Copyright and risk: how to judge what to do

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Abstract

This article looks at a number of key risk factors that cut across multiple legal systems. The author highlights the causes by which some degree of risk associated with the copyright protected materials. This includes a range of decisions about probabilities, legal interpretations and economic consequences. Its aim is not to encourage people to break the law, but to help them understand their choices within a system that is more flexible than often portrayed. The key factors include the social contract in which the rights owner may abstain from defending their rights in a work. However, when this social contract extends to some commercial publishers which comes under written contract who give back certain rights to the author such as post copies of the works for free access on institutional website or in institutional repositories. Another major factor is the out of print materials in which it may have renewed economic value as publishing technologies change and orphaned work may be freely available on the web. The legal exemptions also become a major hindrance in which the courts do not weigh these factors equally, and recent decisions have tended to emphasize the principle that a fair is not one that takes money from the rights holder.

Introduction

Copyright and risk go together. Even apparently legal uses of copyright protected materials have some degree of risk associated with them.

A permission letter may, for example, not come from the genuine rights holder. That can happen when authors forget about signing away the copyright for articles written decades earlier. Or a work may have multiple layers of copyrights that require more than a single permission. In a translated work the original author and the translator can have separate copyrights, unless one of them has contractually surrendered or reassigned the rights. Music notoriously has multiple rights in the score, the lyrics, the arrangement, and the performance. Fair use (17 USC 107) or fair dealing rights in the Anglo-American legal systems offer important exemptions to the exclusive rights of authors, but these rights represent a defence against admitted infringement and only a court can make a final determination about whether the use was fair.

Risk assessment for copyright-protected materials includes a range of decisions about probabilities, legal interpretations, and economic consequences. Questions include the likelihood that an infringement will be discovered, and the likelihood that the rights holder will want to take legal action and will be successful. The risk assessment involves the economic penalties inherent in the law, which include the ability to pay the legal costs if a case is lost. Wilful infringement can be extremely expensive. With a few notable exceptions, such as breeching a technological protection in the US Digital Millennium Copyright Act, non-economic penalties are rare.

This article looks at a number of key risk factors that cut across multiple legal systems. Its goal is not to encourage people to break the law, but to help them understand their choices within a system that is more flexible than often portrayed.

The social contract

Copyright law has an enforcement mechanism that involves a complex social contract in which the rights owner may abstain from defending their rights in a work. There are no copyright police. (Seadle, 2006) The enforcement of copyright laws lies in the hands of rights holders and their representatives. Rights holders may abstain from enforcing their rights against infringements for a variety of non-altruistic reasons. For example, the cost of discovering minor infringements may outweigh any likely economic benefits. Or the rights holder may have forgotten about or lost the proof that they owned rights to a work. Or the time and effort involved in asserting rights may simply not be worth the trouble. While these reasons tend especially to be true for individual authors, corporations also lose records, lose track of what they own, or choose not to put their energy into enforcement because that is not how they make their money.

Some authors also intentionally abstain from asserting their copyrights because they want their works read and copied and distributed as broadly as possible. In the US under the old 1909 copyright law, it was easy to put a work deliberately into the public domain by omitting any notification of copyright (e.g. the © symbol or the word 'copyright') when publishing the work:

> Under the old Act, copyright protection came into being when a work was 'published with notice'. 'Publication' was the dividing line since there was no statutory protection without publication. But if a work was published without the requisite formalities, it went into the public domain immediately. – Oakley, 1990

Radical groups such as the Black Panthers or the Students for a Democratic Society often abstained from any copyright notification, either from contempt for the system or from a desire to use the lack of protection as a way to encourage wider distribution. Today in the US and other Berne Convention members do not have a similar mechanism within law, since all materials are automatically protected the moment they are created (17 USC 302).

Authors today who want explicitly to make their works available, and to let other know that they are available, must use a contractual mechanism such as the Creative Commons License (2006) that states explicitly:

> You are free to
> • copy, distribute, display, and perform the work
> • make derivative works
> • make commercial use of the work

The Creative Commons license is used in Europe and North America by academic authors committed to the principles of open access. The presence of such a license is less of an absolute guarantee of safety than the lack of a copyright notice on US published works pre-1978, since the license could be attached to the wrong article. Nonetheless it offers strong reasons to believe a work is safe to use.

Written contracts

The social contract extends also to some commercial publishers who give back certain rights to authors, such as the right to allow authors to post copies of the works for free access on their institutional websites or in institutional repositories, and to use them in teaching. The Sherpa/RoMEO project provides a website that lists publishers' copyright and self-publishing policies.[1] Emerald Group Publishing Ltd. in the UK offers one of the broadest and most liberal policies. Its Author's Charter (2005):

> … includes the right to:
> • Distribute photocopies of the published version of your article to students and colleagues for teaching/educational purposes within your university or externally.
> • Reproduce your article, including peer review/editorial changes, in another journal, as content in a book of which you are the author, in a thesis, dissertation or in any other record of study, in print or electronic format as required by your university or for your own career development.
> • Deposit an electronic copy of your own Word/Tex file version of your article, including peer review/editorial changes, on your own or institutional website.
>
> Authors are requested to cite the original publication source of their work and link to the published version – but are NOT required to seek Emerald's permission with regard to the personal re-use of their work as described above. Emerald never charges its authors for re-use of any of their own published works.'

These rights are broad, but not unlimited, as the clause about citing the original publication indicates in the license above. The real problem for authors can be to remember which contract offers which rights for which article. Standardization does not exist.

Out-of-print and orphaned works

When the rights holders of out-of-print works can be found, they are often willing to cooperate in letting university faculty make limited copies of their works for courses. It is tempting to generalize from that experience that out-of-print works are relatively safe to use, especially since they tend to be numerous in big research libraries. According to Paul

[1] http://www.sherpa.ac.uk/romeo.php

Courant (2006), the former Provost at the University of Michigan and now the University Librarian:

> Somewhere between 95 and 97 percent of the copyrighted material in the University of Michigan libraries is out of print.

The problem is that works that are out-of-print may have renewed economic value as publishing technologies change. Some publishers, such as the University of Chicago Press, are moving to a print-on-demand system that will keep books in print indefinitely without forcing them to maintain warehouse supplies of unsold copies. It is entirely possible that these publishers will also resurrect out-of-print titles, if they think demand might suffice to make it economically feasible.

Orphaned works (works whose rights holders cannot be found) often overlap with out-of-print works, though neither is necessarily a subset of the other. The rights holder for an out-of-print work may choose not to reply to a query, and that non-response does not put the work in the 'orphaned' category. Likewise a work may be freely available on the Web, but have an ambiguous or unlocatable rights holder. The US Congress and the European Union are both considering legal limits to the damages a person might have to pay when using a protected work after making a good-faith effort to find the rights holder:

> The orphan works issue is currently being considered both at the national and at the EU level. The US24 and Canada25 have also taken initiatives regarding orphan works. While approaches to this issue differ, the proposed solutions are mostly based on a common principle; a user has to perform a reasonable search in order to try to identify or locate the rightholder(s). – Commission of the European Communities (2008)

When a digital copy of an out-of-print work shows an unexpected revival in demand, a rights holder who previously had benignly ignored blatant infringement may suddenly threaten legal action and claim damages. The outcome of such a case depends on many factors including the amount of effort the infringing party put into locating the rights holder and getting a permission. Someone making money from illegal copies is likely to face greater risks than a situation where a limited exposure occurrs for purely educational or research purposes.

Legal exemptions

Most countries build in legal exemptions to copyrights for education and personal research. The US 'fair use' exemption (17 USC 107) is one of the broadest, because the language does not explicitly limit to educational institutions or situations. Instead it substitutes following four factors.

> 1 the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
> 2 the nature of the copyrighted work;
> 3 the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> 4 the effect of the use upon the potential market for or value of the copyrighted work.
>
> – 17 USC 107

The courts do not weigh these factors equally, and recent decisions have tended to emphasize the principle that a fair use is not one that takes money from the rights holder.

Similar rights exist in many countries, often under the name of 'fair dealing.' In India, for example, some of the exemptions are the uses of the work.

> I for the purpose of research or private study
> II for criticism or review
> III for reporting current events

IV in connection with judicial proceeding
V performance by an amateur club or society if the performance is given to a non-paying audience, and
VI the making of sound recordings of literary, dramatic or musical works under certain conditions. – Government of India, 1999

These exemptions are easy to misunderstand and to misuse. People are often surprised at how narrowly courts interpret exemptions that seem obviously fair to a person who wants to copy elements of a work.

Cost of infringement

The monetary cost of infringement varies widely. Even just within US law, the penalties can range from $200 to $150 000 for a single instance of wilful infringement. This is in addition to actual damages plus 'any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.' (17 USC 504) Court costs can represent another large potential expense.

An example of the variability of these penalties can be seen in the recent case of WB Music Corp. *vs* RTV Communication Group, Inc. In this case the defendants were accused of copying and distributing seven CDs with copyright-protected music on them. The judge decided that the infringement was wilful and the defendants elected to receive statutory damages. The District Court originally calculated the infringement based on seven separate infringements, one for each CD. The Appeals Court vacated that judgment, and recalculated the costs based on each separate copyrighted work:

> 'Each of the plaintiffs' separate copyrighted works constitutes one work for purposes of § 504(c)(1), and accordingly the defendants' infringement of thirteen copyrights by copying thirteen songs onto seven distinct CD products warrants thirteen statutory damage awards. On remand, the district court should allow the plaintiffs-appellants to recover thirteen awards of statutory damages, each in an amount not less than $500 or more than $100,000 as the court considers just.'– US Court of Appeals, 2006

The result is that the costs must be at least $6,500 instead of $3,500 and could be as high as $1,300,000 instead of $700,000.

The German law has somewhat lower maximum financial penalties.

> Die Ordnungswidrigkeit kann in den Fällen des Absatzes 1 Nr. 1 und 2 mit einer Geldbuße bis zu fünfzigtausend Euro und in den übrigen Fällen mit einer Geldbuße bis zu zehntausend Euro geahndet werden. [Offences can be punished in the case of Section 1, Number 1 and 2, with a fine of up to €50,000 and in the remaining cases with a fine of up to €10,000] – Deutsche Bundesrepublik, 2003, Paragraph 111a

Nonetheless they are high enough to make any risk worth considering before attempting any conscious and intentional infringement.

Most legal systems give the courts broad discretion to award damages. Australian law, for example, eschews minimums and maximums, and says simply: 'the court may, in assessing damages for the infringement, award such additional damages as it considers appropriate in the circumstances… (Australian Legal Information Institute, 2006)

The penalties are not always only monetary. In India, for example, conviction for a copyright violation can include a prison sentence.

> The minimum punishment for infringement of copyright is imprisonment for six months with the minimum fine of Rs 50 000. In the case of a second and subsequent conviction the minimum

> punishment is imprisonment for one year and fine of Rs one lakh. – Government of India, 1999

The same is also true for German law, which allows for a prison sentence of up to three years in certain situations (Deutsche Bundesrepublik, 2003, Paragraph 108b). Imprisonment is a relatively unusual penalty for copyright violations, but gives some sense of how serious the consequences can be.

Risk is not strictly a matter of court decisions and legal penalties. Corporations with sufficient financial resources and legal staff may also send out notices that threaten legal action against individuals or small organizations that simply do not have the money to hire lawyers to fight what might be a reasonable fair-use of protected materials. The 'Chilling Effects Clearinghouse' monitors these kinds of threats. The Clearinghouse is a 'joint project of the Electronic Frontier Foundation and Harvard, Stanford, Berkeley, University of San Francisco, University of Maine, George Washington School of Law, and Santa Clara University School of Law clinics.' (Chilling Effects, N.D.) They describe their goals as follows.

> Chilling Effects aims to help you understand the protections that the First Amendment and intellectual property laws give to your online activities. … Anecdotal evidence suggests that some individuals and corporations are using intellectual property and other laws to silence other online users. Chilling Effects encourages respect for intellectual property law, while frowning on its misuse to 'chill' legitimate activity. – Chilling Effects, N.D.

The cost in the case of these threatening notices is not necessarily monetary. The goal is often merely to discourage people from using copyright-protected works, even if the use may arguably be fair under the applicable statutes. Such warnings can, however, result in people agreeing to pay penalties to rights holders without actually fighting in court because they believe they will lose and that the court-levied costs will be higher.

Weighing the risks

There is no simple calculus that will produce a simple answer on whether a copyright risk should be taken or not. Those people and institutions that are extremely risk adverse should probably never take a risk any greater than the possibility that a written permission came from someone who was not really the rights holder, or that they mistook a death-date and presumed that an author's work was in the public domain.

At the other extreme are young persons who blatantly serve copyright-protected music from their computers, either from ignorance of the law or from a youthful sense that they will never be caught. While a substantial number of these people do in fact get away with the risk, they face a very aggressive and well-organized music industry that is aggressively pursuing all forms of illegal file-sharing. This kind of file-sharing is a bad risk to take, especially when it is done mainly to save money and not to pursue rights. These heedless risk-takers give those defending their fair-use rights a bad name.

Most countries give schools and universities a complex set of special rights and exemptions that provide some legal leverage in balancing the risks. These institutions are generally large enough to have the legal staff to fight frivolous warning letters. They may also belong to some part of government with its own special exemptions. In the US, for example, state universities may come under the sovereign immunity clause of the Constitution, which could protect them from monetary damages. At the same time government-funded institutions would not want the legislators who pass their budgets to see them as publicly flouting the law.

While the exact nature and specificity of the educational exemptions varies widely from country to country, the intent of those exemptions is almost always to encourage educators to integrate relevant copyright-protected materials into their teaching and research, without depriving the rights holders of a reasonable and expected return. The US TEACH Act (found in 17 USC 110) offers an example of this. Faculty have the right to use a wide range of protected materials in the part of an online course that is equivalent to face-to-face classroom teaching, but explicitly do not have the right to put readings that would ordinarily be in a purchased course-pack or textbook online for free access (except with an appropriate license or permission). Some faculty find the distinction bizarre in an online environment, as probably some rights holders do as well, but the goal is balance, and balance is what risk assessment is about.

Google settlement

When Google began its mass-digitization project that included all the books in the University of Michigan Libraries regardless of their copyright status, it took a substantial fiscal risk. While court approval is still pending, Google has reached a settlement with a key set of rights holders that largely justifies Google's risk. While the whole settlement is too long and complex, for a systematic analysis here, the key element in the agreement is

> As of the Effective Date, in the United States (i) Google may, on a non-exclusive basis, Digitize all Books and Inserts obtained by Google from any source (whether obtained before or after the Effective Date), (ii) Fully Participating Libraries and Cooperating Libraries may provide Books and Inserts to Google in hard copy (including microform) format to be Digitized (or in a form Digitized by or for such Fully Participating Library or Cooperating Library), and (iii) Google and Fully Participating Libraries may use such Books and Inserts as provided in this Settlement Agreement and the Library-Registry (Fully Participating) Agreements. – Google, 2008, p. 26

The agreement did not come without some cost. Google will have to pay a minimum of $45 million to a settlements fund, and potentially more.

> For every Principal Work, Entire Insert or Partial Insert that Google Digitized prior to the Opt-Out Deadline without the Rightsholder's authorization and that is the subject of a validated claim pursuant to Article XIII (Settlement Administration Program), Google will make a Cash Payment to the Settlement Fund of at least sixty United States dollars (US $60) per Principal Work, fifteen United States dollars (US $15) per Entire Insert, and five United States dollars (US $5) per Partial Insert (each, a 'Cash Payment'). – Google, 2008, p. 61.

Nonetheless these costs are for Google very manageable and the long term benefits that it gained in terms of the right to continue digitizing works appears at this point to outweigh the cost.

Conclusion

At last the International Conference on Digital Libraries in New Delhi, the then President of India, Dr A P J Abdul Kalam, addressed the conference and requested recommendations about copyright policy to which the author had the honour to contribute along with a number of contributions from India and around the world. While intelligent recommendations were made, the problem remained that for India, as for many other countries, the cost of acquiring copyrighted materials for genuine educational purposes seems prohibitively expensive.

While risk assessment is not a solution in itself, the Berne Convention does allow

countries to apply their own laws and exemptions when dealing with copyrighted materials from other Berne members. University faculty and administrators have some responsibility to make every reasonable legal use of those exemptions in the interests of the students and the research. Blatant exploitation of protected materials will cause damage, but failing to take reasonable risks based on statutory exemptions and measured judgments about the social contracts between rights holders and users, especially in regard to orphaned copyrights, may in the long run be equally harmful to the students and the society.

In introducing his intentions in The Social Contract and Discourse on the Origin of Inequality (1762), Jean-Jacques Rousseau describes a balance between justice and utility.

> I wish to inquire whether, taking men as they are and laws as they can be made, it is possible to establish some just and certain rule of administration in civil affairs. … In this investigation I shall always strive to reconcile what right permits with what interest prescribes, so that justice and utility may not be severed. – p. 5

This balance should be fundamental to any copyright risk assessment where the goal is not merely to spare a few dollars or euros or rupees, but (in the words of Clause 8 of the US Constitution) 'to promote the progress of science the useful arts…'

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