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Pop-up Advertising – Grey Areas in the Context of Copyright Law

Vikrant Narayan Vasudeva*

I. INTRODUCTION

Pop-up advertising is a form of interstitial advertisement involving the simultaneous appearance to the computer user of a webpage containing an advertisement which is on top of the webpage, intended to be visited, and covers either part or all of the screen. Usually to reach a desired link the user must first close the advertisement. Companies such as Gator and WhenU have created software that enable interposition of advertisements over existing webpages without the website operator's consent. The software resides on the user's computer and is voluntarily downloaded as part of a bundled software package. As a condition for acquiring the free software, the user may have to accept a licensing agreement that describes the software to be downloaded and alerts the user that advertisements will appear as a result of installation.

This software generates pop-up ads on the basis of the contextual advertising technique, so that when a computer with the software installed is used to browse the Internet, the program selects advertisements “based on a proprietary analysis of the consumer’s immediate interests, as reflected by the consumer’s Internet browsing activity.” Using a directory of commonly used search phrases, commonly visited web addresses, and various keyword algorithms, the software scans the user’s Internet activity to determine whether any of the terms, web addresses, or content match the information in the directory. If a match occurs, the software program obtains an advertisement and pops an ad on the computer monitor. Due to the software’s tracking feature, precise targeting of users is made possible by generating advertisements complimentary to their Internet browsing, yet the software company does not have to share any advertising revenues with the original site that triggered the delivery of its ads. This can certainly have substantial economic impact on the revenues of the website on which such pop-up ads are generated.

This advertising practice has been the impetus for several lawsuits against Gator and WhenU, the two primary organizations practicing such techniques. These lawsuits have raised several issues involving privacy,


3. Id. at 738.
trademark, unfair competition, and copyright. The focus of this article is solely on the copyright issues raised by pop-up advertising.

II. TWO TYPES OF COPYRIGHT ISSUES

The pop-up advertising scenario raises two distinct issues regarding copyright infringement: direct infringement and contributory infringement. Display of ads over the content of plaintiff’s websites has been alleged to constitute direct infringement of the website owner’s exclusive right “to display the copyrighted work publicly” and “to prepare derivative works based upon the copyrighted work,” as protected by the Copyright Act of 1976 (Copyright Act). In contrast, allegations of contributory infringement depend on the argument that the pop-up companies “induce, cause or materially contribute” to consumers initiating the defendant’s software on their computers, which results in an unlawful alteration of the websites.

III. DIRECT INFRINGEMENT

The direct infringement issues involving the right to display the work publicly and the right to create derivative works based on the original have been a major source of discussion and concern in regards to Internet copyright protection.

A. Exclusive Right of Public Display

The argument against pop-up advertisers and supporting the website owner’s exclusive right of public display has its roots in contract theory. It states that the website owners grant consumers a license to use and display the site but prohibits the alteration of the site or its appearance. Thus, exceeding the terms of the license constitutes copyright infringement. The pop-ups alter the plaintiffs’ pages by covering up a portion of each page. This argument, however, has not carried much weight with courts.

First, by definition, to “display” a work means “to show a copy of it.” Courts have held that the right to display is not infringed, because the pop-up ads are displayed in a separate window that has no physical relationship to the window in which the webpage is displayed. The pop-up window never alters or modifies any of the content on any of the webpages; it merely puts something in front of the plaintiffs’ content. The Court further remarked

6. ALS Scan, Inc. v. RemarQ Cmty’s., Inc., 239 F.3d 619, 621 n.1 (4th Cir. 2001) (quoting Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)).
9. Id.
that to hold that computer users are limited in their use of the plaintiffs’ websites to viewing the websites without any obstructing windows or programs would subject countless computer users and software developers to liability for copyright infringement and contributory copyright infringement; since the modern computer environment in which the plaintiffs’ websites exist allows users to obscure, cover, and change the appearance of browser windows containing the plaintiffs’ websites.\(^\text{10}\)

Secondly, because Internet users download the pop-up generating software, it is the users, not the pop-up advertisers, who are ultimately responsible for calling up the advertisements.\(^\text{11}\) One court noted that pop-up companies do not show users any business website through its pop-up program because it is the user who calls up the business website and not the program.\(^\text{12}\) Furthermore, the company shows the computer user its own advertisements, not another business’s copyrighted material.\(^\text{13}\) The pop-up program interacts with the user’s computer to determine whether an advertisement is appropriate, but does not actually reproduce or copy any copyrighted material.\(^\text{14}\) Therefore, it is “[u]ltimately . . . the computer user who controls how windows are displayed on the computer desktop.”\(^\text{15}\) An important aspect of the court’s analysis in this case was that the user had consented to the pop-up software license, which constitutes an authorization of the pop-up ads. As a result, the ads were analogous to actions that other authorized software produces on a user’s computer.

B. Critical Appraisal

In the context of the Internet, the court in *Kelly v. Ariba Soft Corp.* originally found a violation of the display right when “the defendants took an active role in creating the display of the copyrighted images.”\(^\text{16}\) The key point in all of these cases is that courts have acknowledged the right of the copyright owner to have his work displayed in a specific context. The legislative history of the Copyright Act also offers some guidance, noting that “[t]he concept of public display cover[s] not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public.”\(^\text{17}\) The history goes on to add that

12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Kelly v. Ariba Soft Corp.*, 280 F.3d 934, 946 (9th Cir. 2002), aff’g in part, rev’g in part 77 F. Supp. 2d 1116, withdrawn and superseded opinion on denial of rehearing by 336 F.3d 811 (9th Cir. 2002).
“every method by which the images or sounds comprising a . . . display are picked up and conveyed is a ‘transmission’, and if the transmission reaches the public in [any] form, the case comes within the scope of clauses (4) or (5) of section 106.”18 A generous reading in favor of protection would be that when technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of its basic purpose to protect creative expression19

It remains to be determined whether a modification must be permanent or whether a substantial but temporary modification of the work infringes on copyright rights. If a permanent modification is not required, then the screen display observable to the user is certainly altered from what otherwise would have been perceptible.

The court in 1-800 Contacts, Inc. v. WhenU.com found that “any action by a computer user that produced a computer window or visual graphic that altered the screen appearance of Plaintiff’s website, however slight, would require Plaintiff’s permission.”20 However, the problem with the court’s holding is that it fails to acknowledge that although computer users have rights over the display of their screens, based on the Copyright Act of 1976, and these rights are subject to the rights of others. A user cannot use his rights to achieve an objective impinging on the rights of another party.21

The concept of control over the display as mentioned by the court has certain inadequacies. First, being able to close the window and being forced to close the window are two different concepts. Computer users should not have to close unauthorized pop-up advertisements in order to view a desired webpage. Second, the people who use such bundled software packages must agree before downloading the software to allow the launching of pop-up advertisements.22 Such consent has the effect of diluting the user’s autonomy argument because he or she has explicitly surrendered control. This of course carries the counter argument that if a user should have some control over his computer and online experience, it may logically follow that he should also be able to contract away that control to a third-party in exchange for some service or benefit.

The court in U-Haul Int’l v. WhenU.com, Inc. stated that the appearance of a pop-up was equivalent to the display of an email notification window or other pop-up system message.23 This is also questionable. System messages

18. Id. at 5678.
19. Id. at 5680.
21. Id. at 509.
are associated with specific functions of a computer’s working. Pop-up advertisements, on the other hand, are not associated with any function but are an imposition associated with the opening of specific websites that would not ordinarily have occurred. Furthermore, system messages pop-up randomly on the occurrence of an associated function; however, pop-up advertisements are bound to occur on the opening of specific websites.

The *U-Haul Int’l* court noted that pop-up windows have no physical relationship to the window in which the targeted webpage might appear.\(^{24}\) This statement is also questionable. First, the pop-up advertisement does not exist per se; it comes into existence only on the opening of the targeted website. Second, when the pop-up advertisement is clicked, the pop-up ad closes and either a new website is launched or the user’s currently active Internet browser window gets redirected to the designated webpage of the advertiser featured in the ad. This suggests that the windows are not completely separated.

C. Derivative Right

Courts have also disfavored plaintiffs’ derivative right claims. In *Wells Fargo & Co. v. WhenU.com, Inc.*, the copyright holder’s claim that a defendant violated the right to create derivative works was treated as a contributory liability claim rather than a claim of direct liability.\(^ {25}\) In that case, the plaintiffs had failed to make the necessary showing that the defendants, and not the computer users, incorporated the plaintiffs’ web sites into a new work.\(^ {26}\) The court in *U-Haul Int’l* similarly found that the defendants were not liable for contributory copyright infringement since consumers who cause the display of the pop-up advertisements on their screens do not alter plaintiffs’ websites.\(^ {27}\)

In rejecting the derivative works claim in *Wells Fargo*, the court outlined the relevant legal test: “[a] derivative work must incorporate a protected work in some concrete or permanent “form.””\(^ {28}\) Finding that the pop-up window failed this test in *U-Haul Int’l*, the court reasoned that it was distinct from the targeted website and transitory because it “may not be exactly duplicated in . . . another user’s computer.”\(^ {29}\) The court also noted that the pop-ups modified the user’s computer display, and not the targeted website.\(^ {30}\)

24. *Id.*


26. *Id.*


30. *Id.*
As an alternative ground for denying plaintiffs’ motion, the court in Wells Fargo briefly entertained the idea that an “overlapping window could be said to change the appearance of the underlying window on a computer screen.”31 Even if such was true, however, the court found that consumers using defendant’s program still do not create derivative works because the way the sites are viewed is changed only momentarily.32 The court in Wells Fargo held that “[a]s soon as the advertisements are ‘disconnected’—that is, closed or minimized—plaintiffs’ sites revert to their original form.”33

The plaintiffs in Wells Fargo claimed, however, that the modification of the pixels that make up the image on the user’s screen created a derivative work.34 The court found this argument to fail for two reasons. First, the plaintiffs did not have any property interest, let alone a copyright interest in the content of computer users’ pixels.35 Second, the modified pixels were not sufficiently ‘fixed’ so as to qualify independently for copyright, which is a necessary element in finding a derivative work has been created.36 Pixels were updated every 1/70th of a second, which is too transitory to satisfy the fixation requirement.37

As a result, even if the court was to accept that an overlying window on a computer screen modified the appearance of an underlying window, it could not be accepted that computer users prepared a derivative, independently copyrightable work. Finally, the court once again underscored a practical reason for finding no infringement:

[I]f obscuring a browser window containing a copyrighted website with another computer window produces a “derivative work,” then any action by a computer user that produced a computer window or visual graphic that altered the screen appearance of Plaintiff’s website, however slight, would require Plaintiff’s permission. A definition of “derivative work” that sweeps within the scope of the copyright law a multi-tasking Internet shopper whose word-processing program obscures the screen display of Plaintiff’s website is indeed “jarring.”38

33. Id. at 770.
34. Id.
35. Id. at 770-71.
36. Id. at 771.
37. Id.
D. Critical Appraisal

The Wells Fargo court's view notwithstanding, pop-up windows do not always appear to be distinct from the windows over which they pop up. In certain instances, clicking on a pop-up redirects the primary page displaying a company's legitimate website.

Although the "transitory" finding was relevant because derivative works must be independently copyrightable (and to be independently copyrightable, a work must be fixed), the court mischaracterized this requirement. A work is fixed when it is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."\(^{39}\) A website display certainly exists long enough to be perceived by the user for as long as the user wants to view it. Furthermore, contrary to the U-Haul Int'l court's assertion that the appearance of a pop-up advertisement "is a transitory occurrence that may not be exactly duplicated" on a particular computer, the tendency for the same advertisements to appear attached with the same keywords on a specific website is quite high.\(^{40}\) Alternately, it is not simply the same pop-up ad which should occur; it is just the concept of viewing a window within a window abstractly, and this experience is certainly being duplicated every time. Further undercutting the courts' approach to the fixation issue, the House Report accompanying the 1976 Copyright Act states that the right to prepare derivative works is broader than the right of reproduction "in the sense that reproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form."\(^{41}\) This seems to demonstrate that derivative works must be fixed to be copyrighted, but not for purposes of infringement.\(^{42}\) In Lewis Galoob Toys, Inc. v. Nintendo, the Ninth Circuit reached the same conclusion, stating that "[a] derivative work must be fixed to be protected under the Act . . . but not to infringe."\(^{43}\) According to the court, this distinction is justified because the definition of "copies" in the 1976 Act expressly incorporates the fixation requirement, while the definition of "derivative work" does not mention the fixation requirement.\(^{44}\)

42. Id.
43. Lewis Galoob Toys, Inc. v. Nintendo of Am., 964 F.2d 965, 968 (9th Cir. 1992) (emphasis original).
44. Id.
The court's finding that the pop-ups only change the computer display and not any of the targeted website's copyrighted materials is a limited perspective. Certainly, the pop-ups do not physically alter the targeted website. They do, however, alter the functionality of the targeted website and limit its intended expression. They cause the click-through sequence pertaining to a website to be restructured, thus altering the user's experience and creating a new format for presentation. The sequence of screens presented by a site constitutes a copyrightable work, and due to an unauthorized insertion of another window in that sequence, the exclusive right to derivative works has been infringed.

"Derivative works" include those "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."45 "A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'"46 The text of the statutory provisions seems broad enough to cover modifications to a website's functionality.

Furthermore, the pop-up software does use the websites as a launching pad for its work and, as was noted in Worlds of Wonder, Inc. v. Veritel Learning Systems, the pop-up ad software would be worthless if it could not use other companies' websites as a trigger to deliver its pop-ups to users' screens.47

Finally, while there might not be any observable direct physical interaction, the pop-up software certainly does employ indirect interaction by looking for a keyword match between the user's commands and its directory, with the user's commands in turn being a derived expression of the targeted website. This is then employed to launch a pop-up window, thus creating a new expression based on and modifying the older expression—exactly the sort of modification against which the derivative use right was designed to protect.

IV. OTHER POSSIBLE ALLEGATIONS

To date, plaintiffs in these cases have raised issues of copyright infringement based only on the display right and the derivative right issues. However, in certain instances, certain other copyright issues could also be explored.

46. Id. (emphasis added).
A. Performance Right

The Copyright Act provides that "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works," the copyright owner has the exclusive right to perform the work publicly. 48 To perform a work means "to recite, render, play, dance or act it, either directly or by means of any device or process." 49 Such devices and processes may include "all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented." 50 To perform a work publicly means "to transmit or otherwise communicate a performance . . . of the work to [any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered] 51 or to the public, by any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places." 52 Based on the principle of ejusdem generis, "otherwise communicate" has been construed as relating to "transmit." 53 Therefore, "one must conclude that under the transmit clause a public performance at least involves sending out some sort of signal via a device or process to be received by the public at a place beyond the place from which it is sent." 54 Thus, the act of broadcasting a work is itself a performance of that work. 55 Furthermore, even if such a broadcast is received in the privacy of an individual's home, it is nevertheless a "public" performance. 56 In the case of a motion picture or other audiovisual work, a performance occurs by act of "show[ing] its images in any sequence or mak[ing] the sounds accompanying it audible." 57

In a recent case, the defendants installed a device that monitored the signal received by a television set. 58 When the signal switched from a program to an advertisement, the device caused the television to display content provided by the device, typically other advertisements. When the show re-

53. Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc., 866 F.2d 278, 281 (9th Cir. 1989).
54. Id. at 282.
56. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 157-58 (1975).
started, the device switched the television’s display back to the content provided by the signal. Defendants’ motion to dismiss the complaint on the ground that it was not an infringement of the broadcaster’s performance right was denied.\textsuperscript{59}

In the Internet context, the situation described above is analogous to a pop-up advertisement covering the advertisement on the targeted website and displaying its own advertisement. A website may not always be text-related. For example, in certain instances the website may involve flash movies or a live feed. In some instances, as soon as a website is opened, such performances commence without any initiation by the user. In such an instance, if an advertisement juxtaposes on the website, then the performance right of the website has probably been infringed.

B. Digital Performance Right in Sound Recordings

Section 106(6) of the Copyright Act creates the right “in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”\textsuperscript{60} Through “the ‘Digital Performance Right in Sound Recordings Act of 1995,’ Congress conferred performance rights on sound recordings.”\textsuperscript{61} When section 106 was drafted in 1976, it contained five particular rights, and the performance right was circumscribed to exclude sound recordings.\textsuperscript{62} Instead of simply amending that feature to add sound recordings to the works that could claim a public performance right, Congress added a new paragraph to section 106 conferring the right “in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”\textsuperscript{63} This reference in section 106(6) to “digital audio transmission” suggests a qualitative limitation on the right. This law attempts to create a public performance right in sound recordings limited to: (1) transmissions, as opposed to live performances (2) of audio works, as opposed to audiovisual works, (3) that occur in digital format, as opposed to analog and (4) even as to digital audio transmissions, attaching at enactment almost exclusively to subscription and interactive services.\textsuperscript{64}

Many websites play music online and such performances often begin without any initiation by the user. In such an instance if an advertisement juxtaposes on the website, then the digital performance right of the website has probably been infringed.

\textsuperscript{59} Id.


\textsuperscript{61} See 2-8 \textsc{M} \textsc{e} \textsc{l} \textsc{v} \textsc{i} \textsc{l} \textsc{e} \textsc{v} \textsc{i} \textsc{l} \textsc{e}, \textsc{B}. \textsc{N} \textsc{i} \textsc{m} \textsc{m} \textsc{e} \textsc{r} \textsc{e} \textsc{r} \textsc{e} \textsc{s}, \textsc{N} \textsc{i} \textsc{m} \textsc{m} \textsc{e} \textsc{r}, \textsc{N} \textsc{i} \textsc{m} \textsc{m} \textsc{e} \textsc{r} \textsc{o} \textsc{n} \textsc{C} \textsc{o} \textsc{p} \textsc{y} \textsc{r} \textsc{i} \textsc{t} \textsc{r} \textsc{i} \textsc{c} \textsc{t} \textsc{r} § 8.21[B] (2008).

\textsuperscript{62} See id.

\textsuperscript{63} See id. at § 8.21.

\textsuperscript{64} Id.
C. Moral Rights

Moral rights in the online context are not yet recognized; however, with the virtual presence of every physical embodiment increasing every day, an accommodation may have to be reached soon. This becomes more evident as online interfaces emphasize the aesthetics of the interfaces over any other aspect.

A concept known as the integrity right grants the author a right to prevent distortion, truncation, and mutilation of his work. Nimmer recognizes that “the exclusive right ‘to prepare derivative works’ could be conceptualized as an author’s integrity right, particularly when augmented with provisions and interpretations arising under statutes other than the Copyright Act.”

Furthermore, the case of Gilliam v. American Broadcasting Companies suggests a deeper interest in an author’s integrity. In Gilliam, the court observed that “the ability of the copyright holder to control his work remains paramount in our copyright law” and that “copyright law should be used to recognize the important role of the artist in our society.” The court held it likely that the plaintiffs would succeed in demonstrating “an actionable mutilation” of their work. An action “seeking redress for deformation of an artist’s work” is one that “finds its roots in the continental concept of droit moral, or moral right, which may generally be summarized as including the right of the artist to have his work attributed to him in the form in which he created it.”

In United States v. Microsoft Corp., the court also touched on copyright law in addition to the well-known antitrust concerns. The court ruled that Microsoft protected the monopoly in its Windows operating system by placing illegal conditions on its licenses with Original Equipment Manufacturers (OEMs). Microsoft defended the license restrictions by construing Gilliam to lay down the blanket rule “that a copyright holder may limit a licensee’s ability to engage in significant and deleterious alterations of a copyrighted work.” Though rejecting Microsoft’s basic copyright defense as borderline ‘frivolous,’ the court accepted Microsoft’s argument as applied to one hypothetical fact pattern: “[w]e agree that a shell that automatically prevents the Windows desktop from ever being seen by the user is a drastic

65. Id. at § 8D.02.
67. See id. at 21-23.
68. See id. at 23-24.
69. Id. at 24.
70. See United States v. Microsoft Corp., 253 F.3d 34, 63 (D.C. Cir. 2001).
71. See id.
72. Id.
alteration of Microsoft’s copyrighted work, and outweighs the marginal anticompetitive effect of prohibiting the OEMs from substituting a different interface automatically upon completion of the initial boot process.”

D. Fair Use Analysis

If copyright infringement is found, then it is likely that the pop-up advertisers will raise a defense of fair use. Section 107 of the Copyright Act, which embodies the doctrine of fair use, states that “the fair use of a copyrighted work . . . is not an infringement of copyright.” Section 107 further provides examples of the kinds of use that might be fair, including uses “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” Fair use is an affirmative defense in which the defendant has the burden of proof and persuasion. However, the applicability of the doctrine is limited. For example, the court in *Universal City Studios, Inc. v. Reimerdes* declined to extend the fair-use defense. That court concluded that Congress, in its legislative history, could not have meant that the fair use defense applied to actions where the defendants are not sued for copyright infringement but for offering and providing technology designed to circumvent technological measures that control access to copyrighted works. The distinction here is that an unauthorized advertiser may be entitled to non-infringing use of their advertisements to serve the public good and social science.

Finally, section 107 directs that a fair use defense should include an analysis of four factors: (1) the purpose and character of the use, (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. The factors contained in section 107 are merely by way of example, and are not an exhaustive enumeration. This means that factors other than those enumerated could have a bearing upon the determination of fair use.

Under the first factor, if the nature of the use is commercial, it is presumptively unfair. Pop-up advertisers use websites to launch not just com-

73. *Id.*
75. *See id.*
76. *See University City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 323 (S.D.N.Y. 2000).*
77. *Id.*
79. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (2008).
mmercial activity, but commercial activity that interferes with other companies' commercial use of their own websites; thus, this factor discourages a fair use finding. Using a mode of communication free from the fees and expenses that are usually incurred by the authorized advertiser not only impedes the existing advertising commerciality but also manipulates copyrighted work for a commercial advantage. Furthermore, an advertisement to sell any product is undoubtedly commercial; its sole purpose and method of publication is designed to generate economic profit. Another issue in the purpose and character analysis is to what extent the unauthorized advertiser's use of copyrighted elements is "transformative."81 Here, the query is "whether the new work merely 'supersede[s] the objects' of the original creation, ... or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."82 An advertisement may add new expression, meaning, and message, but the infringing work heavily depends on the copyrighted website to transmit the unauthorized advertisement. Without the original copyrighted work (the targeted website), the unauthorized advertisement could not exist. Thus, without the copyrighted work and the website, there would be no work to infringe upon. Such use is exploitive and should fail on this factor.

The second factor suggests use is unfair when copyrighted work is used informatively rather than functionally.83 This factor would likely favor the pop-up advertisers, given that the use of plaintiffs' web addresses to trigger advertisements is more of a functional use than an informative use. However, this may not hurt a plaintiff's case because the second factor "typically recedes into insignificance in the greater fair use calculus."84

The third factor weighs against fair use if the entire work is copied and otherwise leaves to the court's discretion the determination of whether too much of the work has been used. As a pop-up is entirely dependent on a user's call to a plaintiff's webpage, the entire targeted website is "used" in the process that generates a pop-up. This factor would thus go against a finding of fair use.

Finally, the fourth factor favors a finding of unfair use when the alleged infringer's use of the material usurps demand for the original copyrighted work. Since the intent of the pop-up software companies is to divert users from the plaintiffs' sites to their competitors', this factor would appear to support a finding of unfair use. Even if the economic harm is not immediate or imminent, a future effect on the market is certainly probable, which is inconsistent with a finding of fair use. Thus, since factors one, three, and four tend to disfavor pop-up software companies' fair use claim, it is unlikely

82. Id.
84. Campbell, 510 U.S. at 586.
that a pop-up generator will be able to claim this defense if a court finds a copyright infringement.

E. Contributory Infringement

"To make a prima facie case for contributory copyright infringement there must actually be direct infringement." Finding that the plaintiff's claim of copyright infringement failed, the Court in *U-Haul Int'l* concluded that the claim for contributory copyright infringement failed for the same reasons.

Contributory liability is imposed on a defendant who, "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." Prerequisite to contributory liability for copyright infringement is that the defendant must have aided or encouraged someone who actually engaged in copyright infringement. The knowledge element is satisfied if the defendant should have known about the infringing activity, including where a defendant is "willfully blind." In the Ninth Circuit's words, "providing the site and facilities for known infringing activity is sufficient to establish contributory liability."

If a conclusion of copyright infringement is reached a similar conclusion as to contributory infringement would probably follow. The pop-up advertiser's device served no other purpose than to encourage the alleged infringing behavior, and it was capable of no non-infringing use.

V. Conclusion

As technology keeps evolving, the race to keep step with it is becoming increasingly more difficult for traditional laws. The myriad of implications become quite difficult to balance with the traditional concept of law. Copyright law has its basis in the evolution of technology, from the printing press to the Internet. However, as a technologically driven law, copyright law seems to be advocated and propagated more by the legislature than by the judiciary. The judiciary has always sought an accommodation of rights based on traditional concepts, seeking then to apply them to the future. Pop-up advertisements are a very minor embodiment of this quandary. However, here too, the judiciary seeks to apply traditional analogies to a new medium. Derivative and display rights acquire a completely new meaning with a transition in this new online medium of communication. This is especially so in a versatile and dynamic medium such as the internet. Accordingly, the nec-


87. *Matthew Bender*, 158 F.3d at 706.

88. Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996).
essary resolution may have to be arrived at legislatively, rather than judi-
cially. In any case, while legislatures scramble to keep up with ever-
changing technological realities, courts must undertake the difficult task of
promulgating rules which can be readily applied to new technologies that are
outside the scope of old copyright statutes.