Use of On-line Materials -- Licensing and Copyright Issues, Pirated Software

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"I can resist everything except temptation."
-- Oscar Wilde

Oh, its so tempting. So much stuff on-line. So easy to copy. Heck, the Internet is just *built* for copying information, right? Who would know? Who would care? Everyone does it.

Unfortunately, *some* people do care. Sometimes they care a great deal. In some cases, they care so much, they will sue you even though they might well lose, or even if they lose money. Some people and companies really get upset when they think their content has been "appropriated" without permission.

There are many companies that want to sell you information. Those companies want to create *scarcity* of information in order to charge a premium for it. However, to reduce costs, they want to *distribute* that information via the Internet; and the Internet is all about *sharing* information. The Internet can turn something scarce into something abundant. Hence, there is a fundamental dilemma for distributors of information via the Internet.

Over the years, content owners have availed themselves to certain laws that support or perpetuate their business model in the Internet age. Those laws include copyright (and it cousin the Digital Millennium Copyright Act or "DMCA"), the Computer Fraud and Abuse Act, and patents. While this article will not be a review of intellectual property rights, it will discuss those four laws and how they pertain to on-line materials that law firms and companies may wish to access.

Incidentally, the author sides with many intellectual property attorneys who dislike using the term "pirating" for the unauthorized copying of on-line materials. Pirating is a pejorative term, but it is also ill-suited to describe the activity involved. When something is "pirated" in the traditional sense, it is lost to the original owner. However, in the case of on-line materials, the original copy remains intact (and in possession of the original owner). The loss (if there is one) typically stems from a lost sale or license, or a lack of attribution to the author of the work. Those latter losses are fundamentally different from the traditional notion of piracy on the high seas. Unfortunately, the music and movie industries appropriated (pirated?) the term and cleverly used it as a cultural weapon to bolster their business model. They were not seeking clarity. Rather, as with all propaganda, they were seeking an effect.[2]

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2 For a good review of the abundance/scarcity dilemma for copyright, see Lemley, Mark A., I*P in a World Without Scarcity* (March 24, 2014). Available at SSRN: http://ssrn.com/abstract=2413974 or http://dx.doi.org/10.2139/ssrn.2413974.

1. Copyright

Article 1, § 8 of the United States Constitution allows Congress to enact laws related to copyright and patent.[3] Congress has done so by enacting the Copyright Act.[4] Section 106 of the Copyright Act confers to the owners of the work certain basic rights pertaining to the distribution of copyrighted works. Among other things, the owner of the copyrighted work can exclude others from: reproducing copies of the copyrighted work;[5] preparing derivative works based upon the copyrighted work;[6] distributing copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;[7] performing the copyrighted work publicly;[8] and displaying the copyrighted work publicly.[9] Moreover, in the United States, copyright protection is conferred automatically upon completion of the work -- without the requirement for the author of the work to take any action to register the work with a copyright authority.[10] Indeed, the way that the law is written, it makes it quite difficult for the author to *disclaim* the copyright to a work. The threshold for copyrightability is relatively low. Virtually any unique *expression* of an idea by an author that is fixed in a tangible medium (such as bits in a computer file) constitutes a copyrightable work.

Because of the changes in the Copyright Act over the years, the exact term of copyright for any given work can be a little tricky to calculate.[11] However, the term of the copyright for copyright is routinely extended by Congress, and covers most works created after 1923. Consequently, you should assume that just about any on-line legal materials are copyrighted.

Once you find the materials that you want to make use of, either for a brief, an agreement, or whatnot, it is up to you to determine whether or not you have permission from the copyright owner to make use of the materials that you found on-line. In some cases, you can get the permission of the owner, typically for a fee and typically with strings attached (such as limited use or distribution). There are some exceptions, however. For example, the U.S. Copyright Act allows for the "fair use" of a work (or portion thereof) without the owner's permission under certain circumstances.[12]

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3 U.S. CONST. art. 1, § 8, cl. 8.

4 17 U.S.C. §§ 101 – 810.

5 17 U.S.C. § 106(1).

6 17 U.S.C. § 106(2).

7 17 U.S.C. § 106(3).

8 17 U.S.C. § 106(4). The exact language used is: "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly"

9 17 U.S.C. § 106(5). The exact language used is: "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"

10 Because the U.S. became a signatory of the Berne Convention for the Protection of Literary and Artistic Works (specifically Article 5), the U.S. Copyright Act was amended in 1976 to confer protection automatically, without the need for the author to register the work with the Copyright Office.

11 For a useful calculator of the term of a copyright under certain circumstances, see http://copyright.cornell.edu/resources/publicdomain.cfm

12 *See*, 17 U.S.C. § 107, the full text of which is:
Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as

The reason for all the concern about copyright is that the penalties for infringement are draconian. Copyright infringement is defined as any act that violates the owner's exclusive rights under Section 106 (among other things).[13] An example of infringement is simply downloading an article from a website without permission, or forwarding an article that you did pay for to a co-worker who did not. It is also a violation of the Copyright Act to download (import) a copy of a copyrighted work from a foreign country.[14] Under the Copyright Act, remedies include injunctions,[15] impounding of infringing devices,[16] damages and lost profits,[17] costs and attorneys fees,[18] and if that weren't enough, there is even provision for criminal sanctions.[19] Statutory penalties range from $200 to $150,000 *per copy*.[20]

Computers and the Internet make infringement of copyrights almost effortless. The remedies for infringement are downright terrifying. That is why copyright entanglements are worrisome for business owners.

2. The Digital Millennium Copyright Act

With the advent of widespread Internet usage, copyright owners needed some way to "protect" (*i.e.*, prevent copying of) their works technologically. Initially, they put their works into encrypted ("locked") containers that could be accessed with owner-approved software, commonly known as "digital rights management" or "DRM" for short. As with all things digital, the encrypted containers were examined and the locks were subsequently broken. Websites appeared that described how the locks were picked and in some cases the lock-picking code was provided. Instead of changing their business model to accommodate the new technology, a vocal (and rich) subset of copyright owners lobbied for passage of the Digital Millennium Copyright Act ("DMCA"). For the purposes of this article, it is Section 2[21] of the DMCA that is particularly relevant. Section 2 of the DMCA amended the Copyright Act to criminalize the

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criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit 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.
The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

13 *See*, 17 U.S.C. § 501. Section 501 sets out that infringement can constitute a violation of any right enumerated in Sections 106-122. 17 U.S.C. § 501(a).
14 17 U.S.C. § 501(a).
15 17 U.S.C. § 502.
16 17 U.S.C. § 503.
17 17 U.S.C. § 504.
18 17 U.S.C. § 505.
19 17 U.S.C. § 506.
20 17 U.S.C. § 504(c)(2).
21 17 U.S.C. § 1201.

software (or the description of software) that could circumvent DRM. In other words, because their keys were ineffective, they criminalized the act of picking the lock. Since its passage in 1998, the DMCA has had a spotty history. Broadly written, it has been abused by some, vilified by many, and is now considered largely obsolete. Use of DRM by copyright owners has been reduced dramatically, mainly because it was found to be onerous and troublesome for legitimate users, but was not an impediment for non-legitimate users. In the end, DMCA and DRM failed to stem the tide of lock pickers, but that learning process caused many needless casualties.

Even though DRM has fallen into disfavor, it is still used by some content owners. Websites and other on-line materials can be protected with DRM. There is no scienter requirement for violation of the anti-circumvention provisions of the DMCA, and the criminal penalties for circumvention are on top of the already-draconian penalties for copyright infringement. Worse, the penalties for circumvention apply even if the protected content is in the public domain or is use would have been deemed fair. For these reasons, it is incumbent upon law firms and companies to refrain from using DRM-defeating software, and they should warn their employees, partners and associates about the potential for violation and penalties.

3. The Computer Fraud and Abuse Act

Websites often have Terms of Use that govern (purportedly contractually) what can and cannot be done on the website.[22] The terms of on-line websites are enforceable.[23] The Computer Fraud and Abuse Act ("CFAA") was signed into law in 1986.[24] While the CFAA primarily addresses hacking, Congress has provided civil remedies along with criminal sanctions. Because the CFAA is broadly written, and because website owners get to decide what it means to "exceed authorized access", website owners have used the CFAA to sue users who violate the website's Terms of Service.[25] What this means is that if you sign up for an on-line service, there may be stipulations in the Terms of Use with that website that may govern *how* you retrieve information on that website. In many cases, *automated* methods of retrieving the information on the website may be prohibited, even though *manual* methods to do the same thing are permitted. Similarly, if you borrow someone's access credentials (username and password) to gain access to a website, that may be a violation of the CFAA because you were not authorized to access the site at all.

4. Patents

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22 Terms of Use are distinguished from Terms of Service, which are typically promulgated by Internet Service Providers ("ISP's"). Terms of Service concern what users can and cannot do when they access the Internet. Whereas Terms of Use are specific to the websites accessed via the Internet.

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24 18 U.S.C. 1030, et. seq.

25 *See, e.g. Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000) (a marketing company was found to be in violation of the CFAA when that marketing company accessed publicly available information on the plaintiff's website, but did so in a manner inconsistent with what was allowed under the website's Terms of Use policy and thus "exceeded authorized access" in violation of 18 U.S.C. 1030(a)(2)(C)). *See also, Shurgard Storage Center v. Safeguard Self Storage, Inc.*, 119 F. Supp. 2d 1121, 1125 (W.D. Wash. 2000) (in a trade secret misappropriation lawsuit, an employee exceeded his authorization when he "sent an e-mail to a competitor containing his employer's information" and was thus in violation of the CFAA).

Patents may seem to be an odd topic for this paper, but its not. Many on-line services utilize technology (*e.g.*, document assembly) that can, in certain jurisdictions, constitute patentable subject matter. Patents are territorial, in that they are enforceable only within the jurisdiction in which they were issued. Before 1988, it was possible for a foreign company to use a U.S.-patented process to make something and then import that product into the United States without incurring any liability for using the U.S.-patented process. However, Congress added Section 281(g) to close that loophole by making the importation of a product made by a patented process an act of patent infringement.[26] It is possible for a service in a foreign jurisdiction to be running a software process that is legal to use *in that foreign jurisdiction* but may require a license for you to import a product (such as an electronic document) for use within the United States. Unfortunately, the service provider in that jurisdiction may not inform you that it is an infringement of a patent to use their service in the U.S. (or they may be blissfully unaware). While detection of the infringement is notoriously hard for the patent owner, it is not impossible. Hence, there is some risk in using an offshore software service.

5. Conclusions

While the Internet may make finding and copying information easy, we still live in a permission-based legal system. It is up to the user to determine whether permission to access, copy, modify, or use content is legal (or not) and to secure the necessary permissions. Failure to obtain permission can lead to stiff penalties and unwanted attention.

26 35 U.S.C. § 271(g) (1988). *See*, Troy Petersen, *U.S. Infringement Liability for Foreign Sellers of Infringing* Products, available at: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1101&context=dltr Petersen indicated that the amendment "closed a loophole in § 271 that had allowed foreign manufactures to make products abroad using a process patented in the United States and then import and sell the products in the U.S. without committing infringement." Petersen also cited Anna M. Budde, *Liability of a Foreign Manufacturer Using a Patented Process for Indirect Infringement*, 42 WAYNE L. REV. 291, 294 (1995).