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Cohabiting with Copyright on the Nets

ABSTRACT

Although the primary purpose of both copyright and the nets is to expand the publicly available knowledge base, the way each goes about expanding the knowledge base can be quite different. To avoid potential conflicts, net users must understand common misconceptions about what constitutes work in the public domain and what uses are permitted (copyright does not necessarily permit users to do the same things with electronic works as nonelectronic works). Determining if the work is in the public domain, what exactly the copyright holder has given permission to do, and how and from whom to ask permission will reduce copyright conflicts. In addition, understanding that the law is a political compromise between various points of view, that it is complex and often can only be interpreted by experts, and that it is only a starting point for discussion between users and copyright holders will improve both equitable access for users and equitable compensation for copyright holders.

INTRODUCTION

Several months ago, when Brett Sutton first asked me to select a title for my paper, I suggested two titles. I suggested "Cohabiting with Copyright on the Nets" or "Coexisting with Copyright on the Nets." Brett chose *cohabiting*, probably because it sounds sexier and

was more likely to attract attention. That may have been the original reason for the choice of title, but as I reflected on what I wanted to say, I came to realize that the term *cohabiting* also expresses what I want to say better than the term *coexisting* does. To coexist with something means to be present in the same place, time, or context. It implies nothing about whether the coexistence is intentional or happens by chance; nothing about whether there is a mutually beneficial relationship (however rocky it may be), an attraction between two entities, or just a coincidence. *Cohabitation* implies a far more complex relationship with attraction, common interests, or some mutually beneficial reason for living in the same place, time, or context. The relationship between copyright and the nets is complex, intentional, and, one hopes, mutually beneficial, although at times it may seem rockier than Charles and Diana's marriage and perhaps as doomed to failure.

The constitutional purpose behind copyright in the United States is to encourage the creation of useful works by giving authors sufficient rewards, incentives, and protection to make it worthwhile for them to continue producing works. Thus, a primary purpose of copyright is to expand the knowledge base available to the public. In many respects, that is also a primary purpose of the nets. However, the way that copyright and the nets go about expanding the knowledge base can be very different. While copyright seeks to expand the knowledge base by encouraging creation through control of distribution to produce rewards, the nets take the approach of increasing knowledge by expanding access and removing barriers to mass distribution. This apparent conflict is made worse by a public whose ideas about copyright often more closely resembles the law of the past than the law of the present. If this rocky relationship is ever to develop into a solid lasting marriage, the people involved are going to have to give up their romantic illusions and settle down to the hard work that is needed to make a marriage survive and work.

ROMANTIC ILLUSIONS

Romantic Illusion #1:
If it is on the nets, it must be in the public domain.

Since I labeled this statement an illusion, it is obvious that I will point out that not everything on the nets is in the public domain. In fact, the opposite is true. Most of the documents, messages, and other works on the net are copyrighted.

Honeymoon Version of Romantic Illusion #1:
If it is posted on an anonymous FTP site, it must be in the public domain.

Even when people realize that just because something is on the net doesn't mean it is in the public domain, most people still tend to think of at least the documents posted on anonymous File Transfer Protocol (FTP) servers as material that is in the public domain. However, users of the nets cannot rely on the fact that a document is posted on an anonymous FTP server as a basis for assuming that there are no copyright restrictions on the use of the document. Anyone can post a document on most anonymous FTP servers. Even if the server is set up so that only selected people can post documents to it, the people who run the servers are often uneducated on the subject of copyright and suffer from some of the same misconceptions as many users of the nets.

Newlywed Version of Romantic Illusion #1:
If it doesn't have a copyright notice on it, it must be in the public domain.

Another common misconception is that if authors want their works to be protected by copyright, authors have to put notices on the works and/or go through other formalities to obtain copyright protection. This used to be the law under the 1909 Act. But under the 1976 Act, copyright attaches as soon as an author's expression is fixed in a tangible medium of expression. All documents that exist on the net are fixed somewhere on someone's storage devices, and so they all meet the fixation requirement. As recently as 1988, an author could lose his copyright if he allowed his work to be widely distributed to the public in the United States without a notice. But even that formality is now gone. When the United States joined the Berne Convention in 1989, the notice requirement was removed from U.S. law. Furthermore, notice requirements never existed in many other countries where a number of the documents on the nets originated or reside.

First Anniversary Version of Romantic Illusion #1:
If it says it is in the public domain, it is in the public domain.

Once people begin to understand that the absence of a copyright notice does not mean that something is in the public domain, they begin to look for notices in files that say that the files are in the public domain or may be copied and freely distributed. This is definitely a step in the right direction, but it is still a naive view. It assumes that the person who put the public domain or permission notice on the

document is either the copyright holder or someone with sufficient copyright knowledge to determine when something is in the public domain. Unfortunately, misconceptions about the duration of copyright are as common as misconceptions about obtaining a copyright.

If it appears that the author put the public domain or permission statement on a work, it is usually safe to do those things with the work that the statement specifically authorizes. However, just because the copyright holder gives permission to reproduce or distribute a document under certain circumstances does not mean that the user has the right to reproduce or distribute the document in even slightly different circumstances. For example, if an author gives people the right to distribute copies free of charge, that does not necessarily give a university the right to distribute copies to a class on a cost recovery basis. Such notices rarely place works in the public domain. What they really are is a type of copyright license, and net users must abide by the terms of the license or seek additional permission for whatever they want to do with the document.

One very popular file on the Internet contains a statement similar to the following permission statement:

> Permission is granted to make and distribute verbatim copies of this guide provided the copyright notice and this permission notice are preserved on all copies.
>
> Permission is granted to copy and distribute modified versions of this booklet under the conditions for verbatim copying, provided that the entire resulting derived work is distributed under the terms of a permission notice similar to this one.

This notice does not place this work in the public domain.

If it appears that the public domain statement was placed on a document by someone other than the author, then it is only as reliable as the person or organization responsible for putting the notice on the document. The person or organization may even be immanently reliable in all aspects except their knowledge of the intricacies of U.S. (and in some cases international and foreign) copyright law. This is not a simple area of the law. Because of the amount of time it took Congress to pass the 1976 Act and the way it dealt with the transition provisions, it is easy even for attorneys to make mistakes with certain types of documents unless they are familiar with these provisions.

It is also unsafe to assume that the same rules that are in effect today concerning what is in the public domain will remain unchanged even in the near-term future. Congress recently made changes in the renewal provisions. The European Community is in the process of lengthening the copyright term, and a similar move is under consideration in the United States. The North American Free Trade

Agreement (NAFTA) even restored copyright in certain limited cases to films that had fallen into the public domain.

This is a complex area of the law requiring reasonable caution at all times and expert advice if you want to be absolutely safe.

Romantic Illusion #2:
Copyright permits people to do similar things with works on the nets as it permits with nonelectronic works.

Most people think of copyright primarily as a law governing when you can make a copy of something. But copyright goes far beyond merely regulating reproduction. It also regulates four other types of activities: production of derivative works, public performance of works, public displays of works, and public distribution of works. Because of the way the law defines these activities, it is impossible to use works on the nets without engaging in public displays, public performances, and public distribution. For example, any time a copy of the work is displayed on a cathode ray tube or other viewing device, a display occurs.

Newlywed Version of Romantic Illusion #2:
Even if copyright prohibits some of the things that seem like they ought to be permitted, private uses of works on the nets is okay.

If a work is available for display or performance or distribution in a place open to the public or in a place where a substantial number of people outside the normal circle of a family and its social acquaintances are gathered, the distribution, performance, or display is public. Because the net is accessible from so many places, anything on it, including nearly all performances, displays, or distributions that occur on it, is probably public even if it is password protected. Furthermore, there is no general private use exception in the copyright law.

First Anniversary Version of Romantic Illusion #2:
Exceptions in the law, such as fair use, permit most ordinary uses of works on the nets.

Fair use and the other exceptions in the law apply to works on the nets as they do to more traditional works. But the application does not always produce the results that many people think it should.

First, many people have a very hazy understanding of these exceptions even in the non-network environment. They tend to oversimplify, generalize, and broaden the application of the exceptions. For example, few people realize that the subsection of the law that permits the performance or display of works in classrooms is limited to face-to-face activities. The next subsection that permits transmission outside

of a single classroom applies only to nondramatic literary and musical works, and so would not permit the showing of audiovisual material over a closed circuit TV channel much less a wide area network.

Second, people do not take into account the fact that the capabilities of the network naturally encourage people to copy, distribute, display, and perform greater portions of works than the nonelectronic world does. The mere fact that more of the work is involved in an electronic activity makes it less likely that fair use and other exceptions will permit the activity. How many of you have ever FTPed or downloaded only part of a document? You get the whole thing even if you eventually will use only part of it. In fact, it is so easy, you often get all of several files just to make sure you have everything you might need.

Finally, the networked world is a potential source of royalty income for copyright owners. Open access to a work on the networks can substitute to some degree for forms of the work for which the copyright holder is entitled to expect compensation. If network access supplants some of any commercial market for a work, that factor weighs heavily against a finding of fair use.

Thus, even though fair use and the other exceptions are technically no different on the nets than they are in the nonelectronic world, they don't lead to the results that people expect them to lead to on the nets.

BUILDING THE STABLE MARRIAGE

Technique #1:
How to tell if a work is in the public domain.

Figure out when, where, and by whom the work was created or edited. Then apply the following rules of thumb. Do not rely upon statements of others that a particular file is in the public domain unless you know that the person making the statement has done a reliable investigation of the copyright status of the work.

United States

1. Works written by U.S. government officials as part of their official duties are in the public domain. Works written by contractors for the U.S. government are not necessarily in the public domain. Works written by state employees are usually protected by copyright.
2. The actual text of laws, ordinances, regulations, and court opinions are in the public domain. Additional material such as headnotes, references, or annotations which appear in statute compilations and case reporters are usually protected by copyright.
3. Works on which the copyright has expired are in the public domain. But be careful about this rule of thumb. Many people think that

works are in the public domain under this principle when they really are not.

a. Works first published before January 1, 1978, usually enter the public domain seventy-five years from the date copyright was first secured, which is usually seventy-five years from the date of first publication.
b. Works first created on or after January 1, 1978, enter the public domain fifty years after the death of the author. (Nothing will enter the public domain under this rule until at least January 1, 2023.)
c. Works first created on or after January 1, 1978, that are created by a corporate author enter the public domain seventy-five years after publication or one hundred years after creation, whichever occurs first. (Nothing will enter the public domain under this rule until at least January 1, 2053.)
d. Works created before January 1, 1978, but not published before that date are copyrighted under rules b and c above, except that in no case will the copyright on a work not published prior to January 1, 1978, expire before December 31, 2002. (This rule copyrights a lot of manuscripts that we would otherwise think of as public domain because of their age.)
e. If a substantial number of copies were distributed in the United States without a copyright notice prior to March 1, 1989, the work is in the public domain in the United States. (Caveat: Every time a substantially new edition is created, especially if it is a new translation or done by a new editor, a new work is created, so you count from the creation of that edition, not from the creation of the original.)

United Kingdom and a Lot of Other Countries

The general rule is life of the author plus fifty years.

Copyright notice was never required in these countries. So publication without a copyright notice never puts a work in the public domain in these countries.

Whose Law Applies

The law of the country where the potential infringing activity occurs (copying, distribution, public performance, public display, or creation of a derivative work) applies. Thus, if copying is done in the United States, U.S. law applies. If the copies are distributed in the United Kingdom (via a network or otherwise), U.K. law applies to the act of distribution.

Technique #2:
How to tell what the copyright holder has given permission to do.

Permission statements should be read very carefully. Do not read anything into them that is not there. If it doesn't tell you that you can't do something, don't assume that you can do it. Assume that you cannot do anything unless the statement explicitly says you can.

For example, the permission statement quoted under the First Anniversary Version of Romantic Illusion #1 gives permission to copy and to distribute the work, but it does not give permission to copy the work into a larger work that doesn't include a permission statement that is substantially the same as the one quoted. So don't modify this work by stripping off the header that contains the permission statement.

Technique #3:
How and from whom to ask permission to do what you want to do.

You must figure out who the author of the work is. It may be impossible to figure out whether you have requested permission from the right people if you can't figure out who the author is.

You should always ask the author for permission. Copyright nearly always vests originally in the author. It can be assigned to a publisher but only by a signed written agreement that explicitly transfers copyright. Publisher policies that claim to require assignment of all copyrights to the publisher are ineffective unless the author has signed a written agreement transferring copyright. Copyright notices that incorrectly state the name of the copyright holder are fairly common especially in periodicals published by small or specialized presses.

Assignment of specific rights such as the exclusive right to exploit print versions of a work is not the equivalent of an assignment of copyright. For example, if an author sells the print rights to a novel, he has not necessarily sold either the electronic or the movie rights to the novel. So you should always ask the author.

If the author is dead, you need to figure out who his heirs are and ask them.

If the work contains a copyright notice that lists someone other than the author as the copyright holder, you should ask that person as well. In this manner, you will be sure that you have permission from the copyright holder even if you cannot be sure whether a transfer has occurred.

If it isn't obvious who the author is, it will probably be easier to find a different work to use than it will be to get permission to use the work. Sometimes accepting the fact that you cannot safely use a work is necessary to preserve your sanity.

Tell the author or copyright holder exactly what you want to do with a work. If you want to edit a work to make it searchable by Wide

Area Information Servers (WAIS), say so. If you want to create an ASCII version of the work or mark it up with Standard Generalized Markup Language (SGML), tell him that. If you want to post it for anonymous FTP access, tell him that. If you are willing to limit access in some manner, specify the manner in which access will be limited. Don't tell the copyright holder that only a set number of copies will be made unless you have a reliable means to control the number of copies. In short, make sure that any permission you get allows you to do what you intend to do.

Finally, don't assume that a permission given for one use applies to another use. Make sure that the person requesting permission and the person giving permission have the same understanding of what will be done with the work.

Technique #4:
Don't try to make the law what you want it to be.

Far too many people make statements concerning what the law is that are obviously based on what they think a fair, just, or logical result would be. If you are going to cohabit with copyright, you must accept the fact that the law is a political compromise that did not anticipate all the ramifications of electronic networking. You must also accept the fact that what a particular user, copyright holder, or publisher thinks a fair, just, or logical result would be is not necessarily what all users, copyright holders, and publishers think would be a fair, just, or logical result. The law is a compromise between the points of view of the various constituencies who lobbied Congress when it was passed. You can't change it by wishing or complaining. Getting it changed is a long, difficult, and expensive process. The mere fact that you think a change is justified doesn't mean one will or even should occur. Accept the law for what it is and find ways to work within it. If the law says you need permission, get it. If the law says a user doesn't need permission to do something, don't try to prevent the user from doing it through restrictive licensing. If the law is unclear, admit it and work out a reasonable compromise.

Trying to make the law what you want it to be only leads to misunderstandings and bitter emotional battles.

MARRIAGE COUNSELING FOR A STABLE FUTURE

Method A:
For experts only—Try to figure out what the law allows people to do.

It is important for the experts to continue to explore the law and to try to figure out what it does and does not permit people to do

on the nets. But this is not an exercise for most laypeople. Copyright law is complex and confusing even when it is applied to technologies that Congress clearly understood when the law was enacted. Applying it to future technologies that Congress only foresaw vaguely and had no way of foreseeing clearly is even more complex and confusing. It is extremely important to start with the actual language of the law itself, particularly the definitions. Words often have different meanings in the law than they do in common usage, and this is particularly true in the realm of copyright law. So a surface reading of the law is not enough. Interpretation of the copyright law often requires careful legal analysis of the text of the law, the legislative history, and case law. Often, there is no clear answer. Sometimes, what the courts decide is wrong and must be corrected by later cases or by Congressional revisions. If you choose to venture into the waters of interpretation of copyright law, go carefully and get expert advice.

Method B:
Intervention and education—Try to persuade all parties that they need to get serious about their copyright education, look carefully at what the experts are saying, question what is being said, and admit their mistakes when they make them.

Because copyright law is so complex and easily misconstrued, it is important that all the parties involved spend some time becoming educated. It is also important that everyone make sure that their information is coming from reliable sources and that they are not misinterpreting what they are being told. And because it is so easy to make mistakes, it is important that everyone be willing to admit mistakes and correct them when they are made. A good relationship must be based on communication, understanding, and agreement. Quick off-the-cuff uninformed judgments have no place in such a relationship.

Method C:
Custody battles are bad for the family—Encourage all parties to quit misusing the law.

Bitter emotional disputes never lead to stronger relationships. In fact, they lead to a total breakdown of the mutually beneficial relationship. The law can't make a family work. It can't make copyright work either, nor can it make the nets work. Only people working together can build a strong mutually beneficial relationship. The law can serve as a basis for that relationship. Copyright law can serve as a starting point for deciding how to balance the rights of users and copyright holders on the nets, but it cannot insure a fair world.

It is possible and at times even easy to misuse the law. I'm sure all of you are aware of situations in which children have been used as weapons in divorce cases. Copyright can also be misused as a weapon in the power games of the net. Users can try to use their view of the law to justify the widest possible uses without compensation. Copyright holders can use it to try to justify licenses that require compensation for nearly every use. But neither approach is good for the net family. Both lead to bitter emotional territorial disputes. If both sides would try to see the other side's point of view and work out reasonable compromises, the family would be a lot better off.

Method D:
Working together—Organize, listen, talk, negotiate, compromise, and settle your differences.

In some ways, Shakespeare was right. Let's kill all the lawyers. At least, let's kill all the litigators. Letting the situation deteriorate to the point where litigation is necessary means that no one will win.

While we are at it, let's kill all the legislators too. If you have to resort to getting Congress to resolve your disputes, you will die of old age or go out of business before you get a resolution.

There is no possible way for either Congress or the courts to move quickly enough to accommodate the speed at which things change on the nets. The only possible way to work out intellectual property matters on the nets is for all interested parties to organize into groups, talk to each other, *listen* to each other, try to see each other's point of view, *compromise,* and settle any differences that arise. None of this comes naturally. It takes work. It is very much like a marriage. If all sides give 100 percent to the relationship working toward the good of all, it works. If everyone only wants to give his share and is most concerned about getting the most for himself, copyright will hinder all of our work.