1-1-2015

IP Basics: Copyright on the Internet

Thomas G. Field Jr.
Professor Emeritus, University of New Hampshire School of Law

IP Basics: Copyright on the Internet

Additional Information
This series began by Professor Field in the 1970s in print booklets continued as web pages and were last updated in 2015.

IP Basics: Copyright on the Internet

By Thomas G. Field, Jr., Professor Emeritus, University of New Hampshire School of Law Franklin Pierce Center for Intellectual Property

Last updated 2015

Introduction

This discussion addresses U.S. copyright issues of concern to those who post to or own email lists or web pages. It also deals with situations where someone might want to forward or archive another's email posting or to copy material from another's web page. It does not, however, deal with liability for material posted by third persons. If your site permits that, it raises other important issues. One of particular importance is the need to make it easy for others to object to third-party posts that allegedly infringe their copyrights, a topic widely discussed elsewhere in the context of the DMCA (the Digital Millennium Copyright Act).

Copyright gives authors, artists and others the right to exclude others from using their works. Federal rights arise automatically when a protectable work has been fixed in a tangible medium such as a floppy disk or hard drive. A poem or picture is as much protected on a disk as on a piece of paper or canvas.

Once a work has been fixed, suits may be brought only in federal, not state, courts. Foreign copyright owners need not register first, but U.S. owners must. Notice is not required. Still, promptly registering works provide legal advantages -- as does providing notice. These matters, and basic limits to copyright protection, are explained below.

Copyright is the right to exclude, not to publish.

Copyright does not give its owners the right to sell or distribute, for example, libelous email messages. Also, of course, works that are obscene or invade another's rights of privacy or publicity are not publishable just because they happen to be covered by copyright.

Basic limits to copyright

Although email messages and web pages may enjoy copyright protection, rights are subject to several fundamental limits. For example, only expression is protected, not facts or ideas. Also, later works that merely happen to be very similar (or even identical) to earlier works do not infringe if they were, in fact, independently created. Sources of general information on those topics are listed below:

Fair use

Fair use is one of the most important, and least clear cut, limits to copyright. It permits some use of others' works even without approval. But when? Words like "fair" or "reasonable" cannot be precisely defined, but here are a few benchmarks.

Uses that advance public interests such as criticism, education or scholarship are favored -- particularly if little of another's work is copied. Uses that generate income or interfere with a copyright owner's income are not. Fairness also means crediting original artists or authors. (A teacher who copied, without credit, much of another's course materials was found to infringe.)

Commercial uses of another's work are also disfavored. For example, anyone who uses, without explicit permission, others' work to suggest that they endorse some commercial product is asking for trouble! Yet, not all commercial uses are forbidden. Most magazines and newspapers are operated for profit; that they are not automatically precluded from fair use has been made clear by the U.S. Supreme Court.

Licenses implied in fact

Fair use allows limited uses of another's work without approval, but other uses may be approved by implication. For example, when a message is posted to a public email list, both forwarding and archiving seem to be impliedly allowed. It is reasonable to assume that such liberties are okay if not explicitly forbidden. However, when forwarding, archiving or, say, using part of a prior message to respond to an earlier message, be careful not to change the original meaning. No one impliedly authorizes another to attribute to them an embarrassing (or worse) message they did not write!

One web site confidently asserts that all list owners must approve before email can be forwarded. Yet, absent rules governing particular lists, I am aware of no legal basis for it. Why would the power of approval be implicitly given to list owners? Beyond that, few who post to public lists would object if their messages are forwarded to others apt to be interested.

In the same vein, it seems that few authors would object to having messages archived. That serves the interests of list members who may want to revisit topics addressed earlier. Indeed, most would prefer archives to seeing old topics rehashed -- why one often sees lists of frequently asked questions (FAQs), with answers.

Can people revoke implied permission once granted? Circumstances allowing that seem rare. Courts are, at best, reluctant to allow someone to impose a difficult burden on others. Email authors should be careful. Inadvertent messages could be removed from archives, but list owners -- particularly if they are not paid to maintain the list -- may have other things to do than correct members' mistakes. Worse, it may well be impossible to recall inadvertent postings after distribution.

Express Licenses -- Put it on the table!

To address some issues, one web author posts this amusing notice:

WARNING: I reserve the right to use any email you send to me as either a testimonial of how great this page is, or as an (rare) example of the stupid things people send to me via email. If you do not want your email to be used in such a manner, mark it confidential....

That seems reasonable; many email copyright problems could be avoided if list owners would broadcast, at least on initial subscription, a similar notice.

A brief sample appears below. List owners who care to use it are given permission, but please do not regard it as legal advice -- much less a fool-proof way to avoid copyright or other problems.

*Members who post to this list retain their copyright but give a non-exclusive license to others to forward any message they post. They also give the list owner the right to archive or approve the archiving of list messages. **All other uses of messages posted to this list requires permission of their authors.***

Special situations

Email lists are exceedingly diverse. Consider, for example, a prostate cancer listserv with a welcome message that provided in part:

Now that you have subscribed, you are encouraged to send a note introducing yourself.... If your concern is about a prostate cancer diagnosis, also include your PSA blood test result, Gleason score, and cancer stage. .... If you have deleted or missed messages these can be found by accessing the archives.... [It lists several archives.]

Each subscriber to that list (as well as many others) should long ponder the wisdom of having personal medical information publicly archived. For example, it could end up in the hands of employers or others who might use it for unintended purposes. When information can be misused, it certainly should not be sent to a public list.

Private lists

"Private" lists are possible. All who sign up might expressedly agree, say, not to forward list messages. Also, list messages could be archived anonymously, if at all, or access could be limited by use of passwords.

Private lists should have few "fair use" problems; permission to use others' posts should be limited mostly by what they agreed to when joining, not by copyright law.

Authors' Rights: Registration

Although web pages and email messages are protected as soon as created, copyright registration is needed before U.S. owners can bring suit. Also, prompt registration provides remedies that make lawsuits affordable. Statutory damages of $150,000 (or more, and attorney fees) for willful infringement can be obtained if published works are registered within three months, or unpublished works are registered before they are infringed.

Registration is inexpensive, and simple application forms with basic instructions are available from the Copyright Office -- TX still appears to be the best choice. Yet, it would be prohibitively expensive for prolific authors or artists to register individual items other than in the context of existing disputes. Their options much improve when multiple works can be registered as a collection.

Web pages. The entire contents of a web site no more require multiple registrations than a book with many chapters and numerous illustrations -- or a CD with text and music, still and animated graphics, and software. Copyright Office Circular 66 contains a brief discussion. However, the following could mislead those unfamiliar with copyright:

Revisions and updates: Many works transmitted online are revised or updated frequently. For individual works, however, there is no blanket registration available to cover revisions published on multiple dates. A revised version for each daily revision may be registered separately.... A separate application and filing fee would be required for each....

While new text isn't covered by prior registrations, it is difficult to see why a court would allow someone to get away with copying a page of mostly registered content merely because it contains a few new sentences or other changes!

Email: If a list owner wants to register threaded list contents, that should be possible -- particularly if copyright has been assigned by members. The main thing that seems unclear is how much time could be spanned by a single registration. Given that "prompt" registration means within three months of "publication", that period makes sense.

The situation for email authors is much more ambiguous. First, group registration of several periodical contributions by a single author is possible, but combining email posts would require liberal interpretation

of the term "periodical." Alternatively, email authors might register their "unpublished" collections, but that presents a different problem: Are messages to "public" lists "published" for all purposes, or might they be regarded as "unpublished" for registration purposes? Perhaps because no one has tried to register, the Copyright Office has so far posted no information.

Notice

For several years, copyright notice has not been required in the U.S. Until then, however, that was not true; notice may be needed to rebut lingering notions that works published without notice can be used by others without restriction.

Again, *web pages* are simpler. Although a formal notice is not required, it is best to provide a notice such as appears at the bottom of this page.

Email: Notice on individual email messages (if blanket notice is not provided, say, in a welcome message) may also be useful. Something as straight-forward as "Please do not forward this message without permission" should be legally adequate as well as honored by most recipients. It is hard to see any advantage to traditional notices.

Links and Frames: Caveats

Links and frames present problems that seem unique to the internet. While typical links to others' sites are unlikely to cause copyright problems under present law, several caveats are warranted.

First, if one directly links to content that would normally be framed elsewhere, its owners are apt to object. There is little law directly on point because the few parties involved in such disputes have settled. Still, if a linking page surrounds other's material with its own ads, cuts out another's ads or makes it appear that the linking site is the source of the linked material, trouble is likely. It is difficult to argue that otherwise implied permission to link could be reasonably expected under such circumstances.

Second, consider situations where linked material infringes another's copyright. Ordinarily, a copyright holder would act only against the directly infringing page; others would be unaware of the dispute. However, where direct infringers are, say, beyond the reach of local courts, and particularly where a site owner actively encourages use of an offending page, there is a solid basis for protest. Unless copyright infringement has been actively encouraged, however, prompt removal of offending links should minimize risk of suit.

Third, while most web owners would complain about copying, some may complain about linking when it burdens their servers or, in the case of images, because it does not credit them. If that information is not posted, it is best to ask the owner. Still, no one should copy, even from sites that urge it without considering whether site owners hold copyright.

Finally, copyright is not the sole legal basis for objection. Anyone who makes derogatory references to others (or their sites, products or services), however it is done, invites trouble.

User's Risks -- The Bottom Line

Those who copy others' text are ever more easily found on the internet with search engines. Titles, markers and the like may also enable owners to locate improper copies of sounds or images.

Copyright law precludes most uses of others' works without explicit or implied permission. Because some uses are okay, people often ask which uses are okay. Such questions often miss the point. The most important risk is not of liability, it is of suit.

Consider graphics for example. Those who use a relatively small amount of another's work -- if not copied in detail -- may face small risk. Still, it is much better to work from scratch. Things represented to be in the public domain may not be. People looking for graphics have an alternative -- commercial clip art sold for such uses. Unlike freeware picked up on the web, it should also have warranties against infringement.

Litigation is expensive. People concerned about, say, the nuances of fair use must not become so entangled in legal details that they forget that anything generating income or interfering with another's potential income dramatically increases the chance of suit.

The most compelling questions are: (1) Is a proposed use of another's work likely to offend, and (2) Are expected benefits worth the bother and possible cost to resolve a dispute?

Why not ask? Only if the owner says "no" does the second question need to be addressed.

More general information and use of this web page