

Copyright Infringement Pitfalls in the Online Arena

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There is a tendency to assume that something acquired for free is public domain, particularly as respects material on the Internet. This can be a very costly assumption. Discover the copyright pitfalls and learn how to avoid them in this insightful article.

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Picture the following scenario. It's a busy workday in the not-too-distant future. Getting a short break from the demanding task of guiding your business through the shark-infested waters that make up the modern online marketplace, you take the opportunity to make a valiant attempt at shrinking that pile of mail on your desk. On the top of the stack is an official-looking off-white envelope bearing an intimidating green "certified mail" sticker. Opening the envelope, you are greeted by the following correspondence:

TOUGH & MCNASTY, LLP

Mr. L.M. Startup CEO

Lean & Mean Startup, Inc.

Palo Alto, CA

Re: Your Web site at <http://www.leanandmeanstartup.com>

Dear Sir:

Our firm has been retained to represent COPYRIGHTOWNER.COM in intellectual property and other matters. It has come to our attention that your company has, for some time, been copying, using, and commercially exploiting certain of our client's copyrighted materials on your Web site without permission, in violation of federal copyright law. As you are probably aware, the copyright statutes of the United States provide for monetary damages for copyright infringement. Our initial audit of your Web site has uncovered numerous acts of infringement, and we are presently conducting a

more thorough audit which may uncover additional infringements. Depending on the facts uncovered upon further investigation, your liability to our client may exceed \$1 million...

Copyright infringement?? Violation of federal laws?? One million dollars?? A letter like the one above could very well ruin your whole day.

In addition to whatever monetary liability your firm may incur, a copyright infringement allegation has the potential to consume considerable portions of your valuable time and that of your most important employees, even if a lawsuit is never filed. In the event a lawsuit is filed, there is no telling how much time, expense, and grief you and your company may have to go through before the issue is ultimately resolved, even if you are successful in defending the suit. And if you lose, there is that little matter of the monetary damages, which, although they will probably not reach a million dollars, may end up costing you a considerable chunk of hard-earned cash.

This article examines why it is extremely important to proceed with caution in the creation and development of your company's online presence and be aware of the pitfalls that lie in wait for the unwary.

The Internet and Copyright Infringement

The Internet has become an incredible resource for all areas of human activity. In business, education, recreation, and research, the amazing capabilities of the Internet have truly put the world at the fingertips of the savvy user. Although viewing of a Web site technically involves "copying" the site content, searching and surfing activities really do not present much in the way of potential copyright liability for the Internet user. It is what is done with acquired Web content that presents the problem.

Professionals working in the highly competitive Internet marketplace are under heavy pressure to produce useful Web content while constantly fighting to stay one step ahead of their competitors in the market. Accordingly, Internet innovators have developed a wide range of novel approaches to providing a wealth of cutting-edge information for the benefit of their customers. Examples include "information mining"—the automated extraction of data from online sources, and "framing"—the redisplay or re-interpretation of a Web page in a slightly different form. Although the developers of these algorithms should be commended for their

ingenuity, Web professionals making use of such algorithms should make themselves well aware of the copyright liability implications of their use.

The courts have made it abundantly clear that copyright protection is not limited to the protection of the printed word on paper. As technology has given us new media for the storage and transmission of information, these new media have been understood to fit within the copyright law, so as to promote the ends for which copyright law was originally created. As with other media, copyright law has been applied to the Internet when the courts have considered it appropriate, and the courts have not hesitated to find copyright infringement where protected materials have been posted on the Internet without the author's permission. The law of copyright has been applied to the Internet according to essentially the same rules as those applied to other media, including print and broadcasting media.

One reason that the Internet poses such a serious potential for copyright infringement liability is the ease with which copyrighted material can be located, electronically duplicated, and redistributed. What once took hours—or at least a few minutes in the heyday of libraries, using cassette tapes and photocopiers --can be performed in seconds in the age of the Internet. In many cases, copyrighted material can be located, copied, and distributed without any human interaction required whatsoever. Infringement tends to become more likely as copying becomes easier, and can become automatic where copying is automated. With such a wealth of information at your fingertips, the opportunity to use another's work as your own has, for many, been too great a deal to pass up—with serious consequences if and when such unauthorized use is discovered.

The potential for copyright infringement arises after the Web page content has been downloaded to computer memory and the user, or a software program, does something with the material other than review it. Once it is in the computer memory, the local system can do essentially anything with it, and this is where the problem begins.

Web page content downloaded to a user's computer can be copied from one application to another in a mere handful of mouse-clicks or computer instructions. Text can be dragged into a word processor and revised, and images can be pulled into image software and edited. Any of these by itself can constitute a copyright infringement, and can give rise to liability to the owner of the copyright, and a mountain of potential headaches—and possibly legal bills—that go along with it. There is a tendency to assume that something acquired for free is public domain, to do with as one chooses. This can be a very costly assumption, especially considering the relative ease with which such infringement can be discovered.

The Internet, and in particular Internet-based publication, presents additional liability for the Internet-based business due to the increased likelihood that copying and reincorporation of copyrighted material will be discovered, as compared to more traditional advertising media. In the context of traditional direct-mail advertising, as an example, a flyer or brochure incorporating a substantial degree of infringing material might be sent to the customer base of even a sizable company without a high likelihood that the use would be identified by the owner of the copyright. In contrast, a document, or even a small portion of a document, posted on the Web essentially becomes an entry in a vast, indexed database. Due to the wonders of automated search routines, the contents of your Web site, including any infringing materials, soon become readily accessible to all the world, including the owner of the copyrighted material and his or her attorneys.

What Is Protected?

There is no doubt that many copyright infringements occur completely innocently. Clearly, it is not always readily apparent, particularly to those not trained in copyright law, what is and what is not protected. Because of the manner in which copyright protection attaches to a work, it is always prudent to assume that material is protected until you clearly determine otherwise.

Copyright protection is governed by federal statutory law. The copyright laws of the United States protect "original works of authorship" that are "fixed in any tangible medium of expression." Although the scope of that which constitutes "original works of authorship" is not rigidly defined, the standard of "authorship" is fairly low. Even if an author contributes only a small portion to a large work, or merely adds his own style to an existing public domain work, the author's contribution is his own, and he has rights in the resultant work.

As to fixation, a work is "fixed" in a "tangible medium of expression," for example, when it is stored in a computer's memory or saved on a disk. In light of the above, it should be clear that most materials are protected by copyright to some degree.

Copyright protection gives the holder of the copyright a group of exclusive rights in the work. The rights, as defined by federal statutory law, include the right:

- To reproduce the copyrighted work in copies or phonorecords
- To prepare derivative works based on the copyrighted work
- To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership or by rental, lease, or lending

- In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures, and other audiovisual works, to perform the copyrighted work publicly
- In the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly
- In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission [17 U.S.C. § 106]

Contrary to popular belief, a copyright notice, such as the traditional (c), a date, or the name of the author, is not required in order for copyright protection to apply to the work.

Furthermore, although a formal registration procedure is provided for under federal law, no formal registration is necessary for copyright protection to attach. Formal notice and formal registration were required by law in the United States at one time, but under current law, a copyrighted work is protected against unauthorized copying even without any copyright notice or attribution. Copyright protection attaches at the point in time that a work is first "fixed" in a "tangible medium of expression." It is crucial that all employees and consultants responsible for your Web content understand these facts. Good information on copyrights can be found on the official web site for the U.S. Copyright Office located at <http://www.copyright.gov/>.

Fair Use

Although the rights and protections afforded to an author by the copyright law are significant, they are not absolute. The law recognizes a concept known as "fair use," which allows members of the public to make certain, limited uses of a copyrighted work for certain, limited purposes. The concept of fair use provides a "safe haven" within the exclusive rights conferred by the copyright law and permits a member of the public to make limited use of a copyrighted work in a limited and reasonable manner without the consent of the copyright owner.

The courts have made it clear that the fair use defense applies to the Internet in essentially the same manner as other media. A fair use inquiry will always be somewhat subjective but, in general, where the use is of mostly factual information, where the portion of the work copied is relatively small, and where the use would not reasonably be expected to have a negative impact on the market for the author's work, fair use is likely to be found. Alternatively, where the use is of a primarily stylistic nature, where a substantial portion of the original work is copied, or where a copyright holder can show a negative impact on the market for the original work, the fair use defense will likely be unavailing.

Due to the variety of factors involved in, and the gray areas inherent in any fair use inquiry, the reader is encouraged to seek expert legal counsel regarding the specifics of a particular case before proceeding to copy protected material without authorization.

Conclusion

Our goal in writing this piece has been to shed a little light on the serious potential for infringement liability in the e-commerce realm. Summing up the above, it is important to remember the following points.

1. The scope of material available via the Internet, combined with the nature of electronic media, make copyright infringement easier than ever before. Accordingly, it is crucial that the professionals responsible for your Web content be familiar with the basic rules of copyright.
2. The nature of the Internet makes detection of infringement easier than ever before. Accordingly, it is crucial that the professionals responsible for your Web content be aware of the likelihood of detection as well as the potentially serious consequences of infringement.
3. Owing to the broad scope of copyright protection and the fact that notice is not required for protection to attach, any material found on the Internet or elsewhere should be presumed to be protected until it is determined to be otherwise.
4. The concept of "fair use" provides a safe haven allowing for copying of limited portions of copyrighted works for limited use, but the specifics of a particular case should be thoroughly reviewed prior to any such copying.

The above discussion is, of course, not an exhaustive discussion of copyright law. The details of any one of the above points could fill—and, in fact, have filled—books. Our hope is that the above discussion has provided some food for thought and alerted the reader to potential pitfalls to be avoided in the copyright arena. It should be understood, however, that every fact pattern is different, and general principles are no substitute for informed legal advice regarding the specifics of a particular case.