

The NET Act, Fair Use, and Willfulness - Is Congress Making a Scarecrow of the Law?

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“We must not make a scarecrow of the law,
Setting it up to fear the birds of prey . . .”
— William Shakespeare - *Measure for Measure*¹

INTRODUCTION

On Tuesday, December 16, 1997, President Clinton signed H.R. 2265, the “No Electronic Theft (NET) Act” into law.² Big business entities including the software, record, and movie industries, lobbied Congress to pass the NET Act to close the “LaMacchia Loophole.”³ The NET Act closes the loophole by providing criminal penalties for certain copyright infringements, even when the infringer has no profit motive.⁴ This statute reverses copyright policy that has been in existence for over a century by eliminating the requirement of commercial exploitation to trigger criminal penalties for infringement.⁵ Moreover, the new law is both overbroad and dangerously vague.⁶ It provides

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1. The Oxford Dictionary of Quotations, 686:4 (5/2nd ed. Oxford University Press 1999).

2. No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997) (codified as amended in sections 17 and 18 U.S.C.).

3. See Copyright Piracy on the Internet: Hearing on H.R. 2265 before the Subcomm. on Courts and Intellectual Property Comm. of the Comm. on the Judiciary, U.S. 105th Congress (1977) [hereinafter *NET Act Hearing*]. Witnesses speaking before the committee included: Greg Wrenn of Adobe Software and Brad Smith of Microsoft, both speaking on behalf of the Business Software Alliance (BSA); Sandra Sellers of the Software Publishers Association; Cary Sherman of the Recording Industry Association of America; and Fritz Attaway of the Motion Picture Association of America. *Id.* See also *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994). Defendant LaMacchia was a twenty-one-year-old student at the Massachusetts Institute of Technology (MIT) who set up an electronic bulletin board that encouraged users to post and download copyrighted software. *Id.* at 536. The government’s attempt to criminally prosecute LaMacchia under the wire fraud statute, 18 U.S.C. § 1343, failed when the court ruled that “copyright prosecutions should be limited to Section 506 of the Act, and other incidental statutes that explicitly refer to copyright and copyrighted works.” *Id.* at 545 (quoting Professor Nimmer, 3 Nimmer on Copyright, § 15.05 at 15-20 (1993)).

4. Pub. L. No. 105-147, 111 Stat. 2678 (1997) (expanding criminal penalties to include infringement for purposes of private “financial gain”). *Id.* Financial gain is defined to include the “receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.” *Id.*

5. See *LaMacchia*, 871 F. Supp. at 539. Under the 1897 Act, the mens rea required for criminal copyright infringement was “willful” conduct undertaken “for profit.” *Id.*

6. See, e.g., Net Act Hearing, *supra* note 3 (statement of David Nimmer, Irell & Manella, LLP, Los Angeles, CA, on behalf of the United States Telephone Assoc.) (expressing concern over lack of definition of “willfully” in the text of the NET Act); Press Release, USACM, Computer Scientists Urge President Clinton to Veto Legislation Restricting Flow of Scientific Information (Nov. 25, 1997), at <http://www.acmorg.usacm/>

jail terms for a person who “willfully” infringes a copyrighted work or works which have a total retail value of as little as \$1001.⁷ The criminal penalties are out of proportion to the crime and ignore the inherent tension between the rights of copyright holders and copyright users.

Copyright does not exist merely to protect intellectual property.⁸ As reflected in the Constitution, the ultimate purpose of copyright legislation is to foster the growth of learning and culture for the public welfare, and granting exclusive rights to “authors” is a means to that end.⁹ The NET Act and many other recent pieces of legislation, such as the Sonny Bono Copyright Term Extension Act, have apparently lost sight of this purpose.¹⁰ The proponents of the NET Act are almost exclusively large corporations who are justifiably focused on protecting their investments.¹¹ Unless criminal penalties are somehow necessary to benefit the public, the NET Act contravenes the original intention of copyright protection.

The Net Act enjoys strong support from the Software Publishers Association, U.S. Copyright Office, the Department of Justice, Adobe Software, Microsoft Corporation, the Recording Industry of America, and the Motion Picture Association of America.¹² A representative of each of these groups addressed the U.S. House of Representatives, speaking in favor of the Bill.¹³ These speakers generally engaged in flag waving speeches that in some instances exaggerated the extent of the problem and ignored the real problems

IP/usacm-release-hr2265.html (visited Mar. 12, 1999) (stating USACM Public Policy Committee position that NET Act was “poorly drafted”); Letter from AALL Washington Affairs to the Honorable Henry J. Hyde, (Oct. 3, 1997), at <http://www.ll.georgetown.edu/aallwash/lt100397.html> (commenting on lack of clarity as to meaning of “willful”).

7. See Pub. L. No. 105-147, 111 Stat. 2678 (1997) (amending 17 U.S.C. § 506(a) and 18 U.S.C. § 2319). For an infringement consisting of “the reproduction or distribution of 10 or more copies or phonorecords of 1 or more copyrighted works” with a retail value of between \$1,001 and \$2,500 the jail term can be up to one year. *Id.* (amending 18 U.S.C. 2319(c)(3)). An infringement of over \$2,500 is deemed a felony and the jail term can be up to three years. *Id.* (amending 18 U.S.C. § 2319(c)(1)).

8. See U.S. CONST., art. I, § 8, cl. 8. The purpose of copyright protection is to “promote the Progress of Science and useful Arts . . .” *Id.*

9. See, e.g. *Feist Publications, Inc. v. Rural Telephone Serv.*, 499 U.S. 340, 349 (1991) (noting purpose of copyright, not to enrich authors, but to increase knowledge of society); *Sony Corp. of Amer. v. Universal City Studios*, 464 U.S. 417, 431-32 (1984) (stating private economic motivation is provided to spur creative effort and increase public access to works); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (commenting private motivation must ultimately promote broad public availability of creative works).

10. See Sonny Bono Copyright Term Extension Act [hereinafter *Bono Act*], Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.). This statute extends copyright protection for existing works under copyright by 20 years. *Id.* at § 102. The new law has reduced access to thousands of copyrighted works that would have otherwise entered the public domain. See Copyright’s Commons, Fighting for the Public Domain, at <http://cyber.law.harvard.edu/cc/>. Copyright’s Commons is one of the plaintiffs in *Eldred v. Reno*, a lawsuit that challenges the constitutionality of the Bono Act. *Id.* See also Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 1998 Stat. 2037 (1998). This legislation, which was signed into law by President Clinton in October, 1998, has engendered criticism from several groups. See Letter from law professors to Rep. Coble (Sept. 16, 1997), at <http://www.dfc.org/dfc1/Archives/WIPO/profltr.html> (questioning new civil and criminal penalties for circumvention of copyright protection systems). The professors expressed concern that the law would have a chilling effect on “the very expressive activities which copyright law is designed to encourage.” *Id.*

11. See NET Act Hearing, *supra* note 3, Witness List.

12. *Id.* These companies openly claim an ability to influence Congress to secure protective legislation for their business interests. See *Federal*, at <http://www.riaa.com/musicleg/mlfed.htm> (on file with author) (asserting RIAA’s “influential role” in educating and informing Congress); NET Act Hearing, *supra* note 3. (statement of Greg Wrenn, Senior Corporate Counsel, Adobe Systems, Inc. on Behalf of the Business Software Alliance) (noting BSA’s international public policy program promotes industry growth).

13. See NET Act Hearing, *supra* note 3, Witness List.

connected with imprisoning these non-violent offenders.¹⁴ It is worth noting that no organizations representing musicians, artists, or authors addressed the House of Representatives concerning this bill.¹⁵

Critics of the NET Act are mostly concerned about three specific problems. The criminal penalty bar is set too low¹⁶, the criminal penalties are triggered by the vague and undefined term of “willfulness,”¹⁷ and the effect of a fair use defense is unclear¹⁸. These problems combine to create a law that could have a “chilling effect” upon free speech.¹⁹ The NET Act has also been criticized as being over broad and jeopardizing people whose acts did not warrant criminal sanction.²⁰

“Laws developed prior to consensus usually serve
the already established few who can get them passed
and not society as a whole.”
— John Perry Barlow²¹

PROBLEM BEING ADDRESSED

The same technological advances that have increased the potential value of copyrighted material have simultaneously threatened to make it worthless.²² The ease of making “perfect” copies has driven the level of piracy to

14. See NET Act Hearing, *supra* note 3 (statement of Greg Wrenn, Senior Corporate Counsel, Adobe Systems, Inc. on Behalf of the Business Software Alliance) (using the term “United States” or “U.S.” in ten of his first eleven sentences). See also *id.* (statement of Cary H. Sherman, Senior Vice President and General Counsel of the Recording Industry Association of America (mentioning United States, U.S., or America in seven consecutive sentences.) Note that while testifying before Congress on September 11, 1997, Sherman spoke in favor of the NET Act, while on January 25, 1999 Sherman stated that trying to protect music rights by “trying to fence it in, with a confrontational piecemeal legislative approach—we believe is ultimately futile, a losing strategy.” Compare *id.* with NET Act Hearing, *supra* note 3, Statement of Sherman with Cary Sherman, Address at MIDEEM 1999, “Protecting Music Rights in the Digital Era: The U.S. Experience” [hereinafter MIDEEM] (Jan. 25, 1999), transcript available at http://www.riaa.com/stats/press/sherman_speech.htm (on file with author). MIDEEM is the acronym for the Society for Microelectronics, Electronic Components, and Materials. *Id.*

15. See NET Act Hearing, *supra* note 3, Witness List.

16. See NET Act Hearing, *supra* note 3, Statement of the Honorable Marybeth Peters, Register of Copyrights, Copyright Office of the United States, The Library of Congress. Peters testified the Copyright Office would prefer “to limit criminal liability for infringement without a profit motive to cases of willful infringement that threaten to cause substantial economic harm.” *Id.*

17. See NET Act Hearing, *supra* note 3 (testimony of David Nimmer, Irell & Manella, LLP, Los Angeles, on behalf of the United States Telephone Association) (discussing legal ambiguities flowing from lack of definition of “willfulness”). See also Letter from the American Association of Law Libraries to Hon. Henry J. Hyde, Chairman, House Judiciary Committee (Oct. 3, 1997), at <http://www.ll.georgetown.edu/aallwash/lt100397.html> (requesting definition of “willfully” to require “criminal intent to violate copyright”).

18. See also Letter from Dr. Barbara Simons, Chair, U.S. Public Policy Committee, Association for Computing to President William J. Clinton (Nov. 25, 1997), at <http://www.acm.org/usacm/IP/usacm-hr2265-letter.html> (criticizing lack of explicit recognition of fair use and requesting veto of NET Act).

19. See *id.* (describing likelihood of institutional restrictions on Internet publishing to reduce risk of litigation). See also Dan Goodin, *Scientists Want NET Law Veto*, at <http://www.news.com/News/Item/0,4,16814,00html?st.ne.ni.rel> (quoting opinion of law professor Pam Samuelson).

20. See NET Act Hearing, *supra* note 3 (testimony of David Nimmer, Irell & Manella, LLP, Los Angeles on behalf of the United States Telephone Association) (opining that NET Act encompasses people whose conduct should not lead to criminal liability). See also *Analysis of H.R. 2265, the “No Electronic Theft” (Net) Act* at <http://www.sla.org/govt/hr2265.html> (on file with author) (noting Special Libraries Association’s fear that NET Act would lead to criminal “witch hunt” by copyright owners).

21. See John Perry Barlow, *Selling Wine Without Bottles, The Economy of Mind on the Global Net*, at http://www.eff.org/pub/Intellectual_property/idea_economy.article.

22. See Charles C. Mann, *Who Will Own Your Next Good Idea?*, *The Atlantic Monthly*, Sept. 1998, at 57.

unprecedented heights.²³ Moreover, the distribution of copyrighted material via the Internet exponentially compounds the problem.²⁴ For example, the MP3 music file compression technology enables music fans to download songs from the Internet to their computers.²⁵ A high percentage of MP3 files on the Internet are unauthorized copies that generate no revenues for the recording industry or artists.²⁶ The film and software industries are also experiencing a dramatic increase in the pirating of their products.²⁷ Worldwide losses due to piracy are estimated at \$20-\$22 billion annually.²⁸ This serious problem for the creative industries is only going to become more pronounced as technology continues to progress.²⁹

CONFLICTING COPYRIGHT PHILOSOPHIES

Technological progress has resulted in new forms of copyrighted material and new ways to access the material.³⁰ This development has resulted in considerable debate as to the appropriate level of copyright protection that should be afforded these new forms and uses.³¹

23. See Lawrence J. Glusman, Comment, *It's My Copy Right? Music Industry Power to Control Growing Resale Markets in Used Digital Audio Recordings*, 1995 Wis. L. REV. 709 (1995) (discussing increased piracy problems due to capability to make "perfect" copies). For example, the RIAA estimates domestic losses due to piracy at \$300 million annually. See Press Release, *RIAA Obtains Half a Million Dollars in Settlement for Unlicensed CD Compilation*, at http://www.riaa.com/PR_Story.cfm?id=165.

24. See NET Act Hearing, *supra* note 3, Statement of Cary Sherman, Senior Vice President and General Counsel of the Recording Industry of America (discussing ease of transmitting millions of copies via Internet).

25. See Vanessa E. Jones, *Rocking the Free Music World*, THE BOSTON GLOBE, Mar. 9, 1999, at E1. MP3 player software products are available for free on the Internet. *Id.* at E6. One such product, the Winamp player, is downloaded 100,000 times per day from <http://www.winamp.com>. *Id.* Forty million copies of the Real Player and five million copies of the Winamp player have been downloaded. David Weiss, *MP3: The Real Deal*, Musician, Apr. 1999, at 42. Estimates concerning the number of MP3 files on the Internet range from 150,000 to 500,000. *Id.* See also Jones at E1.

26. See NET Act Hearing, *supra* note 3, Statement of Cary Sherman, Senior Vice President and General Counsel of the Recording Industry Association of America (providing examples of unauthorized recordings on the Internet). See Mann, *supra* note 22 (relating conversation with James Brown concerning unauthorized downloading of Brown's album). Note however, there are many authorized MP3 files on the Internet as well. See Weiss, *supra* note 25, at 40 (discussing mp3.com website featuring authorized music from 1,500 musicians).

27. See Mann, *supra* note 22. Motion Picture Association of America (MPAA) president Jack Valenti was able to purchase pirate copies of *Titanic* prior to the film's theatrical release. *Id.* Valenti claims that cable modems have the capability to allow a two hour movie to be downloaded "in about two minutes." *Id.* In terms of the problem in the software industry, Wrenn claims that 25% of domestic computer programs are pirated copies. See NET Act Hearing, *supra* note 3, Statement of Greg Wrenn, Senior Corporate Counsel, Adobe Systems, Inc. on Behalf of the Business Software Alliance.

28. See International Intellectual Property Association (IIPA), Description of the IIPA at <http://www.iipa.com/aboutiipa.html> (estimating piracy losses). The IIPA is a coalition that includes: Association of American Publishers, American Film Marketing Association, Business Software Alliance, Interactive Digital Software Association, Motion Picture Association of America, National Music Publishers Association, and the Recording Industry Association of America. *Id.*

29. See Bruce Haring, *Formats Vie for Position Amid High Volume of Ideas*, USA TODAY, Apr. 13, 1999, at D1, D4 (noting Forrester Research's projection that by 2003 digital downloading will be a \$1.1 billion business).

30. See U.S. Department of Commerce, Information Infrastructure Task Force, Intellectual Property and the National Infrastructure: The Report of the Working Group on Intellectual Property Rights (1995), at 5 [hereinafter *White Paper*]. See generally Julie C. Smith, *Comment The NII Copyright Act of 1995: A Roadblock Along the Information Superhighway*, 8 SETON HALL CONST. L.J. 891 (1998).

31. See The Debate on the White Paper at <http://www.harvnet.harvard.edu/online/moreinfo/boyledeb.html>. The debate includes a letter from over 100 law professors to Bruce Lehman expressing their concerns about the White Paper as well as Lehman's response. *Id.*

On one side are the copyright maximalists who have been lobbying for “thick” copyright protection.³² Scientists, librarians, and other groups oppose the maximalist agenda and favor users’ rights over the interests of big business.³³ The maximalist approach is exemplified by Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, who is also Chair of the widely criticized National Information Infrastructure (NII) White Paper.³⁴ In addition to Lehman, several members of Congress, including Senators Orrin Hatch (R-UT), Patrick Leahy (D-VT), and Jon Kyl (R-AZ), as well as House Representatives Bob Goodlatte (R-VA) and Howard Coble (R-NC), have advocated an expansion of Copyright protection.³⁵ Generally, copyright maximalists favor a broadening of copyright protection into previously unprotected areas such as databases, increased criminal penalties for copyright infringement, and protection of digital copies with technology to prevent illegal uses.³⁶ Senator Leahy has stated that without special protections, copyright owners will not release information on the Internet, severely limiting the amount and types of information available to the public.³⁷

The maximalist position is opposed by a group of copyright scholars and business people who believe that recent increases in copyright protection impede scholarship and threaten free speech.³⁸ This group asserts the World Wide Web was formed to allow people access to a global, diverse advanced information system.³⁹ Copyright theorists, such as John Perry Barlow, assert that the recently proposed and passed copyright legislation is an attempt to

32. See Pamela Samuelson, *The Copyright Grab*, Wired Archive, 4.01 – Jan. 1996 at http://www.wired.com/wired/archive/4.01/white.paper_pr.html (detailing maximalist agenda). See also Fairness in Musical Licensing Act of 1998. This amendment to the Bono Act revised the music licensing requirements of Copyright law to exempt a large number of restaurants and retailers. *Id.* Despite its name, this amendment was passed over the strong objection of the music rights agency Broadcast Music, Inc. (BMI) and musical artists as diverse and well known as Little Richard, Willie Nelson, and Kenny G. See BMI - Government Relations, at <http://www.bmi.com/legislation/main2.html> (on file with author). Moreover, the European Community has upheld a complaint filed with the World Trade Organization (WTO) against the Fairness in Musical Licensing Act. See *Legislative Newsflash*, (Jan. 19, 1999) at <http://www.bmi.com/legislation/jan1999.html> (on file with author). The complaint was filed by the Irish Performing Rights Society (IMRO). *Id.* The IMRO argues that the statutory amendment violates the Berne Convention to which the United States is a signatory. *Id.*

33. See Letter, *supra* note 18; Statement of James G. Neal, Dean, University Libraries Johns Hopkins University on behalf of the American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association, Special Libraries Association before the Subcomm. on Courts and Intellectual Property Comm. on Judiciary Hearing on “Collections of Information Antipiracy Act” (1999), at <http://www.house.gov/judiciary/106-neal.htm>; Mann, *supra* note 22.

34. See Letter, *supra* note 18. Also, critics have claimed that the Clinton Administration tried to circumvent Congress by asserting positions prior to Congressional hearings and debate on the issues being held. See MARK LITWAK, *LITWAK’S MULTIMEDIA PRODUCER’S HANDBOOK, A LEGAL AND DISTRIBUTION GUIDE* at 25 (Silman-James Press 1998).

35. See Bono Act, 105 P.L. 298, 112 Stat. 2827 (1998); Collections of Information Antipiracy Act, H.R. 2652 105th Congress (1997); National Information Infrastructure Copyright Protection Act of 1995, S. 1284, 104th Cong., 1st Sess. 1-5 (1995).

36. See Samuelson, *supra* note 32, at 2-3.

37. See 141 Cong. Rec. S14547-05, S14550 (daily ed. Sept. 28, 1995) (statement of Sen. Leahy).

38. See Barlow, *supra* note 21, at 3. See also Fair Use Online at <http://cyber.law.harvard.edu/fairuse/content.html> (last visited Apr. 27, 1999) (discussing difficulties obtaining copyright clearance for materials for Harvard University Law School cyberspace course).

39. See Needham J. Boddie, II, Thomas C. McThenia, Jr., Fred B. Amos, II, and Douglas W. Kim, *A Review of Copyright and the Internet*, 20 CAMPBELL L. REV. 193, 201 (1998).

“preserve by law what can no longer be sustained by necessity.”⁴⁰ An alternative approach is seen in the free software or open source software movement.⁴¹ In 1984, computer programmer Richard Stallman founded the anti-copyright Free Software Foundation.⁴² This organization’s goals are to challenge current thinking about intellectual property and to replace proprietary software with programs people can exchange with each other without copyright restrictions.⁴³ “Free” software means that users can copy or modify it, not necessarily that it is available without charge.⁴⁴ The idea is that users of the free software will make improvements and make the source code to the improved program freely available.⁴⁵ In addition, some legal scholars argue that since copying is an unavoidable incident of using, or even viewing, information on the Internet, “reproduction is no longer an appropriate way to measure infringement.”⁴⁶

The NET Act, therefore, represents a significant step toward accomplishing the maximalist agenda by providing for criminal penalties in response to low levels of infringement and removing the requirement of a profit motive. According to Barlow, the ability of the maximalists to successfully lobby Congress for protective legislation is because big business interests can provide significant campaign contributions.⁴⁷

“Breaking rocks out in the hot sun, I fought the law and the law won.”
— Bobby Fuller Four⁴⁸

CRIMINAL PENALTY BAR

The criminal penalty bar is set too low.⁴⁹ The NET Act was ostensibly passed to close the “LaMacchia Loophole.”⁵⁰ LaMacchia, however, was

40. See John Perry Barlow, *Life, Liberty, and the Pursuit of Copyright?, Round One, Opening Remarks*, Atlantic Unbound at <http://www.theatlantic.com/unbound/forum/copyright/barlow1.htm> at 3 (visited Mar. 24, 1999).

41. See Hiawatha Bray, *Going to the Source*, THE BOSTON SUNDAY GLOBE, Apr. 11, 1999 at F1 (discussing possibility of Microsoft making source code available for new Windows 2000 operating system software).

42. See Mann, *supra* note 22.

43. *Id.*

44. *Id.* Examples of “free” software include Linux, a computer operating system developed by a group of programmers who were led by Linus Torvalds, and Apache, which is used by half of the “server” computers on the Web. *Id.*

45. See Stephan Somogyi, *Free Enterprise – An Open-source Success Story*, Wired (May 1999) at 146 (detailing development of open-source market).

46. See Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 37 (1996). Litman asserts that “making digital reproductions is an unavoidable incident of reading, viewing, listening to, learning from, sharing, improving, and reusing works embodied in digital media.” *Id.* at 21.

47. See John Perry Barlow, *Life, Liberty, and the Pursuit of Copyright?, Round Three, Concluding Remarks*, Atlantic Unbound at <http://www.theatlantic.com/unbound/forum/copyright/barlow3.htm> at 3 (visited Mar. 24, 1999). See also Samuelson, *supra* note 32, at 1 (claiming support of the copyright industry was essential to President Clinton’s re-election bid); Litwak, *supra* note 34, at 25 (noting similarity between position taken by Clinton Administration and position advocated by copyright industries).

48. The Bobby Fuller Four, *I Fought the Law*, Rhino Records (1966).

49. See NET Act Hearing, *supra* note 3, Statement of the Honorable Marybeth Peters, Register of Copyrights, Copyright Office of the United States, The Library of Congress. Peters testified that the criminal provisions should be “limited to situations like LaMacchia.” *Id.* By way of comparison the National Stolen Property Act requires over \$5,000 to trigger the criminal penalties. See 18 U.S.C. § 2314 (1994).

accused of infringing copyrighted material valued at over \$1,000,000, not \$1,000.⁵¹ Assuming willfulness is shown, the \$1,000 bar represents a “bright line” trigger for the criminal penalties.⁵² This new trigger fails to differentiate between various types of non-commercial infringement.⁵³ Moreover, the distinction between civil and criminal liability is dependent on the retail value of the item infringed and the number of copies made.⁵⁴ Once an item is posted to a web site, unless access is restricted, the number of copies downloaded is not within the control of the person who posted the material; the information is available to anyone who visits the site.⁵⁵

The low threshold for criminal liability is a concern for scientists who often post their papers on the Internet in order to enrich the scientific community.⁵⁶ Scientists have engaged in this practice even though the copyright often is owned by the journal that originally published the piece.⁵⁷ Even if a scientific paper is worth only \$1, a scientist with ten articles that are downloaded an average of 101 times each would exceed the \$1,000 criminal penalty bar.⁵⁸ Recently, a former college student sued her professor for posting her paper online without her consent.⁵⁹ If the student can demonstrate that her paper had a retail value of only \$50 and it is downloaded 21 times, under the NET Act the professor could be subject to criminal penalties.⁶⁰ This type of problem is even

50. See NET Act Hearing, *supra* note 3, Opening Statement of the Honorable Howard Coble, Chairman (acknowledging NET Act is a legislative response to *LaMacchia* decision). Since *LaMacchia* was a college student with few assets, he was essentially judgment proof, making civil penalties an ineffective remedy. See Smith, *supra* note 30, at 923. Note that Congressional attempts to pass legislation to close the “*LaMacchia* Loophole” with criminal penalties first began in 1995. See National Information Infrastructure Copyright Protection Act of 1995, S. 1284, 104th Cong., 1st Sess. 1-5 (1995) (providing criminal penalties for unauthorized “transmissions” of copyrighted material); S. 1122, 104th Cong., 1st Sess. 2 (1995) (redefining “financial gain” to encompass “receipt of anything of value, including the receipt of copyrighted works”). These two bills failed to gain enough support to be enacted, but the issues resurfaced in the NET Act. See Pub. L. No. 105-147, 111 Stat. 2678 (1997).

51. *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994).

52. See Prepared Statement of Shari Steele, Staff Attorney, Electronic Frontier Foundation on the Proposed Amendments to Guideline Section 2B5.3 before the United States Sentencing Commission (Mar. 12, 1998), at http://www.eff.org/pub/Legal/NET_Act_sentencing/19970312_eff_ussc_written.testimony. Criminal copyright infringement sentences are determined by reference to § 2B5.3 of the United States Sentencing Commission Guidelines Manual. See Federal Prosecution of Violations of Intellectual Property Rights, at Section III - Criminal Remedies for Copyright Violations [hereinafter *Federal Prosecution*], at http://www.usdoj.gov/criminal/cybercrime/intell_prop_rts/SectIII.htm.

53. See Steele, *supra* note 52. Steele argues that the hobbyist-collector, known as a “warez trader,” is a more culpable non-commercial infringer than the individual who engages in non-commercial software copying, because the warez trader encourages and organizes further piracy. *Id.*

54. *Id.* In addition, the statute of limitations under the NET Act is extended to five years, instead of the three year statute of limitations that is otherwise applicable to copyright litigation. Compare NET Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997) with 17 U.S.C. § 507(a) (listing applicable statutes of limitation). Once the three year statute of limitations has run, parties who feel their copyrighted works have been infringed will be forced to try to use the NET Act or go without compensation. Moreover, although retail value seems like a clear and objective way to measure harm, retail value is generally based on consideration of the item’s suggested retail price and assumes distribution through conventional channels. See *Federal Prosecution*, *supra* note 52, at 5(b). In the context of a “black” market, however, the retail value is generally determined by the price of the item on the “black” market. *Id.*

55. See White Paper, *supra* note 30, at 7.

56. See Kurt Kleiner, *Publish on the Net and Be Damned*, NEW SCIENTIST, Dec. 6, 1997 at <http://www.newscientist.com/ns/971206/npublish.html> (on file with author).

57. *Id.*

58. *Id.*

59. See Louise Marks, *To Catch A Cyber-thief*, Networker, Mar.-Apr. 1998 at http://www.usc.edu/isd/publications/Networker/97-98/Mar_Apr_98/dispatch-cyber_thief.html.

60. *Id.*

more pronounced in the context of someone posting information to a USENET newsgroup, where a million copies may be created by transmitting the information to the group.⁶¹ Assuming that criminal sanctions for copyright infringement on the Internet are necessary, it should take at least \$100,000 to trigger them.

“When I use a word, it means just what
I choose it to mean — neither more nor less.”
— *Through the Looking Glass*, Lewis Carroll⁶²

WILLFULNESS

The criminal penalties are triggered by “willfulness,” a vague term in the context of criminal law which is not defined in the Net Act.⁶³ Judge Learned Hand decried the use of the term “willfulness” in criminal statutes.⁶⁴ The Supreme Court has recognized that “willful” has many meanings.⁶⁵ The majority view is that “willfully” means a “voluntary, intentional violation of a known legal duty.”⁶⁶ In comparison, the minority view holds that “willful” means only an intent to copy, not an intent to infringe.⁶⁷ A uniform interpretation is of particular importance for enforcement of the Net Act because of the Internet’s national user-base and unlimited boundaries.⁶⁸ Moreover, the government has a duty to provide clear notice as to the conduct that will result in criminal punishment.⁶⁹ Numerous groups, including national library and educational organizations, unsuccessfully sought an amendment to the NET Act to clarify the meaning of “willful.”⁷⁰ Even proponents of the bill have expressed concern about the looseness of the definition.⁷¹ Despite the importance of this word, it is not defined in the text of the NET Act.⁷²

61. See David Loundy, *The Good, Bad, Ugly of Copyright Law Rewrites*, CHICAGO DAILY LAW BULLETIN, Jan. 8, 1998, at 5, available at [Congress’ Digital Copyright Conundrums](http://www.leepfrog.com/E-Law?CDLB/1998-Copyright.html), at <http://www.leepfrog.com/E-Law?CDLB/1998-Copyright.html> (on file with author). USENET newsgroups use ad-hoc connections between peers who are interested in a certain subject area. See Boddie, *supra* note 39, at 199.

62. The Oxford Dictionary of Quotations, 191:3 (5th Ed. Oxford University Press 1979).

63. See Pub. L. No. 105-147, 111 Stat. 2678 (1997).

64. See MODEL PENAL CODE AND COMMENTARIES, § 2.02, at 249 n.47 (Official Draft and Revised Comments 1985) (quoting ALI Proceeding 160 (1955)). Hand stated that willfulness is “an awful word! It is one of the most troublesome words in a statute that I know. If I were to have the index purged, ‘wilful’ [sic] would lead all the rest in spite of its being at the end of the alphabet.” *Id.*

65. See *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994). Black’s Law Dictionary lists seven meanings under the word “willful.” See BLACK’S LAW DICTIONARY, 1593-94 (Seventh Ed. 1999).

66. See *United States v. Moran*, 757 F. Supp. 1046, 1049 (D. Neb. 1991).

67. See *United States v. Taxe*, 380 F. Supp. 1010, 1017 (C.D. Cal. 1974). See also Lilli Hsieh, Jennifer M. McCarthy, and Elizabeth Monkus, *Intellectual Property Crimes*, 35 Am. Crim. L. Rev. 899, 917-18 (1988) (noting Second and Ninth Circuits have adopted minority view, requiring only intent to copy, not intent to infringe).

68. See Net Act Hearing, *supra* note 3 (statement of David Nimmer, Irell & Manella, LLP, Los Angeles, CA, on behalf of the United States Telephone Assoc.) (discussing Internet user base).

69. *Id.*

70. See Letter from AALL Washington Affairs, *supra* note 6.

71. See Courtney Macavinta, *Congress Approves Copyright Bill*, CNET News.com (Nov. 18, 1997), at <http://www.news.com/News/Item/0,4,16550,00.html?st.ne.ni.rel> (on file with author). Dave McClure, Executive Director of the Association of Online Professionals, indicated that while the group supported the bill’s intent, they remained concerned about the definition of “willful.” *Id.*

72. See *supra* note 2.

“What I need is a good defense, ‘Cause I’m feeling like a criminal.”
— Fiona Apple⁷³

FAIR USE

Another important issue left unresolved in the text of the NET Act is whether, and in what manner, the affirmative defense of fair use applies.⁷⁴ Fair use is a statutory codification of the judicially created concept that the free use of copyrighted materials is necessary in some situations in order to fulfill copyright’s basic purpose to promote the creation of artistic works for the public’s benefit.⁷⁵ For example, as a general rule, educators and scientists can openly exchange information under the fair use privilege.⁷⁶ At least one commentator has argued that fair use should apply only to competing businesses and that an individual’s normal use of copyrighted material should not require a fair use defense.⁷⁷ In order to be certain the courts will allow a fair use defense to a prosecution under the NET Act, there should be a clear statement to that effect in the text of the statute.⁷⁸ However, even assuming a fair use defense would apply, how would an unsuccessful fair use defense affect the question of “willfulness?”⁷⁹ Under the majority rule, a person who reasonably believes that a fair use defense is applicable cannot have the required intent to violate a known legal duty.⁸⁰ This question is particularly

73. See FIONA APPLE, Criminal, TIDAL (Work 1996).

74. See NET Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997). See also NET Act Hearing, *supra* note 3, Statement of Fritz E. Attaway, Sr. Vice President, Government Relations and Washington General Counsel, Motion Picture Association of America (claiming NET Act does not target activities for which a fair use defense may apply); Samuelson, *supra* note 32, at 4 (claiming White Paper sought to restrict fair-use rights to times use could not be licensed).

75. See The Copyright Act of 1976, 17 U.S.C. § 107 (1988). The four non-exclusive fair use factors are: 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.

Id.

76. See Simons letter, *supra* note 18 (discussing importance of fair use to scientists).

77. See L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987). Patterson claims, “That an individual consumer’s ordinary use of work, as by copying it, constitutes infringement is not just nonsense, it is dangerous nonsense that is wholly contrary to the constitutional purpose of copyright.” *Id.* at 46.

78. See Net Act Hearing, *supra* note 3 (statement of David Nimmer, Irell & Manella, LLP, Los Angeles, CA, on behalf of the United States Telephone Assoc.). Nimmer maintains that since the NET Act was one of Congress’ first attempts to regulate copyright infringement in the context of the Internet, the key terms should be clearly defined. *Id.* See also *Statement on the NII Copyright Protection Act of 1995 Hearing Before the Senate Committee on the Judiciary*, 104th Cong. Available at 1996 WL 10163321 (May 7, 1996) (statement of Robert L. Oakley, Washington Affairs Representative for the American Association of Law Libraries). Professor Oakley stated that any new copyright legislation should feature a restatement of the fair use applications. *Id.*

79. Compare NET Act Hearing, *supra* note 3, Statement of the Honorable Marybeth Peters, Register of Copyrights, Copyright Office of the United States, The Library of Congress (asserting good faith belief in fair use defense would obviate willfulness) with Federal Prosecution, *supra* note 52, at III(A)(1)(b) (arguing proof of willfulness would virtually preclude a fair use defense).

80. See *United States v. Moran*, 757 F. Supp. 1046, 1049 (D. Neb. 1991).

important given the difficulties courts have experienced applying the fair use doctrine.⁸¹

If a person can claim “fair use” and escape criminal penalties, then the law has no teeth since alleged infringers will invariably assert this defense.⁸² Conversely, if when a person’s fair use defense fails, that conduct is deemed “willful” and the criminal penalties apply, then whether or not a person goes to jail will hinge on the courts’ admittedly inconsistent application of the fair use factors.⁸³

The first fair use factor is purpose and character of the use, including whether the potentially infringing use was commercial or non-commercial.⁸⁴ From 1984 to 1994, the Supreme Court maintained that that every commercial use was presumptively unfair.⁸⁵ Even though the Supreme Court had twice quoted *Sony Corp. of America v. Universal Studios* in support of this analysis, in 1994 the Court criticized the Court of Appeals for the Sixth Circuit for applying the presumption.⁸⁶ Instead, the Supreme Court asserted that a commercial use “is a separate factor that tends to weigh against a finding of fair use.”⁸⁷ The distinction between a presumption that a commercial use is not a fair use and commercial use being a separate factor tending to weigh against fair use is unclear.

The Net Act changes the definition of financial gain to include “receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.”⁸⁸ Does the new definition of financial gain change what would have previously been a non-commercial use into a commercial use? Because the statute failed to address the fair use issue at all, there is no answer to that important question.

The fourth fair use factor is an analysis of “the effect of the use upon the potential market for or value of the copyrighted work.”⁸⁹ In *Sony*, the Supreme Court held that when the infringing use “is for commercial gain, that likelihood [of future harm] may be presumed.”⁹⁰ In *Campbell v. Acuff-Rose Music*, the Court clarified that a presumption of market harm was only proper where the

81. See White Paper, *supra* note 30, at 73 (terming fair use “most significant and, perhaps, murky of the limitations on a copyright owner’s exclusive rights.”). For comprehensive analysis of the fair use doctrine, see 2 Paul Goldstein, *Copyright* ch. 10 (2d ed. 1996).

82. See Pub. L. No. 105-147, 111 Stat. 2678 (1997). Note that this approach is only possible if the court follows the majority view on the meaning of “willfulness.” See Hsieh, *supra* note 67, at 917-18.

83. See *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (acknowledging fair use is “most troublesome” issue in copyright law); *Acuff-Rose v. Campbell*, 972 F.2d 1429, 1439 (6th Cir. 1992) (Nelson, J., dissenting) (admitting “hopeless conflict” between fair use decisions).

84. See The Copyright Act of 1976, 17 U.S.C. § 107(1) (1988).

85. See *Stewart v. Abend*, 495 U.S. 207, 237 (1990); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985); *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 451 (1984). In each of these decisions the Supreme Court states, “[E]very [unauthorized] commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.” *Id.*

86. See *Campbell v. Acuff-Rose*, 510 U.S. 569, 585 (1994) (declaring “elevation of one sentence from *Sony*” to “*per se* rule” counter to fair use).

87. See *id.* The Supreme Court in *Campbell* stated that they explained in *Harper & Row* that *Sony* stood for the separate factor approach. *Id.* The sentence quoted with approval and the sentence the Court rejected appeared consecutively in the *Harper & Row* opinion. *Harper*, 471 U.S. at 562. If the commercial question is indeed a separate factor, does this mean there are five basic fair use factors instead of four?

88. See Pub. L. No. 105-147, 111 Stat. 2678 (1997).

89. See The Copyright Act of 1976, 17 U.S.C. § 107(4) (1988).

90. See *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, at 451 (1984).

infringing use is “beyond mere duplication for commercial purposes.”⁹¹ In many cases, prosecutions under the NET Act will be for duplications that are not for commercial purposes, but that meet the more broad definition of financial gain set forth under the statute.⁹² It is possible the courts will apply the market harm presumption under these facts.

Even if courts determine that fair use is applicable to the NET Act, it is likely to be an ineffective infringement defense.⁹³ Based on the NET Act’s definition of “financial gain,” courts may find a defendant’s use was a commercial, reproductive use and therefore market harm is presumed.⁹⁴ In such a situation the defendant loses on three fair use factors and fair use will not apply.⁹⁵ Nevertheless, the fair use defense may prove effective in negating the *mens rea* requirement of “willfulness” and therefore avoiding the criminal penalties of the NET Act.⁹⁶ Since it seems unlikely that this was the intended result, the statute’s flaws are exposed.

UNINTENDED CONSEQUENCES

Several groups, including the Department of Justice, worry that the NET Act is overbroad and likely to have unintended consequences.⁹⁷ The Special Libraries Association noted that the legislation as introduced would implicate passive recipients infringing material as criminals.⁹⁸ In addition, members of the computer industry have expressed concern about accidentally subjecting people and small businesses to criminal penalties for copying software.⁹⁹ David Duncan, one of the attorneys who defended LaMacchia, says that he has no problem with the basic concept of the NET Act, but believes that ease of copying should not increase a person’s culpability.¹⁰⁰ Duncan notes that, in an Internet context, the defendant has little control over the level of copying.¹⁰¹ As

91. See *Campbell*, 510 U.S. at 569, 591 (1994).

92. See NET Act Hearing, *supra* note 3, Statement of Fritz E. Attaway, Sr. Vice President, Government Relations and Washington General Counsel, Motion Picture Association of America (noting NET Act targets Internet piracy of computer games, videogames, and recorded music).

93. Cf. *Storm Impact Inc. v. Software of the Month Club*, 13 F. Supp. 2d 782 (N.D. Ill. 1998) (finding no fair use where defendant copied and sold free shareware despite express restrictions).

94. See Pub. L. No. 105-147, 111 Stat. 2678 (1997).

95. See The Copyright Act of 1976, 17 U.S.C. § 107 (1988).

96. See *United States v. Moran*, 757 F. Supp. 1046, 1049 (D. Neb. 1991) (requiring a “voluntary, intentional violation of a known legal duty” to demonstrate “willfulness”). Note, however, that under the minority rule, the fair use defense would not be of assistance in this area. See *United States v. Taxe*, 380 F. Supp. 1010, 1017 (C.D. Cal. 1974).

97. See, e.g., NET Act Hearing, *supra* note 3, Statement of Kevin Di Gregory, Deputy Assistant Attorney General (Criminal Division), Department of Justice (expressing concerns the statute “may sweep too broadly.”); *Analysis of H.R. 2265, the “No Electronic Theft” (Net) Act*, at <http://www.sla.org/govt/hr2265.html> (on file with author) (assertion by Special Libraries Assoc. that NET Act is “far too broad.”). See Press Release, *supra* note 6 (condemnation by Association for Computing’s U.S. Public Policy Committee of legislation as “poorly drafted” and likely to result in “many unintended consequences.”).

98. See Computer Scientists Urge President, *supra* note 6.

99. See *United States v. LaMacchia*, 871 F. Supp. 535, 544 (D. Mass. 1994) (quoting testimony of Edward J. Black, Vice President and General Counsel of Computer & Communications Industry Association). Black’s testimony was made before the House Judiciary Subcommittee on Intellectual Property and Judicial Administration at a Hearing on S. 893, Aug. 12, 1992. *Id.*

100. Telephone Interview with David Duncan of Zalkind, Rodrigues, Lunt & Duncan, Boston, MA (Apr. 7, 1999).

101. *Id.*

a result, the retail value of the infringement can expand rapidly and exponentially, resulting in criminal penalties.¹⁰²

David Nimmer echoed these concerns during his testimony regarding the NET Act.¹⁰³ He demonstrated his point by citing two court decisions that adjudicated Internet copyright disputes.¹⁰⁴ In one case an ex-Scientologist posted some of L. Ron Hubbard's secret writings to the Usenet.¹⁰⁵ The defendant added some commentary to advance his purpose of ridiculing the work.¹⁰⁶ The court found the defendant's actions did not constitute a fair use.¹⁰⁷ In the other case, the defendant also copied large amounts of the plaintiff's copyrighted material and posted it on the Internet in order to ridicule the work.¹⁰⁸ This court came to the opposite conclusion and found that the fair use defense was applicable.¹⁰⁹ Since both of the copyists acted from a political motive, not a commercial one, neither would have faced criminal penalties prior to the NET Act.¹¹⁰ With the passage of NET Act, however, one of the defendants is a non-infringer while the other may be sent to prison.¹¹¹

A different legal scenario further demonstrates the thin line between non-infringement and being subject to incarceration.¹¹² The federal district court in *Tasini v. New York Times* initially ruled that although the independent writers had not contracted to transfer the electronic rights to their articles, the New York Times and other named defendants did not infringe the copyrights by making a commercial sale to a third party for use in on-line databases and CD-ROMs.¹¹³ The court reasoned that the new use constituted "revisions" of collective works under Section 201(c) of the Copyright Act and was therefore a non-infringing use.¹¹⁴ However, this decision was later reversed by the U.S. Court of Appeals for the Second Circuit and, therefore, the *New York Times* was potentially a copyright infringer under the NET Act.¹¹⁵ Since the defendant sold the rights to copy the complete text of twenty-one articles that each had a value of at least \$50, the NET Act's statutory bar would have been triggered, leaving only the question of willfulness.¹¹⁶

102. *Id.*

103. See NET Act Hearing, *supra* note 3, Statement of David Nimmer, Irell & Manella, LLP, Los Angeles, CA on behalf of the United States Telephone Association.

104. *Id.*

105. See *Religious Tech. Ctr. v. Netcom*, 923 F. Supp. 1231 (N.D. Cal. 1995).

106. *Id.* at 1249-50.

107. *Id.*

108. See *Belmore v. City Pages, Inc.*, 880 F. Supp. 673 (D. Minn. 1995).

109. *Id.* at 678-79.

110. See Pub. L. No. 105-147, 111 Stat. 2678 (1997).

111. *Id.*

112. See *Tasini v. New York Times*, 972 F. Supp. 804 (S.D.N.Y. 1997).

113. *Id.* at 827.

114. *Id.* at 826. The court's analysis somehow ignored the fact that the original publishers had simply sold the rights to the articles and had not themselves published anything except the original versions. *Id.* at 806. The court attached little significance to the fact that none of the plaintiffs had expressly transferred the electronic rights in their articles. *Id.* at 812. It also ignored the huge differences between paper and electronic publishing, including the loss of the original selection or arrangement of the articles when incorporated into an electronic database. *Id.* at 822.

115. See *Tasini v. New York Times*, 192 3d 356 (2d Cir. 1999), *aff'd* 531 U.S. 978 (2000).

116. Pub. L. No. 105-147, 111 Stat. 2678 (1997).

FREE SPEECH

Since the introduction of the NII Copyright Act of 1995 on the Senate floor, critics have warned that adoption of the copyright maximalists agenda would hamper the dissemination of ideas.¹¹⁷ The numerous problems with the recently passed NET Act combine to create an atmosphere that may have a “chilling effect” on free speech.¹¹⁸ Scientists, universities, and attorneys have all raised this concern.¹¹⁹ The chilling effect can be seen in the disclaimers now posted on some web sites.¹²⁰ Some scholars argue there is a need for the First Amendment privilege on the Internet, separate from the fair use doctrine, in order to protect free speech from courts, copyright holders, and Congress, who may seek to restrict it.¹²¹ Since the freedom of the press under the First Amendment extends to individuals and other groups, not just commercial news organizations, such limitations on free speech contravene the First Amendment.¹²²

“They arrested me and they put me in jail
And they called my Pappy to throw my bail”
— Commander Cody and the Lost Planet Airmen¹²³

PRISON

In addition to the legal issues that arise from the deficiencies in the language of the statute, the real world issues cannot be overlooked. Imprisoning non-violent offenders has proven to be a costly and ineffective method of dealing with various types of crime.¹²⁴ Prisons in this country are filled beyond capacity.¹²⁵ According to the U.S. Department of Justice Bureau of Justice

117. See Smith, *supra* note 30, at 893.

118. See Goodin, *supra* note 19 (quoting Samuelson’s assertion that the NET Act will cause institutions to remove information from the Internet rather than risk criminal penalties).

119. See, e.g., Simons letter, *supra* note 18 (cautioning that universities and research labs may remove materials from the Internet); Wendy Grossman, *Downloading as a Crime*, SCIENTIFIC AMERICAN, Mar. 1998, <http://www.sciam.com/1998/0398issue/0398cyber.html> (quoting Peter Jaszi of American University’s statement that the chilling effect generated will be “significant and real”); Shelley M. Liberto, *Congress Patches a Loophole with the Anti-piracy “NET Act,”* at <http://www.wiz.com/issue21/html/article2.html> (noting chilling effect may also effect not-for-profit groups).

120. See Disclaimer, Frisco Drug Education Initiative at <http://www.friscodrugedu.org/disclaimer.htm> (on file with author). The text of the disclaimer includes the following:

In conformance with the No Electronic Theft Act, all materials at this site, whether copyrighted or not, is posted totally free of charge, and not in exchange for receipt, or expectation of receipt, of anything of value, including the receipt of (other) copyrighted works. Some of the information on this web site may be copyrighted and any publication rights should be obtained from the respective owners.

Id.

121. See generally Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet*, 16 CARDOZO ARTS & ENT. L.J. 1 (1998) (discussing conflicts between First Amendment rights).

122. See Religious Technology Center v. Lerna, 908 F. Supp. 1353, 1359 (E.D. Va. 1995)

123. See COMMANDER CODY AND THE LOST PLANET AIRMEN, Hot Rod Lincoln, on LOST IN THE OZONE (MCA Records 1980).

124. See generally David C. Leven, *Curing America’s Addiction to Prisons*, 20 FORDHAM URB. L.J. 641 (1993).

125. See David B. Kopel, *Prison Blues: How America’s Foolish Sentencing Policies Endanger Public Safety*, May 17, 1994, at <http://www.cato.org/pubs/pas/pa-208.html> (noting the average U.S. prison operates at

Statistics, by midyear 1998 one in every 150 U.S. residents was in jail.¹²⁶ The total U.S. incarceration rate is 668 inmates in federal and state prisons and local jails per 100,000 U.S. residents.¹²⁷ The United States incarcerates the highest percentage of its population than any country in the world.¹²⁸ This percentage is six to ten times more than most developed nations.¹²⁹ In 1998, there were over 1.8 million people in our state and federal prisons.¹³⁰ If the growth in the prison rate continues on pace, two million people will live in this country's prisons by the year 2000.¹³¹

Keeping all of these people in prison is an expensive undertaking. The annual cost of housing each federal prisoner costs about \$31,000 per inmate for salaries, expenses, and maintenance; this figure does not include the cost of constructing new prisons.¹³² The cost of constructing new prisons in this country was \$6.7 billion in 1989 alone.¹³³ Since 1982, the United States has spent more money on criminal justice than education.¹³⁴ Even with all of this spending, prison conditions are frequently so overcrowded and dangerous that courts find the conditions to be unconstitutional.¹³⁵ Unfortunately, the overcrowding is partially caused by the high rate of recidivism of prisoners; most offenders return to prison within three years of release.¹³⁶

Sending an individual to prison is an extreme measure and exposes the person to extreme dangers that include rape, murder, and AIDS.¹³⁷ Of the over 290,000 males that are sexually assaulted in prison every year, the most likely victims are young and in jail for the first time.¹³⁸ This is especially true if they

15.4 percent over capacity). Kopel is research director of the Independence Institute in Golden, CO. *Id.*

126. See Darrell Gilliard, *Prison and Jail Inmates at Midyear 1998*, U.S. Department Bureau of Justice Bureau of Justice Statistics, at <http://www.ojp.usdoj.gov/pub/press/pjim98.pr>.

127. *Id.*

128. See Kopel, *supra* note 124.

129. See Jerry White, *US Prison Population Hits 1.7 Million* (Aug. 7, 1998), at <http://www.wsws.org/news/1998/aug1998/pris-a07.html>.

130. See Gilliard, *supra* note 125.

131. See White, *supra* note 128.

132. See Federal Budget, Department of Justice, Federal Prison System, at <http://ibert.org/0000000AP07.html>. The available figures are from 1993 and have most likely increased during the interim.

133. See Leven, *supra* note 123, at 643.

134. See *id.* at 644. See also David A. Harris, *The Realities of Punishment*, 83 J. CRIM. L. & CRIMINOLOGY 1098, 1110 (1993) (reviewing Wilbert Rideau and Ron Wikberg, *Life Sentences: Rage and Survival Behind Bars*) (1992).

135. See Leven, *supra* note 123, at 641.

136. See *id.*

137. See, e.g., Harris, *supra* note 134, at 1104-05 (discussing enslavement of victims as rapists' "wives"); Stephen Donaldson, *The Rape Crisis Behind Bars*, NEW YORK TIMES, Dec. 29, 1993, <http://www.vix.com/pub/men/abuse/usa-prison.html> (on file with author) (detailing cycle of sexual violence that often turns non-violent offenders into dangerous and angry people); Laura Engle, *It's A Crime! HIV Behind Bars*, BODY POSITIVE, Jan. 1999 (estimating nine percent of men and eighteen percent of women in New York State's prison system are HIV-positive).

138. See Donaldson, *supra* note 136. This article is a prime example of the potential for the NET Act to chill free speech. It originally appeared in the New York Times and even if the article's retail value is only \$205, once it is posted on the Internet and downloaded (copied) only five times, the statutory bar for criminal penalties has been met. This article was posted to the newsgroup: soc.feminism where it was evidently picked up and included in the content on the website listed. *Id.* Assuming the New York Times owns the copyright, if a person posts the article to a newsgroup or a web site, he could be sent to prison under the NET Act. Pub. L. No. 105-147, 111 Stat. 2678 (1997). This result could occur even though the article constitutes political speech that also serves an educational function. *Id.* As a result of the NET Act, this type of speech could be restricted through the threat of criminal action.

are in jail for a less serious crime.¹³⁹ Moreover, rape in prison is generally not an isolated act.¹⁴⁰ A prisoner who has been raped becomes a target and can be repeatedly subjected to gang rapes.¹⁴¹ In order to avoid these attacks some prisoners become an inmate's "wife" in exchange for protection.¹⁴²

Women in prison are also frequently subjected to sexual abuse.¹⁴³ Male prison guards have tremendous power over female inmates.¹⁴⁴ The guards can use physical force or threaten the women with physical abuse or denial of privileges in order to obtain sex.¹⁴⁵ Some of these women are impregnated by the sexual misconduct.¹⁴⁶ For both male and female inmates, pursuing a charge of sexual misconduct against another inmate or guard is virtually useless.¹⁴⁷ The accused invariably denies the charge, the internal investigatory procedures are biased and ineffective, and the penalties for such misconduct are low.¹⁴⁸ Moreover, in 1996 President Clinton signed the Prison Litigation Reform Act (PLRA) into law.¹⁴⁹ The PLRA sharply limits the ability of individual inmates, as well as groups organized on their behalf, to litigate for reform of abusive prison conditions.¹⁵⁰ As a result, our expensive and ineffective prison system can actually take non-violent, minor offenders and turn them into angry, violent people, before releasing them back into society.¹⁵¹

In addition to the problem of rape, inmates have the added fear of acquiring AIDS.¹⁵² A recent book on prison and AIDS indicates that in 1994 the U.S.

139. See Donaldson, *supra* note 137.

140. *Id.*

141. *Id.* (noting that very few prison rapes are ever reported).

142. See Harris, *supra* note 134, at 1104. The authors of the book, Rideau and Wikberg, were inmates at Angola, both serving time for murder. *Id.* at 1099. They humanize the horror of this existence with the illustrative story of James Dunn who was incarcerated at Angola when he was nineteen. *Id.* at 1104. An inmate raped and enslaved Dunn, who submitted because he had a short sentence and realized he needed protection. *Id.* When Dunn's owner was released, Dunn had to defend himself against other inmates who wished to re-enslave him. *Id.* at 1104-05. Eventually, he killed one of his attackers and was given a life sentence. *Id.* at 1105.

143. See United States: Sexual Abuse of Women in U.S. State Prisons Prisons [hereinafter *Abuse of Women*], Human Rights Watch at <http://www.hrw.org/summaries/s.us96d.html>.

144. *Id.*

145. *Id.*

146. *Id.*

147. See Abuse of Women, *supra* note 143 (alleging Department of Justice regularly receives custodial sexual misconduct complaints, but does not track or systematically monitor them). See also Donaldson, *supra* note 136.

148. See Abuse of Women, *supra* note 143. In some states sexual misconduct that includes contact between officers and prisoners is only a misdemeanor. *Id.* This sexual abuse of power is therefore a lesser crime than copyright infringement of \$2,501. See The NET Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997).

149. See Abuse of Women, *supra* note 143.

150. *Id.*

151. See Donaldson, *supra* note 137. Violators of the NET Act are likely to be extremely knowledgeable about computers. If hackers can unleash damaging viruses such as the Melissa and Chernobyl viruses without seeking to cause harm, an angry NET Act convict could create a virus designed to maximize damage. See S. Mitra Kalita, *Suspect in Virus Case Never Meant Any Harm, Lawyer Says*, The Boston Globe, Apr. 4, 1999, at A21 (reporting comments of attorney for man accused of releasing Melissa virus); Press Release, U.S. Attorney, Eugene E. Kashpureff Pleaded Guilty to Unleashing Software on the Internet that Interrupted Service for Tens of Thousands of Internet Users Worldwide (Mar. 19, 1998) at <http://www.usdoj.gov/criminal/cybercrime/kashpurepr.htm> (discussing defendant's "hijacking" of Internet users attempting to reach competitors web site); Ross Kerber, *Safe Surfing, Specialists Say Bugs Like Chernobyl Could Be Avoided if Computer Users Took Precautions*, THE BOSTON GLOBE, Apr. 27, 1999, at C1 (discussing damage done to computer hard drives if anti-virus software is not used).

152. See Engle, *supra* note 137.

population had an AIDS incidence rate of 31 cases per 100,000 people.¹⁵³ The average number of HIV positive inmates in state and federal prison was 518 cases per 100,000.¹⁵⁴ In New York, where HIV/AIDS is most prevalent among inmates, roughly 8,000 of the state system's 70,000 prisoners are HIV-positive.¹⁵⁵ Approximately half of the HIV positive inmates have not been diagnosed and receive no medical treatment.¹⁵⁶ Meanwhile, due in part to overcrowding, many HIV-positive prisoners are released.¹⁵⁷

Another serious problem is that prison overcrowding due to increased imprisonment of non-violent offenders is resulting in the premature release of violent criminals.¹⁵⁸ Several commentators and public rights groups have advocated a change in our laws so that the prison system is used primarily to incarcerate violent offenders.¹⁵⁹ Alternative methods of dealing with non-violent offenders have been suggested and are being used in a limited fashion.¹⁶⁰ Alternative methods of reform include: boot camps, intensive supervised probation, electronic home monitoring, community service, and shaming punishments.¹⁶¹ These methods are being tried as recognition grows that increasing the number of prisoners does not reduce crime.¹⁶²

At the same time Congress and big business wants to imprison non-commercial copyright infringers, some of the worst criminals in our country remain free.¹⁶³ For example, Carl Dorelean, is a former member of the Haitian army high command who now lives in Florida.¹⁶⁴ Between 1991 and 1994, the 7,000-man army Dorelean commanded is said to be responsible for the death of 5,000 Haitian civilians.¹⁶⁵ Even though U.S. government spent \$2.2 billion

153. See *Prison and AIDS Book Outlines Challenges and Opportunities Inherent in this Public Health Issue* [hereinafter *Prison and AIDS Book*] (reviewing *Prison and AIDS* by Ronald L. Braithwaite, Ph.D., Theodore M. Hammett, Ph.D., and Robert M. Mayberry, Ph.D., *Prison and AIDS* published by Jossey-Bass Inc. Publishers, San Francisco, 1996), at http://www.cc.emory.edu/WHSC/HSNEWS/releases/oct96/aids_prisons.html.

154. See *id.*

155. See Engle, *supra* note 137. The estimates are based on a seroprevalence study conducted anonymously at one prison. *Id.*

156. *Id.*

157. See *Prison and AIDS Book*, *supra* note 153. For example, half of the 8,000 HIV positive inmates were released from New York State's prisons in 1991. *Id.*

158. See Kopel, *supra* note 124. For example, Kenneth McDuff was in prison in Texas for murdering two boys and raping and murdering a girl. *Id.* In order to deal with space limitations in the prisons, the Texas Parole Board lowered its standards and released McDuff. *Id.* Within a year McDuff was arrested again and charged with three more murders, the first one within three days of his release. *Id.*

159. See Andrew Vachss, *If We Really Want to Keep Our Children Safe*, PARADE MAGAZINE, THE BOSTON SUNDAY GLOBE, May 2, 1999 at 6-7 (advocating release of non-violent prisoners and longer sentences with higher parole standards for sex offenders); Cassandra Burrell, *US: 1 in Every 155 Americans Behind Bars as Prison Population Continues to Climb*, Associated Press, Jan. 19, 1998 (reporting suggestion by The Sentencing Project to use creative alternatives rather than prison); Paula Mergenhausen, *The Prison Population Bomb*, AMERICAN DEMOGRAPHICS, Feb. 1996 at http://www.demographics.com/publications?AD/96_AD/9602_AD/AD880.htm (visited Mar. 30, 1999) (noting high percentage of inmates imprisoned for drug offenses).

160. See Kopel, *supra* note 124.

161. *Id.* See also Jeffrey Rosen, *The Social Police*, THE NEW YORKER, Oct. 20 - 27, 1997, at 174 (explaining the use of shaming punishments as a deterrent to non-violent crimes).

162. See Leven, *supra* note 123, at 650 (declaring "there is no nexus between crime and incarceration rates.").

163. See Steve Fainaru, *US is a Haven for Suspected War Criminals*, The Boston Sunday Globe, May 2, 1999, at A1.

164. *Id.* He was fortunate enough to win \$3.2 million in the Florida lottery. *Id.*

165. *Id.* There is also evidence that the army raped, kidnapped, and tortured civilians. *Id.*

trying to remove the government he represented from power, he has been granted a visa to live in this country.¹⁶⁶ At least 14 other people connected with international human rights abuses have been given refuge in the United States.¹⁶⁷

Finally, in order to put the criminal penalties of the NET Act into context, the sentences being awarded for other crimes should be noted. The average prison time served for first time offenders are: five years for murder, four years for rape, three years for robbery, and two years for aggravated assault.¹⁶⁸ The NET Act provides for prison terms of up to three years for a first offense if the value of the copyrighted material copied exceeds \$2,500.

“WARNING: Federal law provides severe civil
and criminal penalties for the unauthorized
reproduction, distribution, or exhibition of
copyrighted motion pictures.”¹⁶⁹

EDUCATION

The proponents of protective legislation for the copyright industries have emphasized the need for educating people concerning copyright law, especially in the context of the Internet.¹⁷⁰ Even the White Paper proponents concede that the “average citizen has only the most general understanding that there are patents, copyrights, and trademarks.”¹⁷¹ The White Paper adds that intellectual property law is viewed by non-lawyers as “incomprehensible” and that a mere listing of “do’s and don’ts” is insufficient.¹⁷² Meanwhile, the Department of Justice has set up a web page listing “do’s and don’ts” to explain the “Internet Rules of the Road” to children.¹⁷³

The advice provided is contradictory and does nothing to explain how to discern legal uses from infringing uses.¹⁷⁴ For example, the government advises, “DO use the Internet to help with schoolwork. The Internet is . . . like having the world’s largest library at your fingertips.”¹⁷⁵ Confusingly, the government also warns, “Don’t make copies of any copyrighted material . . . Copyrighted works are available (usually illegally) on the Internet. You are

166. *Id.*

167. *Id.*

168. See Kopel, *supra* note 125 (setting forth average time served in Virginia for conviction of listed crimes).

169. See Copyright Warning Notice at the beginning of U.S. videocassettes.

170. See, e.g., NET Act Hearing, *supra* note 3, Opening Statement of the Honorable Howard Coble, Chairman (declaring the public must come to understand the importance of intellectual property rights); Statement of Greg Wrenn, Senior Corporate Counsel, Adobe Systems, Inc. on Behalf of the Business Software Alliance (stating Congress needs to alter people’s attitudes concerning software piracy); White Paper, *supra* note 30, at 203 (calling government’s Copyright Awareness Campaign critical to success of the National Information Infrastructure).

171. See White Paper, *supra* note 30, at 201 (adding many lawyers fail to comprehend this “highly specialized area of the law.”).

172. *Id.*

173. See Internet Rules of the Road, at <http://www.usdoj.gov/kidspage/do-don't.htm>.

174. *Id.*

175. *Id.*

committing a crime if you copy and distribute them.”¹⁷⁶ The Internet Rules of the Road fail to explain that a copy is made automatically when the information appears on the computer monitor. The rules don’t warn that by printing out an article for use in a research paper, another copy is created.¹⁷⁷ No attempt is made to explain that it is not a crime to use Internet research for educational purposes.¹⁷⁸

The government also tells children, “DO be careful when you “download” (copy) programs from the Internet.”¹⁷⁹ The list goes on to advise, “DON’T steal copyrighted computer programs . . . by copying it from the Internet.”¹⁸⁰ No attempt is made to instruct the children on how to tell if software on the Internet is authorized.¹⁸¹ One sensible alternative that has been proposed is the utilization of Hyperstamps to clarify the rights a copyright holder is granting the user of the work posted on the Internet.¹⁸²

UNNECESSARY

The advocates of the NET Act assured Congress that the legislation was necessary in order to prevent the widespread theft of copyrighted material and to properly allow for its protection.¹⁸³ The Software Publishers Association even urged Judge Conaboy of the U.S. Sentencing Commission to adopt an emergency amendment to the sentencing guidelines to allow for the earliest possible implementation of the NET Act.¹⁸⁴ As of October 2001, The U.S. Department of Justice website lists six prosecutions under the NET Act.¹⁸⁵ In four instances, the defendants pleaded guilty and were placed on probation for between two and five years.¹⁸⁶ In the remaining two instances, the defendants

176. *Id.*

177. See Boddie, *supra* note 39, at 225 (instructing “virtually every transmittal of a work across . . . Internet will involve . . . exclusive right to copy.”).

178. See 17 U.S.C. § 107 (1988) (although trying to explain all of fair use exceptions would be quite challenging).

179. See Internet Rules of the Road, *supra* note 173.

180. *Id.*

181. *Id.* Unfortunately, the government’s “Rules of the Road” may do more to confuse children than instruct them. This problem of differentiating authorized from unauthorized material on the Internet also occurs in the music industry. See MIDEM, *supra* note 14. Not all MP3 files are infringing copies. Independent musicians, as well as artists of major record labels, post their songs on the Internet in order to reach their potential audience. This blurs the line between “ethical enjoyment of music and piracy.” *Id.*

182. See Karen L. Kranack, *A Web Developer’s Guide to Copyright and Intellectual Property Issues in Cyberspace*, at <http://www.cs.georgetown.edu/~denning/cosc450/papers/kranack.html>. One company that offers this service is Hyperstamps whose web site is located at <http://www.hyperstamps.com>. The meaning of the hyperstamps must be explained since the symbols act as visual indication that some claim is being made or waived. *Id.* For example, one symbol, with the proper supportive text, indicates that copying of the material is allowed as long as the author is mentioned. *Id.* Another symbol would inform potential users that the material may be copied for any purpose. *Id.*

183. See Net Act Hearing, *supra* note 3, Statement of Greg Wrenn, Senior Corporate Counsel, Adobe Systems, Inc. on Behalf of the Business Software Alliance, Fritz E. Attaway, Sr. Vice President, Government Relations and Washington General Counsel, Motion Picture Association of America, and Cary H. Sherman, Senior Vice President and General Counsel of the Recording Industry of America.

184. See Letter from Mark Traphagen, Vice President and Counsel, Intellectual Property and Trade Policy, on behalf of the Software Publishers Association, to The Honorable Richard P. Conaboy, United States Sentencing Commission (Aug. 31, 1999), at <http://www.spa.org/gvmnt/tos/netguidelines.htm> (last visited Feb. 8, 1999).

185. See Intellectual Property Cases at <http://www.usdoj.gov/criminal/cybercrime/ipcases.htm> (on file with author).

186. *Id.* See also Man Sentenced in Michigan for Offering Software Programs for Free Downloading on

have not yet been sentenced. To date, not one individual has been sentenced to a prison term as the result of a conviction under the NET Act.¹⁸⁷ This supports the argument that the NET Act was passed merely to act as a scarecrow and frighten potential infringers in order to protect big business.

As even some of the original proponents admit, the NET Act will be ineffective.¹⁸⁸ According to Cary Sherman of the RIAA, the record industry has “learned that the threat of criminal prosecution was largely irrelevant.”¹⁸⁹ Sherman has also stated, trying to protect music rights “with a confrontational or piecemeal legislative approach . . . is ultimately futile.”¹⁹⁰ Others have noted that the practice of targeting a few visible scapegoats only serves to diminish people’s respect for the law.¹⁹¹

Both the copyright industries and government can use existing criminal and civil copyright laws, as well as technological means, to deter copyright infringement.¹⁹² Current remedies include injunctions, suing for actual or statutory damages, recovery of attorneys fees for the prevailing party, and criminal penalties.¹⁹³ For example, the RIAA uses the existing laws to obtain injunctions, damages, and to negotiate community service obligations.¹⁹⁴ The group has been very successful obtaining substantial damage awards from infringers.¹⁹⁵ In fact, the RIAA obtained a \$2.5 million dollar pre-litigation settlement from a CD manufacturing plant in Massachusetts, based on allegations of unauthorized mastering of CDs.¹⁹⁶ Utilizing the existing laws, the RIAA can target any illegal manufacturing plants, websites containing unauthorized MP3 files, individuals that download illegal music, sites that link to the offending site, and the search engines that direct users to illegal sites.¹⁹⁷ The RIAA announced it is considering a lawsuit against Lycos over a new service that offers links to MP3 sites.¹⁹⁸ These offending sites can be located through new technologies that have been developed, such as Broadcast Music, Inc.’s “spider” programs that crawl around the Internet searching for web sites with infringing material.¹⁹⁹

CONCLUSION

In conclusion, there is no question that unauthorized copying is a serious and ongoing problem for the software, music and movie industries. The NET Act,

“Hacker Hurricane” Web site (Jan. 30, 2001), at <http://www.usdoj.gov/criminal/cybercrime/baltutatsent.htm>.

187. *Id.*

188. See MIDEEM, *supra* note 14.

189. *Id.*

190. *Id.*

191. See Barlow, *supra* note 21, at 6.

192. See Federal Prosecution, *supra* note 52.

193. See Smith, *supra* note 30, at 914-16.

194. See MIDEEM, *supra* note 14.

195. See RIAA Obtains \$2.25 Million Piracy Settlement from CD Plant Producing Illegal Glass Masters at <http://www.riaa.com/piracy/press/040699b.htm> (on file with author).

196. *Id.*

197. *Id.* See also Click News, Yahoo (April 1999), at 38 (noting police seized computers of The International Lyrics Server, web site featuring popular song lyrics).

198. See RIAA Threatens to Sue Lycos Over MP3, CNET News.com at <http://www.news.com/News/Item/Textonly/0,25,34250,00.html> (on file with author).

199. See Mann, *supra* note 22.

however, is unnecessary and may create more serious problems than it solves. The NET Act is an overly harsh, linguistically unclear law that ignores the basic philosophical precepts of copyright protection. It was created in order to protect the economic interests of big business at the expense of potential personal disaster for individuals. The NET Act should be appealed or modified. The meaning of willfulness needs to be defined, the effect of a fair use defense clarified, and the criminal penalty bar raised significantly in order for the law to comport with both public policy and general copyright policy.