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# Copyrighting Cyberspace: Unweaving A Tangled Web

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## I. WHAT IS THE PROBLEM?

### The Basics

The Internet was once a research project. Today it is the largest computer system in the universe. Also known as the *net* or *cyberspace*,<sup>1</sup> this super highway to the stars offers a variety of useful information as one navigates down its ocean of URL's, browsers and hyperlinks. With advanced technology comes new legal issues to battle. The age of information has given rise to greater concerns about copyright law. Although it would appear we are headed to a Star Trek-like world, we need to address fundamental areas so vital to educators, business people, computer professionals and the like before beaming too far into our future.

### 1. Mythstakes .

There are many misconceptions about copyright law apart from the addressing of cyberspace. For example, many people believe that one needs to provide notice in order to possess a copyrighted work.<sup>2</sup> Also, mistakes abound as to the defense of copyrights as well as thoughts of the dreaded "copyright police" coming to arrest for alleged violations.<sup>3</sup> Copyright law is simply misunderstood, misquoted and misused.

In this work I will endeavor to explain the present laws and theories regarding copyrights in cyberspace. I hope that such information will prove to be a resource as well as a guide to all those interested in traversing these navigable waters.

### 2. What is a copyright?

There are numerous efforts that address this subject.<sup>4</sup> However, no work would be complete without at least an overview. The fundamental basis of copyright law stems from the United States Constitution. In Article 1, Section 8, clause 8 we find that the founding fathers wished to promote science and the useful arts by securing an exclusive right to writings. Perhaps the most important statutory law to guide us is the Copyright Act of 1976 (The Copyright Act).<sup>5</sup>

Section 106 of the Copyright Act provides the owner of a copyright certain exclusive rights. In general they include five (5) protections:

- 1) *Reproduction* of the copyrighted work
- 2) *Preparation* of derivative works (adaptations) based upon the copyrighted material
- 3) *Distribution* of the work
- 4) *Performance* of the work publicly
- 5) *Displaying* of the work publicly<sup>6</sup>

Note that copyright law, for the most part, is federal in nature. Of course we must respect laws of other countries.<sup>7</sup> A major issue is that of originality. Works must be original in order to have copyright protection.<sup>8</sup> Thus, not everything is subject to this realm. In fact, one must carefully examine several factors in order to determine whether or not copyright law is applicable. A key factor is expression.

### **3. Express Yourself.**

All authors including those online must be aware that copyright protection affords protection to *expressions* rather than ideas.<sup>9</sup> Thus, examples of copyrightable material would include original, tangible forms of poetry, literature, motion pictures, sound recordings, computer programming, music, videos, plays, photographs, drawings and the like. The work also needs to be *fixed*. It is so when its embodiment:

*...is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission.<sup>10</sup>*

When dealing with cyberspace we need to address a multitude of items (such as downloading or copying onto discs and hard drives, etc.). Most authors agree that many activities do constitute violating fixed, tangible expressions covered by copyright law.<sup>11</sup> However, most would also agree that mere transmission is not fixation.<sup>12</sup> Case law is sparse in these areas. Nevertheless one thing is certain: There will be many issues of law for the courts to feed upon as a result of our advancing technological capabilities in the future.<sup>13</sup> I will address these related issues later herein.

### **4. Formalities**

*Registration.* It is surprising to most people when they find that no major protocol exists to obtain copyright protection. It is no longer

necessary to provide notice (*see discussion below*). However, as all we lawyers would advise, someone is out there ready to use your work without proper permission or authorization. So, registration is advisable. The United States Copyright Office in Washington, D.C. can provide simple forms.<sup>14</sup> All that are necessary are the forms, a twenty (20) dollar fee and a copy of your work and you are on your way. Registration would assist in protecting one's rights, enjoining others and obtaining statutory and civil remedies down the road.

According to sec. 302 of the Copyright Act, such protection normally lasts for an artist's lifetime plus fifty (50) years.

*Notice.* We are all familiar with the old copyright notification symbols. They usually contain a C in a circular symbol, or the actual word copyright, with the date and name of the owner.

*Example:*

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Copyright (or C.) 1997 Bill Kane

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In March, 1989 the United States joined the Berne Convention for the Protection of Literary and Artistic Works.<sup>15</sup> This multinational treaty provides mutual protection and makes the above obsolete. By joining Berne the United States and member nations recognize and respect each other's laws at least minimally. Again there are advocates of the *notice can't hurt* rule. It is a possible way of avoiding trouble, but again the legal sting is well out of it. It remains an optional tool at best.

## **II. FAIR USE: OR IS IT SO FAIR?**

### **Overview**

Fair use<sup>16</sup> is an exception to normal copyright requirements. It allows, in a limited manner, use of normally protected materials in items for purposes of parody, news reports, comedic acts, research and education. The law considers four (4) factors in determining if fair use is applicable as a defense. They are:

- 1) the purpose and character of the use, including whether 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.<sup>17</sup>

By far the last criteria is weighted the heaviest due to its obvious importance. Fair use is on a case by case basis. Let us examine the case of *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). The Supreme Court held that the Sixth Circuit Court erred in finding copyright infringement against 2 Live Crew. The band parodied Roy Orbison's "Oh, Pretty Woman." The Court applied the four-factor test summarized as follows:

- (1) The purpose and character of the use was a parody,
- (2) The nature of the copyrighted song does not prevent use of a parody even in a commercial sense,
- (3) The portion used was only the necessary amount for the parody, and
- (4) The parody was unlikely to have a large effect on the marketplace .<sup>18</sup>

The major problem with fair use is that courts have differed as to guidelines and have been inconsistent in application. This is especially true in the area of academic use where the cases have been few. Fair use is only fair when applied fairly. The present legal state of this doctrine is far from fair.

### **CONFUsing the Issue**

In October, 1996 The Working Group on Intellectual Property Rights in the Electronic Environment under the Clinton Administration proposed guidelines under CONFU, The Conference on Fair Use. CONFU's objective, among others, was to cover fair use in educational settings regarding electronic materials.<sup>19</sup>

The major problem with CONFU is that it left silent any guidance in terms of online course materials among other things. Such areas are so new to our legal system that CONFU hardly even addressed them. Instead, CONFU participants decided to let fair use and the code sections govern most instances. Thus, the problem with CONFU is that it left strategists without a clear strategy. That is, one delving into copyright waters must do so at one's own peril. The lifeboats are there but the direction to them remains a mystery.

### **III. TECHNOLOGY... COPYRIGHT SUBSTITUTE?**

#### **Overview**

There are those in the profession who claim that the Net has provided some type of escape hatch to copyright law. In other words, with the emergence of innovative ways of communicating such law is not applicable to the information highway. The statutes and cases are too archaic for this cyberspace spider. Let us examine this argument.

## **1. Distance Learning**

Distance learning refers to the delivery of educational materials that occurs when course instruction is in a non-traditional setting.<sup>20</sup> Examples include audio, video, motion picture, cable television, microwave and, of course, the Internet. Once again Section 107 of the Copyright Act governs educational performances and displays of works. But, performing and transmitting of information are two different animals. Fair use is not helpful and CONFU seems to be silent. Thus, an implementation of some type of rules is in order to give direction in these gray areas.

## **2. Web-related Issues**

Concerns exist as to linking a web site without permission. Such probably would be beneficial to business. As long as no one directly steals, this action, if tastefully taken, gives credibility and free advertising. Do we then necessarily retain counsel when sending e-mail? More importantly, there are other issues involving cyberspace that need to be examined.

Most scholars feel that the clear-cut issues will remain the same. In other words, treatment of material on the Web is similar to that of literature. So, for purposes of, say CD's, copyright law is clear. But, in the same way a CD is protected, a web page may also be regarded as one unit of owned property and very well may garner favor with the courts in the same respect.

Notice that copyright protection does not extend to computer systems, processes and the like.<sup>21</sup> Clearly browsing, e-mailing and related practices seem free of major problems in this regard as well.<sup>22</sup> A link or URL is a destination obviously not copyrightable since it does not represent an expression which is fixed in nature. There is the question of accessing a web page in violation of existing law. The problem arises when one saves a page to the hard drive. The issue is whether or not there is wrongful reproduction of a fixed expression. There are those who contend that public domain or fair use applies. Again, the courts will have to deal with this subject matter in the near future.

### **Permission...Still the rule of the day**

Since copyright law is so muddled obtaining consent is usually in order. For example, whenever work is being used for commercial or profit purposes, obtaining permission is essential. Most of us forget that educational institutions are here to make money. Organizations charge fees in distance learning. Not only is getting permission proper netiquette but it will save dollars down the road and potential loss of employment for those responsible. When viewing another's work ask the following questions:

- (1) Is this work protected by present copyright laws?
- (2) Am I trying to use and copy it for myself as my own work?

(3) Does any exception to the law apply? (fair use, etc.).

When in doubt, simply say "May I?" Above all, get it in writing.

### **Legality: Truth or Consequences**

The negative effects of copyright come in the form of that infringement complaint delivered to your door. Along with civil and statutory awards of up to one hundred (100) thousand dollars for each violation, criminal penalties ranging from two hundred and fifty (250) thousand dollars and/or up to ten years in jail could be handed down.<sup>23</sup> Case decisions have been rendered on such matters and, in the case of cyberspace, if guidance is not effectively dispatched many will find themselves in such fixes in the future.<sup>24</sup>

## **IV. THE NOT-SO FINAL FRONTIER**

### **Implied License**

The theory of implied license is flying around in cyberspace.<sup>25</sup> This notion contends that a license is automatically granted by those setting up a web page. This is particularly true in hypertext linkage according to some. This simple solution is not as simple as it looks. Implied access to the public seems to be a ghost of Christmas present with no apparent future. No legal precedent is forthcoming. The courts do not seem to be champing at the bit. The best advice is for all to exercise caution and clearly acknowledge links to other sites in order to avoid liability.

Look but don't touch may be well advisable for the present. Don't go overboard with implied license. It could prove to be a major wipeout to many a net surfer.

## **V. CONCLUSION**

The age of intellectual information dissemination via cyberspace has clearly arrived. We can all hypothesize to our hearts content regarding computers and copyrights. Certainly legislative and/or judicial actions are necessary. If fair use is failing, CONFU is in the midst of confusion and bureaucrats are waiting on the sidelines, we as legal professionals need to act.

There are those who side with the infamous White Paper, the creation of the Clinton Administration's Working Group on Intellectual Property/ Infrastructure Task Force. On February 26, 1998 HR 2281, the Clinton administration's alleged solution, made its way to the Judiciary Committee from the House Subcommittee on Courts and Intellectual Property. The bill is among several measures presently

before Congress. Among them are:

HR 3048 *Digital Era Copyright Enhancement Act*

HR 2652 *Collections of Information Antipiracy Act*  
(passed by the House on March 24,1998)

S 483 *Copyright Term Extension Act*  
(from life plus 50 years to life plus 70 years)

S 1122 *Criminal Copyright Implementation Act*  
(by Senate Judiciary Committee Chair Hatch,  
a measure parallel to HR 2281)

Government intervention and private rights seem to always butt heads in this and many areas of legal society. I am not advocating a circumvention of law. Nor am I in favor of total abandonment of existing standards, regarded as totally obsolete by some. However, with the rapidly developing technology some concessions must be made by all concerned. No law will be able to effectively cover all situations. Nevertheless let us try before finding ourselves too entrenched in this Net of wonder. It is far better than finding ourselves caught in a net and left to merely wonder.

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### ***Endnotes***

1. See *ACLU v. Reno*, 929 F. Supp.824 (E.D. Pa. 1996); It is worth mentioning that many legal courses are springing up as a result of this topic. See, e.g., Internet Law at Seattle University School of Law, Cyberlaw at The University of California, (Berkeley), A Law of Cyberspace? at John Marshall Law School, Law and the Internet at Carleton University, Cyberspace Law 1997 at Lewis and Clark College and Law and Internet Seminar at The University of Miami School of Law.

2. See Brad Templeton, 10 Big Myths about Copyright Explained, available at <<http://www.clari.net/brad/copymyths.html>>: see also Jessica Litman, The Exclusive Right to Read, 13 *Cardozo Arts & Ent. L.J.* 29, at 50-51 (1994), available at <<http://yul.yu.edu:80/csl/journals/aelj/articles/13-1/litman.html>>.

3. Id.

4. See, e.g., Eric Schlachter, The Intellectual Property Renaissance in Cyberspace; Why Copyright Law Could be Unimportant on the Internet, *Berkley Technology Law Journal*, Vol. 12, Issue I, Spring,1997; Kenneth Crews, Copyright Law, Libraries and Universities:

Working Paper, available at <<http://palimpsest.stanford.edu/bytopic/intprop/crews.html>>; Copyright Basics, available from the U.S. Government at <<http://lcweb.loc.gov/copyright/cirs/circ01.html>>.

5. 17 U.S.C. sec. 101 et seq.(1994).

6. See, generally, 17 U.S.C. sec. 106 (1994) , as well as a discussion at <<http://lcweb.loc.gov/copyright/cirs/circ01.html>>. It is also interesting to note the rights of teachers and students in this regard. Under section 110(1) of 17 U.S.C., such individuals in a non-profit educational institution may perform or display any copyrighted work regarding activities such as reading aloud, slide presentations, etc., in face-to-face domains. See also 17 U.S.C sec. 110(2) regarding transmissions in distance learning situations.

7. This work will not address foreign jurisdictional matters apart from the Berne Convention discussed infra.

8. See 17 U.S.C.A sec. 102(a) (1996), as well as *Feist Publications, Inc. v. Rural Tel. Ser. Co.*, 499 U.S. 340, 349-50 (1991). In *Feist*, the U.S. Supreme Court explained that the primary objective of copyright law is "not to reward the labor of authors, but (t)o promote the Progress of Science and useful Arts...." id. at 349-50. The case involved the determination of lack of originality in printed, white phone directory pages and is available at <<http://www.seamless.com/rcl/feist.html>> ; see also Benjamin B. Thorner, *Copyright Protection For Computer Databases: The Threat of Feist and a Proposed Solution*, Va. J. L. & Tech. 5, Spring,1997.

9. See 17 U.S.C.A. sec. 102(a) (1996); For a more complete discussion, view the following: <<http://lcweb.loc.gov/copyright/cirs/circ01.html>>.Several works that do not enjoy such afforded protection include titles, names, slogans, symbols, designs, lettering, coloring, improvisational speeches, unrecorded performances, concepts, devices, systems, methods, calendars, etc. Id. See also Mark F. Radcliffe, *The Law of Cyberspace for Non-Lawyers*, *The Cyberspace Law Primer*, 10/96 at <<http://www.gcwf.com/articles/primer.htm>>.

10. 17 U.S.C.A. sec. 101 (1996).

11. See, e.g., Radcliffe, *supra* at 10-11; see also III, *infra*.

12. Id. see also 17 U.S.C.A. sec. 301.

13. Congress is grappling over bills based on the White Paper: See United States Department of Commerce, Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property 10-11 (1995)*(known as the White Paper). The final report can be obtained by writing to the Office of Legislative and International Affairs, U.S. Patent and Trademark Office, Box 4, Washington, D.C. 20231, or at <<http://www.uspto.gov/web/offices/com/doc/ipnii>>. For an analysis of the White Paper, see Kathi A. Cover, *The Emperor's Magic Suit: Proposed Legislation Will Tailor the Copyright Law to Fit the Internet*, at <<http://www.smu.edu/~win96a2.htm>>.



14. See 17 U.S.C. secs. 408 and 409. The United States Copyright Office contact information is as follows:

Phone: 202-707-3000(person);

Phone: 202-707-9100(publications)

Fax: 202-707-2600

Web: <<http://lcweb.loc.gov/copyright>>

see also Thomas G. Field, Copyright For Computer Authors, Franklin Pierce Law Center, at <<http://www.fplc.edu/tfield/copySof.htm>>.

15. Berne Convention Implementation Act of 1988, Pub. L.No. 100-568, 102 Stat. 2853 (codified in 17 U.S.C.A. sec. 101 (1996)).

16. 17 U.S.C. sec. 107 (1992).

17. Id (emphasis added). see also Circular 21, Reproduction of Copyrighted Works by Educators and Librarians, U.S. Government Printing Office, Washington, D.C., 1995 at page 8.

18. 510 U.S. 569, 114 S. Ct. 1164(1994) at 1174-1179. (1994). Compare Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D. N.Y. 1991) with American Geophysical Union v. Texaco, Inc., 60 F. 3d 913 (2d Cir. 1994). (These latter two cases are from the same federal district court with differing results regarding photocopying for education and personal use); see also June M. Besek, The Evolving Law of Copyright and the Internet: Recent Developments in Fair Use Under the Copyright Act, found at <<http://cla.org/matsnpubs/memberarticles/evolve.htm>>.

19. See Besek, supra. For a copy of CONFU's draft report, see <<http://uspto.gov/web/offices/dcom/olia/confu/report.htm>>.

20. See <<http://www.utsystems.edu/OGC/intellectualproperty/distguid.htm> at 1.3.>.

21. Bruce G. Joseph & David A. Vogel, Copyright Protection of Software and Compilations: A Review of Critical Developments, Advanced Seminar on Copyright Law, 441 PLI/PAT, 5/16/96 at 382.

22. Note that the NII White Paper indicates browsing is an infringement. supra note 13 at p. 64-65, n.2. For example, in the case of Religious Technology Center v. Netcom On-Line Communications Services, Inc., 907 F. Supp. 1361 (N.D. Calif.), Netcom found itself ensnarled in such a copyright infringement suit. The case centers upon a former Church of Scientology minister, Dennis Erlich. He copied some of the works of L. Ron Hubbard. Erlich then placed them on a Usenet Group. Religious Technology Center(RTC) claimed ownership of the copyright in the works of Hubbard. Erlich accessed Usenet via a BBS. Netcom provided linkage. Netcom faced three potential liability fronts: direct, vicarious and contributory. The court held that direct liability was inapplicable in that Netcom did not engage in any action that caused a direct violation of copyright law. The company

merely created a copy for a third party. On the issue of vicarious liability the court also stated that plaintiff failed to prove defendant had the requisite control over the infringer's actions sufficient to show any gain from its action. However, on the issue of contributory liability the court held there existed evidence that presented a question of fact as to whether Netcom had knowledge and failed to take appropriate action. The plaintiff informed Netcom of the infringement. The Court held that failure to take said action equates to substantial participation in these instances resulting in potential liability for the storage of data. Id. at 1375; see also <<http://host1.jmls.edu/cyber/cases/netcom.txt>>

23. 17 U.S.C. secs. 504-506. See also U.S.C. Title 18 sec. 2319(b) for federal criminal consequences and Circular 21, supra note 17 at p. 26.

24. See ProCD, Inc. v. Zeidenberg, 86 F. 3d 1447, 1449 (7th Cir. 1996)(case involves the validity of shrinkwrap licenses, agreements by buyers to accept the terms by opening package wrapping). For an in-depth analysis see Jennifer L. Hawkins, ProCD v. Zeidenberg: Enforceability of Shrinkwrap Licenses Under the Copyright Act, 3 Rich. L.J. Tech.6 (1997) at <<http://www.richmond.edu~jolt/v3il/hawkins.html>>.

25. See, e.g., The Copyright WebSite at <<http://www.benedict.com/webiss.htm>> at 4-5 as well as <<http://www.patents.com/weblaw.sht>> at 2.

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