be used more carefully as they are guarded and scrutinized more closely.

c. Amount and Substantiality of the Portion Used

This element is analyzed in conjunction with the purpose and character of the use because some cases justify complete copying versus other cases that borrow no more than is necessary.³³⁹ Uploading and downloading music files “involves copying the entirety of the copyrighted work.”³⁴⁰ Even where a portion of the copyrighted material is taken, courts will not find fair use if what is borrowed contains “the heart” of the original protected work.³⁴¹ While ISPs enable exact copying of what is initially posted by Internet users, they can be found to have copied no more than is necessary to allow them to provide Internet access services, particularly since there is no other way to accomplish the functions of an ISP.³⁴² Linking to full-sized photographs would amount to borrowing the heart of the original, whereas, linking to thumbnail images would not.³⁴³ Depending upon the context in which the borrowed material is used, the quantity and quality of what a weblog borrows may satisfy this element.

d. Effect of Use Upon the Potential Market for the Work

This factor examines any adverse impact on the market for the original work as well as the markets for secondary or derivative works.³⁴⁴ The nature of the Internet is such that unauthorized copying may have a “substantial and immeasurable adverse effect on the market” for the pro-

336. *Sega Enter.*, 857 F. Supp. at 687; *Kelly*, 280 F.3d at 942-43.

337. *Feist Publications*, 499 U.S. at 347-48.

338. *Id.* at 348.

339. *Campbell*, 510 U.S. at 586-87.

340. *Napster*, 239 F.3d at 1016 (citing *Napster*, 114 F. Supp. 2d at 913).

341. *Campbell*, 510 U.S. at 587.

342. *Netcom*, 907 F. Supp. at 1380.

343. *Kelly*, 280 F.3d at 943, 948.

344. *Campbell*, 510 U.S. at 591-92.

tected material.³⁴⁵ For instance, the adverse effects on the value of video games will be significant if they are available for unauthorized copying on a BBS.³⁴⁶ Similarly, linking to full-sized copyrighted photographs harms the market for the originals by depriving the owner of the financial benefits from advertising, selling, and licensing the protected works.³⁴⁷ Weblogs may not satisfy this element if evidence shows that demand for copyrighted works may cease if people can access the same material on weblogs at little or no cost. Currently, it is unlikely that weblogs invade or replace the traditional markets for the original, secondary, or derivative works but future weblog activities may not provide such guarantees.

The policy behind the fair use doctrine is to eliminate the transaction costs associated with obtaining a license from the copyright owner for every use of the protected material, and to promote efficiency by allowing uses of copyrighted materials in cases where a reasonable copyright holder would give permission.³⁴⁸ The fair use defense may be applied where "the purpose of the use is beneficial to society, complete copying is necessary given the type of use, the purpose of the use is completely different than the purpose of the original, and there is no evidence that the use will significantly harm the market for the original."³⁴⁹ Since the fair use defense only applies to claims of copyright infringement, it is not relevant in cases involving circumvention of control technology. As noted below, in enacting the anti-circumvention provisions of the DMCA, Congress intentionally excluded the fair use justification and, instead, granted a limited number of other defenses.

The fair use doctrine provides much support for current weblog activities because most, if not all, uses of copyrighted material may satisfy the above elements. However, once weblogs become more commercial in nature and generate monetary and non-monetary gains, fair use may be harder to defend. In addition, bloggers must be aware that technological barriers such as blocks, passwords and firewalls installed to prevent unauthorized copying or linking on the Internet may cut against a fair use defense because the use of such tools would signify the copyright owners' intent to prevent unpermitted uses of their protected works.³⁵⁰ A stronger fair use defense may arise where technology does not prevent copying or linking to online content.

345. *Sega Enter.*, 857 F. Supp. at 688.

346. *Id.*

347. *Kelly*, 280 F.3d at 948.

348. *Kiritsov*, *supra* n. 322, at 4.

349. *Netcom*, 907 F. Supp. at 1380.

350. *Kiritsov*, *supra* n. 322, at 5.

2. *Implied License*

An affirmative defense to a charge of copyright infringement is the doctrine of implied license under which the conduct of the copyright owner may indicate an implicit agreement to use the protected work. It can be argued that one who posts material on a Web site expressly or impliedly licenses the right to browse, copy, and link to the Web site.³⁵¹ Most Internet content is intended for general accessibility and does not alert users that materials may be copyrighted nor does it include warnings about copyright infringement for unauthorized use.³⁵² Publishing content on an open and unsecured network, without some evidence that the information contained within is copyright protected, is an implied invitation to visit the site.³⁵³

For this defense to apply, weblog owners, operators, and hosts must overcome the following hurdles: licenses can only be granted by legitimate copyright owners, they can be explicitly disclaimed, and they can be subject to the terms and conditions set by the copyright owners.³⁵⁴ The use of technological control measures or lack of prior consent to prevent copying or linking may diffuse an implied license argument.³⁵⁵ Courts are likely to examine the customs and practices of Internet publishers as evidence of whether or not an implied license is granted.³⁵⁶

3. *Digital Millennium Copyright Act ("DMCA")*

The four safe harbors granted to service providers in Section 512 of the DMCA may serve as a defense to online copyright infringement and may limit liability only if the service providers comply with the statutory provisions. These exceptions designate the type of technical and mechanical computer and Internet processes that qualify for immunity, the role and functions the service providers must perform, the responsibilities imposed upon copyright owners with regard to notification of alleged infringement, and the duties of service providers once they have actual or constructive knowledge or received notice that their system or network is potentially used for infringing activities. As the court in *Ellison* stated, the DMCA only mandates that service providers alert users to the policy of denial of service for repeat infringement of copyright protection; it does not require that service providers actually monitor the activities of its users for infringing conduct or terminate the accounts of

351. Lemley, *supra* n. 236, at 567; Tsilas, *supra* n. 60, at 89.

352. Kiritsov, *supra* n. 322, at 4.

353. Mark Sableman, *Link Law Revisited: Internet Linking Law at Five Years*, 16 Berkeley Tech. L.J. 1273, 1331 (2001).

354. Lemley, *supra* n. 236, at 567.

355. Sableman, *supra* n. 353, at 1331; Kiritsov, *supra* n. 322, at 5.

356. Sableman, *supra* n. 353, at 1331.

subscribers who are repeat infringers.³⁵⁷

The *Hendrickson v. eBay* court determined that the defendant qualified for the safe harbor relating to “storage at direction of a user of material that resides on a system or network controlled or operated by or for the service provider” because the plaintiff copyright owner failed to substantially comply with the DMCA when he refused to identify specific item numbers of copyrighted materials that were allegedly being offered for sale on the defendant’s auction Web site.³⁵⁸ “The limited information that Plaintiff provided to eBay cannot, as a matter of law, establish actual or constructive knowledge that particular listings were involved in infringing activity.”³⁵⁹ The fact that the defendant received a payment for enabling the advertisement and any subsequent sale, that the defendant was able to block access to Web site content and that the defendant voluntarily monitored its Web site for apparent infringements did not amount to the defendant’s “right and ability to control” the infringing conduct, as required by the statute.³⁶⁰

The *Ellison* decision also held that the defendant ISP’s conduct fell within this safe harbor since the defendant had adopted and implemented a “Terms of Service” policy that every subscriber must agree to, which notified them of the prohibition against infringement of intellectual property rights and termination of service for unauthorized copying.³⁶¹ Furthermore, the defendant met the safe harbor for “transitory digital network communications” because one of its users initiated the transmission of the infringing material, it did not choose or select any of the content that was transmitted through its system, it did not select the recipients of any material, and it did not in any way modify the information that was transmitted through its system.³⁶²

Conversely, in *ALS Scan*, the Fourth Circuit found that the defendant did not qualify for the “storage at the direction of a user” safe harbor because the plaintiff copyright owner substantially complied with the statutory notification requirements when it: “(1) identified two sites created for the sole purpose of publishing ALS Scan’s copyrighted works, (2) asserted that virtually all the images at the two sites were its copy-

357. *Ellison*, 189 F. Supp. 2d at 1066.

358. *eBay*, 165 F. Supp. 2d at 1092. Plaintiff claimed to be copyright owner of a documentary that was allegedly being offered for sale without his permission on defendant’s Web site. Defendant operated an Internet auction Web site that enabled sellers and buyers to transact their business without any intervention from eBay. eBay received a fee for each advertisement that a seller posted and a percentage of the highest bid at which the item was sold.

359. *Id.* at 1093.

360. *Id.* at 1093-94 (citing § 512(c)(1)(B)).

361. *Ellison*, 189 F. Supp. 2d at 1065.

362. *Id.* at 1070-71.

righted material, and (3) referred [defendant ISP] RemarQ to two web addresses where RemarQ could find pictures of ALS Scan's models and obtain ALS Scan's copyright information."³⁶³ Similarly, the *Perfect 10* court determined that there was little likelihood of the defendant meeting the requirements of this safe harbor, or the one for information location tools such as web browsers and links, where the defendant failed to tailor and implement a policy against copyright infringement that substantially complied with the DMCA.³⁶⁴ The defendant's unreasonable and inflexible conduct in requiring copyright owners to strictly adhere to the defendant's own notice of infringement policy and in not accommodating those who substantially complied with its policy went well beyond the dictates of the DMCA.³⁶⁵ Moreover, the defendant derived financial benefit directly from the infringing material in the form of new visitors and subscribers who paid to access the infringing content via defendant's service.³⁶⁶

The provisions of the DMCA concerning prohibition against circumvention of access control technology are not subject to a claim of fair use defense. The fair use exemption is only available in copyright infringement actions and not in cases involving circumvention of control devices. The legislative history of the DMCA indicates that the "decision not to make fair use a defense to a claim under Section 1201(a) was quite deliberate."³⁶⁷ Congress did recognize that "technological controls on access to copyrighted works might erode fair use by preventing access even for uses that would be deemed 'fair' if only access might be granted."³⁶⁸ Therefore, Congress incorporated several built-in exceptions or defenses to circumvention of control technology for specific uses that qualified as "fair," such as certain uses by libraries, archives and educational institutions and for reverse engineering, security testing and good faith encryption research.³⁶⁹

The DMCA may be used as a sword or a shield. Copyright owners may use it as a sword to argue that the accused may not limit their liability under the DMCA because the accused does not meet the threshold service provider or safe harbor conditions or, if they did satisfy these conditions, they did not satisfy other mandates of the DMCA. The accused may use it as a shield to show that the copyright owner did not comply the statutory notice requirements that would have alerted the accused to the claim of infringement; therefore, their failure to expeditiously re-

363. *ALS Scan*, 239 F.3d at 625.

364. *Perfect 10*, 213 F. Supp. 2d at 1179-80.

365. *Id.*

366. *Id.* at 1181.

367. *Reimerdes*, 111 F. Supp. 2d at 322.

368. *Id.*

369. 17 U.S.C. §§ 1201(d), (f), (g), (j).

move the offending material did not expose them to liability under the DMCA. In a claim of circumvention to access control technology, the accused may also use it as a shield to point that their conduct is excused under one of the exemptions to the DMCA. For instance, the defendant in *Reimerdes* offered the defenses of reverse engineering, security testing, and encryption research but the court denied these claims due to insufficient evidence to indicate otherwise.³⁷⁰

Whatever the case, the first line of defense for weblogs and entities associated with weblogging is the DMCA, which was specifically enacted to address and limit online liability. As with Web sites, weblogs and entities associated with weblogging may easily qualify as service providers, fall within one or more of the safe harbors and meet the notice-and-takedown provisions. But, unlike Web sites, weblogs bear an enhanced burden of responsibility and heightened scrutiny since they are quick and easy to design and operate, they do not require knowledge of computer programming, such as HTML, they eliminate the necessity of a systems administrator or web master, and there is always direct and immediate access to the weblog content for updating and editing. This setup may impose a greater duty of care upon weblogs, especially if bloggers are perceived as more sophisticated and Internet-savvy than the average users.

E. CONCLUSION

As the framers of the Constitution intended, the ultimate goal of copyright law is to advance the intellectual knowledge of a society. To accomplish this, authors of original creative works are rewarded for their efforts with copyright protection so that, for a limited time, they can reap the benefits of their investment before the works become part of the public domain. That others may be encouraged to contribute their own ideas if their works are protected adds to the collective pool of public knowledge. The law also enables the public to access these creative protected works so long as certain procedures and policies are followed. This fine balance has been difficult to maintain with the advent of Internet Web sites, web pages and, now, weblogs. The urge to devise new laws to address Cyberspace cases has largely been resisted by adherence to traditional legal standards and tests.

Unfortunately, the law often assumes that the average Internet user is sophisticated enough to understand the do's and don't's of copyright law. Therefore, it is imperative that webloggers proceed carefully. When selecting and posting content on weblogs, webloggers must be cautious because the copyrights held by others may curtail the webloggers' own freedom of expression and creativity. Although most current weblog

370. *Reimerdes*, 111 F. Supp. 2d at 319-22.

activities may be protected by one of the exemptions to copyright infringement, future uses of weblogs may trigger serious violations. Increased commercial or sponsorship activities from which weblogs derive financial benefits are one way to attract heightened scrutiny. Official Web sites may incorporate weblogs into their overall marketing and sales strategy, thus, incurring additional responsibility and liability.

The Internet has tempted many users to make unauthorized uses of copyrighted materials. It has forced copyright holders to become more vigilant in monitoring and enforcing their rights. Technological improvements are assisting both users and copyright owners in their respective endeavors. Congress, too, has taken action with the enactment of the DMCA to address the liability of service providers for their own as well as their subscribers' online conduct. Copyright law does not seek to completely bar the use of protected materials, it just seeks to stay abreast of the latest medium of expression and ensure that both the public and private rights are afforded proper protection.

V. CONCLUSION

Weblogs are the latest phenomena to hit Cyberspace and are a revolutionary medium of expression. The simplicity, speed, and low cost of publishing content on the Internet is the driving force behind the rising popularity of weblogs. The weblog technology does away with knowing computer programming and eliminates the need for intermediaries, such as webmasters or web content managers, to establish and maintain weblogs. As such, weblogs lose a crucial layer of protection that is provided by a middleman who may be eligible for shelter under the safe harbors of the *Digital Millennium Copyright Act*. For the average Internet user, the participation of an intermediary who monitors the content to be posted, warns against potentially infringing content, filters for protected material, and mediates when claims of infringement arise plays an important function. Modern tools that can track individual users are also putting bloggers at risk of being easily detected and held directly accountable for infringing conduct. The false sense of security and anonymity associated with Cyberspace is fast becoming a thing of the past since technology is enabling efficient identification of direct infringers.

Once weblog technology matures, the potential for blogging is unlimited. Weblog activity may shift from the mostly non-commercial current use to more commercial use. Individuals may utilize weblogs to market products or services or engage in fundraising. Businesses that lack resources to venture into electronic commerce may realize the benefits of weblogs as an alternative to traditional Web sites. Companies that operate official Web sites may incorporate weblogs into their overall business

plan to better serve existing customers as well as expand the overall consumer base. Researchers may utilize weblogs for consumer surveys and data collection. Whatever the reason or the need, blogging may just be the answer.

As with other Internet issues, practitioners, courts, Internet experts, and end users must be mindful that weblogs will also be subject to the provisions of trademark and copyright law. Intellectual property rights of others may affect and even hinder the weblogger's own freedom of expression and creation. Trademarks and copyright are intellectual creative endeavors that are recognized as valuable assets and protected as proprietary interests. The purpose of awarding these property rights is to encourage contributions to the collective pool of knowledge that promotes the progress of society as a whole. The goals of trademark and copyright law are essentially to acknowledge and attribute proprietary works to their rightful owners, alert the public and prevent confusion as to source or sponsorship of protected materials, recognize the investment that went into developing and promoting the creative works, reward a monopoly on the intellectual creations to recoup the investment, and provide remedies should these property rights be misappropriated or misused. The law aims to balance the competing interests of preserving the rights of the owners of the protected works with those of the right of the public to freely access information in the public domain.

While legal tests for determining "likelihood of confusion," "commercial use," and "copying" are continuously evolving to incorporate modern technologies, there is still great uncertainty as to how a court may interpret these standards given the facts of the case at hand. Defenses such as fair use, implied license and the DMCA do not guarantee victory in all cases, even though they may excuse most uses of protected material in weblogs as noninfringing use. The type and amount of intellectual property "borrowed," the subsequent use that is made of the protected material, and the technical methods by which information is routed to and ultimately posted on the Internet are key factors. Weblogs that are active and that engage in commercial activity are at greater risk. Entities that allow their computer hardware and software to be used to transmit or store weblog content will also be subject to enhanced scrutiny in determining the extent of their liability for the infringing conduct. Protecting the public and private interests has become increasingly complex.

Intellectual property owners are aggressively pursuing Cyber pirates and going after several entities as defendants in lawsuits. The author or creator of a weblog who publishes unauthorized content on a weblog may be liable as a direct infringer. The manufacturer, developer or marketer of computers and software that enable weblogging activity that contains unpermitted postings may be accountable as a contributory or vicarious infringer. The Internet service provider or weblog host that

provides space on their server for a weblog that illegally incorporates protected material is also a potential contributory or vicarious infringer. The advertiser of a product or service or the solicitor of donations or other benefits is yet another target if the weblog contains infringing content. Even links to and from a weblog expose the owners and operators of the linked-to and linked-from Web sites to liability.

It is unpredictable how far the law will reach to recognize and protect owners' rights. As a precaution, the simplest solution against infringing someone's intellectual property rights is to obtain the permission of the owner. Awareness of intellectual property laws is encouraging intellectual property owners to utilize self-help mechanisms such as posting notices if material is protected, installing tools to block unauthorized access, and providing information for requesting authorization to use protected content or reporting violations. This protects owners because they have put the Internet public on notice that specific content is protected and helps Internet users find owners from whom they can seek authorization to use the desired intellectual property.

Weblogs are here to stay and will only increase in popularity as more and more people hear about them. The ability to post content that instantly becomes available to the global Internet community quickly and cheaply is an incredible technological development. Gone are the days of relying on programming gurus to translate your communication into computer code before it could be published. The complete freedom to blog as you please is at your fingertips, just as long as you bear in mind the legal hazards that might be lurking behind your next click. So, go out there and blog your way into Cyberspace!

