Copyright and the Internet

The online world: new opportunities for infringement?

By Lawrence Savell

It's been said, "the more things change, the more they stay the same."

To a degree, this principle applies to the publishing business, as many of the same concerns that editors have traditionally faced in the print medium remain as publications expand to the online and electronic realm. One example is copyright ownership and infringement.

However, the new media clearly can expand the scope of these concerns. The ease of copying, downloading, uploading, and further distributing (as well as modifying) copyrighted materials such as text, pictures, music, and application software increases the opportunity for infringement.

Indeed, U.S. law enforcement authorities reportedly estimate that online infringement and theft of material and data currently exceeds $10 billion annually. Copyright owners need to monitor and take action against the unauthorized use of their property on the Internet, including making sure that works they disseminate in electronic form bear the requisite copyright notice.

Internet users and publishers need to make sure that their use or distribution of materials owned by others does not contravene the rights of those owners. Rights to use copyrighted material should be carefully and consistently obtained.

What is Copyrightable

Bear in mind that it takes relatively little for a "work" to qualify for protection under the copyright law. All that is required is that the item be an "original work[] of authorship fixed [memorialized] in any tangible medium of expression . . . ." Generally, the slightest amount of originality confers protection under the law, with neither artistic merit nor great novelty being required. The key is that the author created it with his or her own skill, labor, and judgment. Thus, publishers should consider the possibility that every text and illustration encountered may meet this modest standard and may thus be subject to copyright protection.

Rights Obtained from Freelancers

A currently "hot" issue in the publishing business is whether and to what degree print publishers have the right to disseminate electronic versions of articles and illustrations prepared by freelancers and originally published in printed form. The case of *Tasini v. New York Times Co.*, currently pending in federal court in New York, raises this precise issue. The case, brought by twelve freelance writers against several publishers, claims that "freelance authors own the electronic rights in their own work unless they have expressly transferred or assigned those rights in accordance with the Copyright Act." The plaintiffs seek money damages, measured by the profits defendants derived from their alleged infringement, an injunction barring further infringement, a declaration that the incorporation of their articles into an electronic database and placement of their articles on CD-ROM without their consent constituted copyright infringement, and court costs and attorneys' fees. The defendant publishers obviously disagree, and view these rights as having been conveyed to them with the initial purchase, with the compensation including payment for conveying such rights. (Note that this case only involves freelance writers, as opposed to employees of publishers, as employees' efforts should be covered by "work-for-hire" agreements.) To a degree, this is an issue of contract interpretation, and suggests that, for those publishers contemplating online publication, the safest course is to obtain the broadest rights possible, often described as a grant of "all rights."

Infringement by Freelancers

The other side of the coin is that publishers need to ensure that freelance contributors truly have the rights they seek to convey. While publishers cannot be mind readers, they can insist on contract language that provides a degree of protection. First, contributors should agree in writing that the material they are selling is original, owned by them, and does not infringe upon or violate any statutory or "common law" (based on court decisions) copyright. Contributors should also agree to indemnify (agree to pay) the publisher for any losses caused by the breach of such a representation. While such provisions may provide some solace (and may discourage some violations), the reality is that freelancers' pockets

are generally far shallower than publishers', and the latter are the ones who will usually end up footing all or most of the bill for any damages and defense costs. Adequate insurance coverage is often the best insulation.

Derivative Work

Bear in mind that you cannot with impunity simply take another's copyrighted work, make a few changes, and consider the resulting work your own. Beyond simple infringement, under the federal Copyright Act, copyright owners also have the exclusive right to prepare so-called "derivative works" based upon the underlying copyrighted work. Thus, an unauthorized work derived from a copyrighted work could also be the basis for a legal claim against a publisher.

"Fair Use"

Copyright protection is not absolute, however. A key limitation on it is the doctrine of "fair use," which is defined as the privilege that others than the copyright owner have to use copyrighted material in a reasonable manner without the owner's consent. To determine whether fair use has been made of copyrighted material, courts will consider and balance a number of interests between the owner and the user. These include: (1) the purpose and character of the use (the right to use for review, comment, or educational purposes is broader than for a purely commercial use); (2) the nature of the copyrighted work ("creative" works are more protected than purely factual works); (3) the proportion that was "taken" (the more, the more dangerous); and (4) the economic impact of the taking (the extent to which the use may diminish the value of the original work).

Online publishers should be aware of some recent cases that have assessed whether an Internet access provider or computer bulletin board operator may be held liable for a subscriber's unauthorized posting of copyrighted material. In 1995, in *Religious Technology Center v. Netcom On-Line Communications Services*, a federal court in California ruled that an Internet access provider and bulletin board service operator were not directly or vicariously liable for copyright infringement, based on a subscriber's posting of writings of the Church of Scientology founder. However, the court allowed to proceed to trial the issues whether the provider and operator should have known that the subscriber infringed the copyrights, whether they substantially participated in the infringement, and whether the provider had a fair use defense. The case settled in August 1996.

In the 1993 Florida federal case of *Playboy Enterprises Inc. v. Frena*, the court ruled that a subscription bulletin board service which displayed photographs from *Playboy* magazine, which were then downloaded by the service's subscribers, infringed the magazine's copyright. That court specifically rejected the defendant's claim that subscribers had uploaded the images, stating that it did not matter that the defendant claimed he did not make the copies himself, as he had supplied a product (the service) containing unauthorized copies of a copyrighted work. The court noted that this was not a situation of fair use, as the defendant's use was clearly commercial (he charged users or they had to purchase products from him), the appropriated photographs were entertainment, not factual works, and were an essential part of the magazine ("There is no doubt that the photographs in *Playboy* magazine are an essential part of the copyrighted work. The Court is not implying that people do not read the articles in [the] magazine. However, a major factor in [*Playboy's*] success is the photographs in its magazine."), and the defendant's conduct, if widespread, would adversely affect the magazine's business.

Court Jurisdiction

Another "hot" issue in the context of copyright and the Internet is the extent to which an online presence allows one to be sued in states where one's only contact with the state is that its Web site can be accessed there. The question of whether a court in such state would have "personal jurisdiction" over an online publisher, allowing the court to hear and decide lawsuits against that publisher, has yet to be finally resolved, although many courts in comparable contexts have found such jurisdiction to exist. The potential implications of such rulings are significant.

Technological Innovations

Finally, although the risks of online/electronic copyright infringement may be greater than in traditional print media, ironically, the same technology may also increase the chances of detecting and prosecuting such offenses. For example, efforts are being made to develop techniques and software (such as embedding copyright information in the computer code of a picture) that will facilitate the identification of plagiarized images or text.

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