©opyrights and Beyond in the Digital Age

BY THOMAS G. FIELD, JR.

THOSE WHO PUBLISH NOVELS, DICTIONARIES, MUSIC, VIDEOS AND GRAPHICS, FOR EXAMPLE, HAVE NO GUARANTEE OF PROFESSIONAL OR ECONOMIC SUCCESS. Their risks are similar to those who sink shafts in search of oil. Sometimes they find a gusher; more often, a dry hole. In both cases, if enterprises are to continue, successful ventures must pay for those that fail. As real property protects wildcatters, copyright helps artists, authors and publishers recover their investments.

At one time, only works visible to the naked eye were copyrightable, but that has long since changed. Now, works capable of perception only by use of VCRs or computers, for example, enjoy the same protection as books, paintings and sculpture.

In 1994, William S. Strong reported that he had "heard Chicken Littles say that the sky is falling in on copyright owners" in the digital age and predicted to the contrary.[1] He was right; publishers' problems may have changed in degree but not in kind. For at least three decades, photocopiers have posed similar risks.

Consider, for example, a 1970s dispute between a publisher of specialized journals and two federal libraries.[2] Because the libraries were distributing copies of many articles, the publisher feared for its long-term existence. It expected such copying to reduce journal subscriptions, making them more expensive and feeding a potentially fatal spiral of fewer subscribers and higher prices. Nevertheless, the publisher lost on the basis of a fair use test developed by the courts to balance the needs of both publishers and the public. The nonprofit, governmental status of defendants no doubt played a role but perhaps not as much as the publisher's inability to do more than anticipate harm.

Photocopiers have since had little effect on most publishers. In the case of books and many other works, photocopies are a poor substitute. In the case of journal articles, although limited copies can still be distributed by libraries,[3] it is inconvenient to receive them by mail, and ones sent by fax are only marginally readable. Thus journal sales continue, often principally to libraries.

Despite arriving more quickly and being identical to originals, digital copies are unlikely to have a significantly larger effect. While it is theoretically possible to distribute further copies within an institution or elsewhere, it is impractical without, say, posting borrowed material on the web. If that were done, it would be both easily spotted and proven. Moreover, substantial penalties may be imposed on behalf of those whose works have been purloined.[4]

Regarding one firm that recently tried to use a public benefit argument to justify a scheme for unauthorized distribution of copyrighted music over the web, a judge said:[5]

> Stripped to its essence, defendant's "consumer protection" argument amounts to nothing more than a bald claim that defendant should be able to misappropriate plaintiffs' property simply because there is a consumer demand for it.

In a sequel, the judge also imposed statutory damages of approximately $118 million, saying:[6]

> [T]he potential for huge profits in the rapidly expanding world of the Internet is the lure that tempted an otherwise generally responsible company... to break the law, and that will also tempt others... if too low a level is set for statutory damages....

Yet, copyright protection is problematic for digital works that have weak or no copyright protection. No copyright exists in works such as those of Shakespeare or Degas, for example, so they can be copied by anyone. Instant web access to such things accounts for much of the internet's appeal. After someone puts them on the web, however, what prevents others from copying the digital version? Even if copyright was available, independent effort is a defense. Copiers may claim to have digitized the works independently. This is something they have every right to do, and it could be difficult to prove otherwise.

Similar problems are faced by many internet-related works. Databases that underlie search engines, for example, are very important. If information on the web can't be found, it may as well not exist. Those who provide search services must recover costs to continue, but how? Copiers may not only claim independent origin, but they will also rely on a 1991 Supreme Court case finding telephone directories to lack sufficient originality for copyright protection.[7]

Those facing double doubts about copyright availability and enforceability often resort to various kinds of self-help.[8] Meanwhile, others are hard at work to counter such efforts.[9] In 1998, Congress forbade the sale and use of means to circumvent "copyright protection schemes,"[10] but the prohibition did not immediately go into effect. Rather, the Librarian of Congress James Billington, with the assistance of Copyright Register Mary Beth Peters, was given two years to examine the need for possible exemptions. They were also given the power to enact rules limiting the reach of the anticircumvention prohibitions.

Two exemptions were granted in October but did not facilitate access to works with, at best, weak copyright protection. Although some had strongly advocated such exemptions, Mr. Billington found no justification. Now some librarians, rather than content providers, claim that the sky is falling. The American Library Association (ALA), for example, promptly accused the Librarian of ruling "against the American public and library users by negating fair use in the digital arena."[11] It also predicted that "users of digital information will have fewer rights and opportunities than users of print information." Its President went so far as to accuse Mr. Billington of "taking away from students, researchers, teachers and librarians the long standing basic right of 'fair use' to our Nation's digital resources."

The ALA's position is based in part on an expectation that a pay-per-view model will dominate, exacerbating a "digital divide" said to separate internet "haves" from "have-nots." Yet, accelerating power and speed, coupled with the decelerating cost of internet access, make it hard to believe that the number of people excluded from the internet will long exceed the number who lack telephones or televisions. Moreover, as Mr. Billington noted, after indicating why pay-per-use may actually be best for some users: "The record in this proceeding does not reveal that 'pay-per-use' business models have, thus far, created the adverse impacts on the ability of users... that would justify any exemptions...."[12]

Mr. Billington and Ms. Peters should be applauded for demanding proof rather than predictions that the sky will fall. The game is far from over because the statute provides for another round of rule making every three years. Should something change, as the Librarian indicated, adjustments can be made in the next round.

Yet, aside from some single source works perhaps, it is hard to imagine what adjustments could ever be warranted. For important, if not critical, internet needs to continue to be met, providers must recoup costs. Anyone who dislikes their prices or other conditions for access may compete, with the same opportunity to recover their costs as they see fit.

Professor Field is an original member of the Law Center's faculty and founded its quarterly journal, Risk: Health, Safety & Environment*, in 1989. He is a charter member of the U.S. Patents Quarterly editorial advisory board and has contributed many articles and comments to IDEA, the Law Center's intellectual property journal. Professor Field's discussions on intellectual property for authors, inventors, artists and programmers are available at the Law Center's website. Before those discussions were available on the web, over 100,000 copies were published and distributed by the Law Center and the Small Business Administration.*

Notes

1 *Copyright in the New World of Electronic Publishing*, J. Elec. Publishing, online at <http://www.press.umich.edu/jep/works/strong.copyright.html>.

2 Williams & Wilkins Co. v. U.S., 487 F.2d 1345 (Ct. Cls. 1973), *aff'd* without opinion by an equally divided court, 420 U.S. (1975).

3 *See, e.g.,* 17 U.S.C. § 108(f) and (g); *see also,* U.S. Copyright Office, Reproductions of Copyrighted Works by Educators and Librarians (Circular. 21, online at <http://www.loc.gov/copyright/circs/circ21.pdf> June 1998). These appear among many fair use exemptions spanning 17 U.S.C. §§ 107-122.

4 *See* my article *Publishers' Rights and Wrongs in the Cyberage,* 39 Idea 429 (1999), also online at <http://www.fplc.edu/tfield/cyberpub.htm>.

5 UMG Recordings, Inc. v. MP3.Com, Inc., 92 F.Supp.2d 349, 352 (S.D. N.Y. 2000).

6 56 U.S.P.Q.2d 1376, 1380.

7 Feist Publns., Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340 (1991).

8 *See, e.g.,* Network Solutions' notice on the Whois database at <network-solutions.com/cgi-bin/whois/whois>. It states in part: "Compilation, repackaging, dissemination, or other use of the WHOIS database in its entirety, or of a substantial portion thereof, is not allowed without NSI's prior written permission. By submitting this query, you agree to abide by this policy."

9 Indeed, Charles Seife, *Digital Music Safeguard May Need Retuning,* 290 Science, 917, 918 (2000) quotes one expert as saying, "Copy protection can't possibly work. Get over it. Accept the inevitable and figure out how to make money anyway."

10 17 U.S.C. §§ 1201-05.

11 ALA Washington Office Newsline, Oct. 26, 2000, online at <http://www.ala.org/washoff/alawon/alwn9085.html>.

12 65 Fed. Reg. 64555, 64564 (Oct. 27, 2000).