

# Using Materials from the Internet:

## What are the Rules?

Copyright law governs the use of materials you might find on the internet, just as it governs the use of books, film or music in the analog world. Many people consider copyright law inadequate to deal with the realities of electronic communication today, but it takes time to change the law. This is actually a good thing: it will probably be better if it changes in response to what we learn about these new technologies through experience, rather than in response to special interests that may want nothing more than to protect their positions in the print world. Unfortunately though, this means that the law is not going to get clearer right away.

Given that the law is not really clear in many cases, what can we do today with the materials we find on the Internet and what are our liabilities for infringing another's copyright in electronic materials?

## Some common assumptions are *wrong*

### Copyright protection

Many people assume that everything posted on the Internet is public domain, probably because our law used to protect published works only if they displayed the proper copyright notice upon publication. The law, however, has changed: neither publication nor a notice of any kind is required to protect works today. Simply putting the pen to the paper or in the electronic medium, putting the fingers to the keyboard creates a copyrighted work. Once expression is committed to a tangible medium (and computer media is considered tangible), copyright protection is automatic. So, postings of all kinds are protected the same as published printed works.

### The scope of the implied license to copy, print and distribute

Whenever an author posts anything to the Internet, he or she should reasonably expect that it will be read, downloaded, printed out, and perhaps forwarded on a limited basis. The author impliedly grants a limited license to users to utilize the work in this manner. Think about the rights a newspaper editor has to publish a "letter to the editor." The author of the letter probably did not include a line in the letter giving the editor permission to publish the letter, but anyone who sends such a letter must be presumed to understand that this is what happens to letters to the editor.

On the other hand, most authors would not think that posting a work gives consent to any commercial use of it without permission. This is not part of what one reasonably expects, and so not part of the implied license.

## Liability for posting infringing works

Plaintiffs in several recent cases have alleged that commercial network service providers were responsible for the infringing activities of the network's subscribers. Individuals are less likely to be sued because they do not generally have the money to make a suit worthwhile, but universities have considerable funds and could easily be held liable for the actions of their employees doing their jobs and possibly students who access the Internet through university machines. This means that universities have to care about what their network users are doing, take effective measures to inform them about their responsibilities, and promptly investigate complaints of infringement.

## Individual liability for using works found online

There is little likelihood that browsers will be held liable for infringement for merely browsing a work online, even if it was posted without permission of the author. Possession of an infringing copy by a person innocent of the infringement is not actionable. But, when a browser begins to use a work beyond the scope of the implied license, for example, downloading an item and republishing it commercially, he most certainly becomes liable for infringement.

## The role of fair use today and tomorrow

Fair use plays a critical role in the analog world where access is effectively limited and authors make money by controlling copies. Fair use balances authors' rights to reasonable compensation with the public's rights to the ideas contained in copyrighted works. If the cost of access to the ideas contained in a work would be prohibitive or if the author might deny permission for a use that would further the purpose of the copyright law (the creation of more knowledge), copyright law has favored the use without payment to or permission from the author as a fair use. It used to be safe to say that reasonable educational uses, research uses and scholarly uses were fair uses. But this is changing.

Recent cases, including *Kinko's*, *Texaco* and *Campbell*, suggest that as the difficulties and costs of obtaining permission diminish, fair use should diminish too.<sup>[1](#)</sup>

Soon copyright owners selling digital rights for reasonable prices will argue before courts inclined to view "making copies" as unjustified under fair use that activities we all consider normal and customary are infringements. How will we respond? If this peek into the future is even close to accurate, we need to get

busy right now negotiating with copyright owners for the rights we want for as cheap as we can get them.

Authors and publishers are very likely to lose control over copying in the electronic environment. They will have to find other ways to obtain compensation than by restricting copying. We should be providing alternatives, exploring ideas, other systems, looking for methods of structuring our relationships with them that give us both what we want.

What is true today will not be true in a very short time so users must work hard to stay current on development of the NII, the copyright law, experiments that are taking place around the country and even around the world where creators, providers and users of information are sitting down and working together to devise new ways to make the copyright law work in the electronic environment.

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**Footnotes:**

1 *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991); *American Geophysical Union v. Texaco, Inc.*, 37 F.3d 881 (2nd Cir. 1994); *Campbell v. Acuff-Rose Music*, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994).