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ABSTRACT

This paper discusses the aspects of copyright law pertinent to World Wide Web users. Topics addressed include: the purpose of copyright law; what can be copyrighted, including categories that do not qualify for copyright protection; notice of copyright; copyright infringement; and the factors that determine fair use, (purpose and character of use, nature of the copyrighted work, quality and quantity of the work used, and effect upon the potential market for the copyrighted work). The following Frequently Asked Questions (FAQs) about copyright law applied to the Web are discussed: (1) Can I freely copy anything that is on a Web page? (2) Can I freely link to Web sites? (3) Can I freely download or print a resource posted on the Web? (4) Can I freely scan images and text and use them on my Web page? (5) Can I use the Web to provide easier access to electronic documents? and (6) Can I freely post other people's e-mail on my Web page? References include case law, federal statutes, law review articles and periodicals, constitutional law, and Internet sources. (Contains 22 references.) (MBS)

Copyright and the World-Wide Web

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Abstract

A basic understanding of copyright law is important for all who write, perform, create, conduct research, and teach. This issue is also becoming increasingly relevant to web developers and users of web pages. Because copyright law is frequently misunderstood, one can easily violate the law and risk the consequence of being sued for copyright infringement. This essay will address the aspects of copyright law pertinent to web users.

The Purpose of Copyright Law

The purpose of copyright law is to give authors an incentive to create literary, artistic and multimedia works by granting five exclusive rights to the original production. These intellectual property rights are granted to authors of copyrighted works by virtue of the 1978 Copyright Act (Title 17 US Code). These exclusive rights are (1) the right to reproduce or copy the work, (2) the right to prepare derivative works, (3) right to distribute copies by sale, transfer of ownership, rental, or lease, (4) the right to perform the work publicly, and (5) the right to display the work publicly.

What Can Be Copyrighted

Anyone who creates a work of original authorship can claim a copyright. In fact, an author owns a copyright the moment the work is fixed to a tangible medium (paper, computer disk, video tape, cassette tape, web pages, etc.). Works eligible for copyright protection include (1) musical works, (2) dramatic works, (3) literary works, (4) choreographic and pantomime works, (5) motion pictures and audio-visual works (most web projects are audiovisual-based), (6) pictorial, graphics, and sculptural works, and (7) sound recordings.

The following categories do not qualify for copyright protection:

1. Works not fixed in tangible form (ideas in your mind)
2. Titles, names, short phrases, slogans, familiar symbols and designs, and letters
3. Ideas, methods, procedures, systems, concepts, principles, discoveries, as distinguished from descriptions, explanations, or illustrations (must be the expression of an idea)
4. Works consisting entirely of information that is common property and contains no original authorship (information that is purely factual in nature)

Notice of Copyright

Once the work is fixed to a tangible medium, the creator is afforded all rights under the law (unless the work was created for an employer as part of the creator's job duties). A copyright mark is not required unless the work is published and copies will be publicly distributed for sale. Copyright law does not require advanced permission of the copyright office in order to put the copyright notice on those works. Actually, it is the copyright owner's responsibility to apply the copyright notice to the work. The Copyright Office recommends that the notice contain three elements: (1) symbol (c), the letter C in a circle (©), the word copyright, or the abbreviation "copr.", (2) year of the first publication of the work, and (3) name of the owner of the copyright.

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By giving notice of copyright (such as at the bottom of a web page) and registering the works, legal advantages become available. Notice along with registration allows the copyright owner to defend his valuable copyrights in Federal Court. The owner is also entitled to greater remedies in the form of damages and attorney fees.

Copyright Infringement

Copyright infringement occurs when a person exercises another's exclusive rights without permission. Copyright infringement requires the claimant to show (1) proof of an existing copyright (expression of idea and fixation) and (2) the exercise of another's exclusive rights without permission.

When multimedia developers scan images and download pages off the Internet, they have exercised the owner's right to reproduce the work. The right to prepare derivative works is further violated when developers use the copied work in their new creations. When these rights are exercised without permission, the second factor of the infringement analysis is satisfied. Once these factors are established, the faculty member must be able to prove that his use is justified under the doctrine of fair use. The next section explains this defense.

Fair Use - The Educator's Defense

The fair use doctrine of the Copyright Act (Title 17 US Code, Section 107) permits certain uses of the copyrighted works without the owner's consent. The statute provides that a copyright is not infringed if copies of a protected work are made for purposes of (1) Criticism, (2) Comment, (3) News writing, (4) Education, (5) Scholarship (student use), or (6) Research.

The fair use doctrine is the affirmative defense to a copyright infringement claim. It is commonly misunderstood that all academic uses fall underneath fair use. Nothing could be further from the truth. Even if the use is educational, it must pass a four-prong test set forth in the Copyright Act. Congress created this test in order to balance the interests between the author's incentive to create intellectual property and society's need to educate the public. The four factors include (1) purpose and character of use, (2) nature of the work used, (3) quality and quantity of the work used, and (4) market effect.

Purpose and Character of Use

Educational use is looked at more favorable than uses for commercial gain, but this factor is not determinative. Where new creations are the subject of scrutiny, the work's transformative nature can also play into the multimedia developer's favor. Transformation occurs when work is taken from one form (painting or drawing) and expressed in a different form (like an audiovisual work). Transformation also occurs when certain elements of a work are changed in order to change the expression of the work. An example might be where the original work's colors are changed, or where certain tangible images in the work are added or deleted.

The Nature of the Copyrighted Work

Uses of works that are factual are looked upon more favorably than works that are fictional, imaginative, or creative in nature. For example, lets suppose that I scanned an image of a "Dilbert" cartoon character off a web page that I came across and placed the image in my own web page. This factor would not help me because cartoons are considered to be very imaginative and creative in nature.

The Quality and Quantity of the Work Used

Quantity is measured by comparing the amount of the work used to the entire work. While there are no established black-letter rules to us exactly what percentage of a work can be used, it is well established that copying an entire work is usually forbidden. As a rule of thumb, most legal experts recommend that users restrict their usage of copyrighted works to less than 5% of the entire work.

Effect Upon the Potential Market for the Copyrighted Work

Many copyright authorities suggest that this is the most important factor in the fair use test. The court takes into account all possible affects of the infringement upon the owner's ability to effectively market the work. For example,

let's suppose that I came across a very informative article about how copyright relates to visual art. Let's also suppose that I took most of the text from this article and placed it into my own web page or PowerPoint presentation. A court might decide that I should have paid a permission fee in order to use the work.

All four factors are considered by courts in determining whether a person's conduct falls within the scope of fair use.

FAQs About Copyright Law Applied to the Web

Use of the World-Wide-Web has raised new concerns relative to copyright law and fair use. Those issues relate to frequently asked questions (FAQs) about all types of resources available on the Web.

FAQ #1: Can I freely copy anything that is on a web page?

Making materials readily accessible to others via the Web does not mean a person has relinquished copyright. Works are considered public domain only if the author expressly puts the work in the public domain, the copyright has expired and was not renewed, the information is purely factual, or the information is a federal government document (report, statute, treaty, law, etc). Even though materials on the Web can be used freely by anyone, it is still important to consider fair use before copying anything seen on the Web. The amount of work copied will be very important in considering whether fair use applies. It is also important to remember that the nature of the work copied (factual or fictional) will also be important. When in doubt, ask permission.

Since it is sometimes difficult to discern whether or not material on a web page or even a web server is copyrighted, it is very important that ownership rights be considered. Many web pages now have the name of the WebMaster or other person to be contacted for questions regarding the content on the page and its subsequent use. Even if a person has permission to copy something from a web page, the entire resource may not be usable if the web page incorporates the work of multiple authors. Unless the person granting permission actually owns all right to the work, the person copying the web page could be held liable for infringement.

FAQ #2: Can I freely link to web sites?

Linking to other web sites raises several questions about copyright. It can be argued that a URL is not copyrightable because of its functional character for locating a web page. However, this type of link established for a web site is still a concern. Because of issues related to copying and displaying an image, it is recommended that an IMG link not be made to a web site without permission. Of course, practical concerns like the image being deleted or changed without your knowledge could also lead to problems for others utilizing your web page.

Most links used on web pages are known as HREF links because they reference other screens and cause them to appear when activated. This practice is acceptable because it promotes easy access to related groups of material and information. One exception to HREF links has evolved with the recent development of frames for web pages. The controversy centers upon others surrounding the content of a frame with advertising or editorial content, which can be misleading or confusing to the viewer relative to the original intent of the content.

FAQ #3: Can I freely download or print a resource posted on the Web?

Although information on the Web is easily accessible, one must assume that this information is protected by copyright unless it is known that the copyright owner has granted express permission to copy the work, the information is a factual government document, or the copyright has expired. Fair use limitations for materials found on the Web are essentially the same as the fair use of materials disseminated by any other means. Single copies of short items for a person's own study may fall within fair use. It has been argued that if the work is freely available on the Web, making copies will have little to no effect on the market because no commercial market for the work has been established or claimed.

However, some publishers argue that the potential market for charging Internet users for each copy means that any copying hinders the market. This is an issue of intense debate. Whenever in doubt as to whether the use qualifies for fair use protection, ask permission from the Webmaster or copyright owner.

FAQ #4: Can I freely scan images and text and use them on my web page?

The short answer is no, especially since it also depends upon the amount of materials being scanned and their intended use. While it is easy to scan images or text out of magazines, books, or other sources and place computer readable copies on one's web page, the fact that it is technically easy does not make it legal. Utilizing fair use is very problematic when it comes to images. It is arguable that fair use supports the use of images that make up a small part of the web page from which the image is taken. However, it is also arguable that the image itself constitutes a single copyrighted work, especially where the image is highly creative. The safest course of action is to obtain permission from the copyright owner before using any image found on the Internet.

FAQ #5: Can I use the Web to provide easier access to electronic documents?

Access restrictions has the greatest influence on tipping the factors in favor of fair use. A problem with making text available on any network is that it can be accessible by readers far beyond the intended audience. Restrictions on access through passwords or other systems can enable the instructor to argue that the purpose is solely to benefit the students and not to provide access for others. Restrictions can also limit the potential adverse effect on the market for the original. By limiting the range of users who may find the document, the instructor can minimize or eliminate any possibility that someone will retrieve the work from the network instead of purchasing a copy. Some critics of electronic reserves have argued that the educational purpose and the minimal market effects cannot be controlled because the electronic medium allows users to print, download, and transmit copies at little cost or effort and thereby undermine the restricted access. The instructor must closely monitor the nature of the material posted on reserves and the amount of material from the original source put on reserves.

FAQ #6: Can I freely post other people's e-mail on my web page?

No. To have a copy of the e-mail is not the same thing as to own the copyright. In fact, almost all e-mail, as written, is copyrighted. To qualify for copyright protection, a work must be an original expression of an idea fixed to a tangible form of expression. Most e-mail would meet this requirement. However, e-mail is not always confidential. One can usually report on what is sent by e-mail by spoken word. Also, one who sues over an ordinary message might not get damages because the message has no commercial value. However, to stay strictly within the law, get permission before using another person's e-mail message.

Summary

Issues related to copyright and fair use relative to the Web are still being discussed because of their complexity. While there is clearly implied permission to view web pages and to utilize web links, such an implied license does not authorize the public to do whatever is desired with material found on the Web. This approach is intended to protect the user as well as the developer, but the matter is far from resolved.

Each case concerning possible infringement of copyright brings a unique perspective to consider when judging an appropriate course of action. Clearly, one common sense way to solve the problem of potential liability is to obtain permission from the copyright owner. The legal system also permits some kinds of uses of copyrighted materials as long as it fits within the scope of the fair use test. The best solution would seem to be the creation and development of all of your own materials so that you own the copyright. Although the last option is not realistic for everyone, it is something to consider for the future as the copyright and fair use debate continues.

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