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CoStar Reopens Settled Fixation Issue in Online Digital Environment

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In a little-noticed analysis last year, the U.S. Court of Appeals for the Fourth Circuit undermined a previously unbroken line of cases holding that electronic copies of digital works are "fixed" within the meaning of the Copyright Act if they exist in the random access memory (RAM) of a computer. *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004).

LoopNet was an Internet service provider whose website allowed its subscribers, generally real estate brokers, to post listings of commercial real estate listings—including photographs of the properties—onto the Internet. Copyright holder CoStar claimed that LoopNet was directly liable for copyright infringement because LoopNet subscribers uploaded CoStar's photos with LoopNet's approval.

In the leading case on direct liability of Internet service providers, *Religious Technology Center v. Netcom On-Line Communication Services*, 907 F.Supp. 1361 (N.D. Cal. 1995), the court had held that ISPs were not liable as direct (as opposed to contributory) infringers when their "role in the infringement is nothing more than setting up and operating [an automated] system that is necessary for the functioning of the Internet." Notwithstanding that copyright is a strict liability statute, Netcom held, "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."

LoopNet, like Netcom, has a system that allows subscribers to upload photos. However, before a subscriber-posted photograph is made available on LoopNet's website, the photo is first transferred to a LoopNet computer for review.

> A LoopNet employee then cursorily reviews the photograph (1) to determine whether the photograph in fact depicts commercial real estate, and (2) to identify any obvious evidence, such as a text message or copyright notice, that the photograph may have been copyrighted by another. If the photograph fails either one of these criteria, the employee deletes the photograph and notifies the subscriber. Otherwise, the employee clicks an "accept" button that prompts LoopNet's system to associate the photograph with the web page for the property listing, making the photograph available for viewing.

373 F.3d at 547.

In the part of the CoStar opinion that has drawn the most attention, the Fourth Circuit held that LoopNet should be considered a passive conduit for purposes of direct infringement, notwithstanding its engagement in "accepting" posted photos. "The employee's look is so cursory as to be insignificant," the court stated, "and if it has any significance, it tends only to lessen the possibility that LoopNet's automatic electronic responses will inadvertently enable others to trespass on a copyright holder's rights." *Id.* at 556.

The *MAI* line, fixation and RAM copies

CoStar's controversial determination that an ISP should not be considered an infringer in these circumstances has injected uncertainty into the law regarding volition and direct infringement. Less noticed but of potentially broader significance, the decision also called into question a long line of cases that had firmly brought RAM "copying" within the meaning of copyright law.

Under 17 U.S.C. § 106, a copyright holder has the exclusive right, among others, "to reproduce the copyrighted work in copies." "Copies," however, must be "fixed," and a work is only fixed "when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101.

Is a copy fixed when it only exists within the random access memory of a computer, the memory that disappears when the computer is shut down? The legislative history of the Copyright Act appeared to provide a negative answer: "[T]he definition of 'fixation' would exclude from the concept purely evanescent or transient reproductions such as those …captured momentarily in the 'memory' of a computer." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 52-53 (1976). However, a consistent line of cases beginning with the Ninth Circuit's decision in *MAI Systems v. Peak Computers,* 911 F.2d 511 (9th Cir. 1993), has held that reproductions in RAM are copies under the Act. See, e.g., *Triad Systems v. Southeaster Express Co.,* 64 F.3d 1330 (9th Cir. 1995); *Stenograph L.L.C. v. Bossard Associates, Inc., 144* F.3d 96 (D.C. Cir. 1998); *Advanced Computer Servs. v. MAI Systems,* 845 F.Supp. 356 (E.D. Va. 1994); *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.,* 53 U.S.P.Q.2d 1425 (D. Utah 1999); *Lowry's Reports, Inc. v. Legg Mason, Inc.,* 271 F. Supp. 2d 737 (D. Md. 2003); *Storage Technology Corp. v. Custom Hardware Engineering & Consulting, Inc.,* 2004 U.S. Dist. LEXIS 12391 (D. Mass. 2004).

The principle appears to have been confirmed by Congress's response to the *MAI* line. In *MAI,* an independent service organization booted up a computer system whose software license allowed only the licensee to use the software. Since the ISO's use of the system software was outside the scope of the license agreement, the activity would be deemed to violate the copyrights in the software, assuming—as the Ninth Circuit expressly held—that the reproductions in RAM were "copies" under the Copyright Act. This holding effectively allowed many vendors of computer systems that include software to maintain a monopoly on service of those systems.

Title III of the Digital Millennium Copyright Act reversed this outcome as regards hardware maintenance, by amending § 117 of the Copyright Act to provide that making a copy in RAM does not infringe if the copy is made solely by activating the machine, and is for the purpose of computer maintenance or repair. Since Congress neither expressly rejected the principle that RAM copies were copies, nor extended the new exception to cover copies made for *software* maintenance or repair, the legislative outcome arguably implies Congress's approval of the principle that RAM reproductions are "copies" within the meaning of the Act.

Transitory duration: "qualitative and quantitative"?

Enter *CoStar,* in which the Fourth Circuit concluded "that an ISP has not itself fixed a copy in its system of more than transitory duration when it provides an Internet hosting service to its subscribers." The court explained:

> When an electronic infrastructure is designed and managed as a *conduit* of information and data that connects users over the Internet, the owner and manager of the conduit hardly "copies" the information and data in the sense that it fixes a copy in its system *of more than transitory duration.* Even if the information and data are "downloaded" onto the owner's RAM or other component as part of the transmission function, that downloading is a temporary, automatic response to the user's request, and the entire system functions solely to transmit the user's data to the Internet. Under such an arrangement, the ISP provides a system that automatically transmits users' material but is itself totally indifferent to the material's content. . . . While temporary electronic copies may be made in this transmission process, they would appear not to be "fixed" in the sense that they are "of more than transitory duration," and the ISP therefore would not be a "copier" to make it directly liable under the Copyright Act.

Id. at 550-51.

In this passage, the Fourth Circuit appears to conflate the issues of volition and duration, even while pointing to factors of obscure relevance. Imagine, for example, a computerized real estate listing system in which the textual and photographic output was not a web page display, but a printed newsletter. No matter how automated that system—and no matter how "indifferent" the printing press might be to the content submitted by third parties—it would scarcely make sense to assert that the resulting hard-copy newsletter was, as a result, not fixed. (The Court's reference to "temporary electronic copies" is also, in all likelihood, inaccurate or incomplete, inasmuch as the approved photos were almost certainly stored on LoopNet's server hard drives and backup systems, as well as found in RAM.)

Itself citing *MAI,* the Fourth Circuit did not reject outright the concept that reproductions in RAM could be "copies." But the court's line between copies and noncopies defies understanding: "When [a] computer owner downloads copyrighted software, it possesses the software, which then functions in the service of the computer or its owner, and the copying is no longer of a transitory nature." "Transitory duration," the court went on,

> is thus both a qualitative and quantitative characterization. It is quantitative insofar as it describes the period during which the function occurs, and it is qualitative in the sense that it describes the status of transition. Thus, when the copyrighted software is downloaded onto the computer, because it may be used to serve the computer or the computer owner, it no longer remains transitory. This, however, is unlike an ISP, which provides a system that automatically receives a subscriber's infringing material and transmits it to the Internet at the instigation of the subscriber.

Id. at 551.

It is not clear what the Fourth Circuit intended to be saying when it pointed to the "status of transition" in connection with the qualitative aspect of its "transitoriness" characterization. If the Court meant that a reproduction should be deemed transitory if its creator does not itself employ the reproduction's functionality, it is difficult to understand the basis for this startling conclusion. If on the other hand "status of transition" is just another way of saying that a third party's intentions and will are critical, then the operational meaning would appear to be that non-volitional copies will simply be deemed noncopies—that is, causation and copying go hand in hand. In any event, the opacity of the Fourth Circuit's analysis represents an invitation for creative explication in other contexts that will probably not be long ignored.