

# 34 Copyright and Intellectual Property

**IN 1790, CONGRESS PASSED** the first Copyright Act giving copyright owners the right to control reproduction and distribution of their creative works for a limited time.<sup>1</sup> In the two centuries since, copyright law has evolved apace with technology. As all forms of media converge onto the Internet, online social and legal norms of conduct continue to change as well. In the early days of the web, it was not unheard of for websites to require permission before allowing other sites to link to their web pages.<sup>2</sup> Today, of course, most linking happens without permission. Tim Berners-Lee, one of the inventors of the World Wide Web, has said that a link is nothing more than a digital referral or footnote, and that the ability to refer to a document is a fundamental right of free speech.<sup>3</sup>

But as news organizations' revenue dwindles, major news publishers point fingers at the vast numbers of websites they see "scrap[ing], syndicat[ing] and monetize[ing]" their original news content "without fair compensation to those who produce, report and verify it,"<sup>4</sup> and they wonder if changes to federal copyright and related intellectual property law policies can help stem their monetary losses.

The very act of performing an Internet search implicates copyright law: in order to carry out a search, the search engine must copy some of other sites' content. Programs variously called "spiders," "robots," and "web crawlers" scour the Internet and perform searching, copying, and retrieving functions on billions of websites to collect the information that ultimately appears in the search results.<sup>5</sup> Although copying is one of the exclusive rights granted to a copyright owner, caching (storing data within a computer program) is not generally considered to be a violation of copyright law.<sup>6</sup>

In contrast, copying an entire news article to disseminate widely—whether by using the keyboard function keys to copy the web page, scanning the article into a PDF file, or simply manually typing the material—constitutes copyright infringement, regardless of whether the source is given attribution. And it appears to happen often. In one 30-day period in 2009, according to the news publisher group Fair Syndication Consortium, 112,000 unlicensed copies of articles were detected on 75,000 websites that featured advertising.<sup>7</sup> The Consortium says that most of the ads came from Google's and Yahoo!'s ad networks. "By running paid advertising alongside articles that have been copied and posted without first being licensed (which therefore infringe upon the owners' copyrights), these websites make money off news stories without compensating the originators of the stories."<sup>8</sup>

Many of these issues will be worked out by private companies, without government involvement. In response to complaints that aggregators and scrapers were benefiting from appearing prominently in search results, Google recently announced a series of steps that may make it easier for the creators of original content to tag their stories in ways that can improve their search rankings.<sup>9</sup>

Whether public policy changes are also needed—specifically a rethinking of copyright law—is tremendously controversial. Any attempts by publishers to use federal copyright policy to try to rein in widespread unpaid distribution of their stories would be constrained by two other principles: The First Amendment and the fair-use doctrine. Copyright, the First Amendment, and fair use overlap and coexist uneasily. Which of these takes precedence in any given instance depends on the particular facts of the case, as interpreted in the context of contemporaneous political and social circumstances.<sup>10</sup> Attorney Doug Rand wrote:

"It is no overstatement to say that the Internet as we know it could not exist without the fair use defense. . . . Since it would be impossible for any search engine to get permission to copy and display this information from billions of websites, the concept of fair use underlies all search."<sup>11</sup>

“Fair use” allows other parties to use copyrighted materials in certain circumstances. The current generally accepted industry practice is to allow aggregators to excerpt a small part of a news story to give a sample of what the story is about, with attribution. News aggregators are presumed to be covered under fair use as long as they limit their copying to a credited excerpt with a linking headline that, when clicked on, brings up the original source. However, some news publishers contend that including enough of the story to enable readers to grasp the gist of the story without having to click through to the article devalues the original content, because many have no interest in reading past the initial sample.

In March 2010, Associated Press attorney Laura Malone told the audience at an FTC hearing that news-aggregation sites that take headlines and leads are taking “the heart of the story.” “[C]opyright owners” should be able “to set the parameters by which people can republish our stuff. If people want to build sites based on the news that is published by any of the news organizations, that’s great. We’ll give them a license,”<sup>12</sup> she said. Bruce W. Sanford of Baker Hostetler, LLP, a law firm that represents news publishers, has written the same philosophy, proposing that Congress pass federal legislation that explicitly makes linking a form of copyright infringement.<sup>13</sup>

Others, including Google (which does have licensing agreements with the major news publishers), contend that linking increases the value of the content by bringing the story to the attention of readers interested in the topic who otherwise would not see it, who then click through to the original story.<sup>14</sup> Yet another viewpoint is that, given prevailing online habits for looking at news, the utility of the quote and link are in the public interest and outweigh any theoretical, unproven loss in value.

### **Opt-out versus Opt-in**

Had the Internet been constructed by lawyers mindful of potential copyright infringement, it would be a very different place. Instead, it was originally constructed by academics and programmers who wanted primarily to communicate with one another. They established a default “opt-out” system that required webmasters to add certain code language to their systems in order to have their websites excluded from search engine copying, indexing, and caching. Some news publishers perceive this as the root of many of their copyright infringement problems. James W. Marcovitz, senior vice president and deputy general counsel for News Corp., explained:

“What we would like to see is a permission-based economy where we could set the value for our content and people come to us and seek permission to use it... If aggregators would like to build business based on the use of our content, they should come to us to seek permission to obtain it on terms that we would sell.”<sup>15</sup>

However, James Boyle of Duke Law School responded by explaining how the Internet would have evolved if this approach had been taken:

“[A]t the beginning of the Internet, had we been debating in this room, ‘Hey, there’s this web thingy, so should we be permissions based or should we be kind of opt-in, opt-in or opt-out?’ We could have come up with great reasons why everyone should have permission. It’s not that hard. You just have to write to the person and get permission to link. It’s not that hard. If you want to create a match up on Google Maps, you just have to write to all the data sources that you’re going to get, all million of them, and just get permissions, it’s not that hard.

“All that would have prevented is the World Wide Web, right, but of course people in this room wouldn’t have cared because they didn’t know what the World Wide Web was.... [W]e would have got it wrong, dramatically wrong, if we had gone permissions based.... This for me suggests humility as the guiding principle of intervention.”<sup>16</sup>

The Robot Exclusion Standard, the most widely used “opt-out” program directing search engines to refrain from copying, indexing, and caching a website, requires that a webmaster add specific lines of HTML code known as Robot Exclusion Headers to the website, which instruct the search engine spider to ignore the site and not to archive the website via a cached link.<sup>17</sup> According to Google’s Josh Cohen, Robots.txt allows a publisher great latitude: the ability to block an entire article, show only a snippet, or show the article without any of the artwork and photos.<sup>18</sup>

## Take-Down Notices

The Copyright Act, as amended in 1998 by the Digital Millennium Copyright Act,<sup>19</sup> provides a fairly simple mechanism that allows any copyright owner to compel unlicensed material to be taken off a website. It also shields online service providers from their own acts of copyright infringement and those of others as long as they expeditiously remove any material alleged to be infringing, and maintain policies to deal with repeat infringers, up to and including terminating their accounts, if necessary.

The law was passed over the objections of content-industry groups that had lobbied for service providers to be held strictly liable for the acts of their users, meaning that they would have been held liable regardless of whether they were aware of the presence of infringing material. In return for being granted the safe harbor, service providers are obliged to disclose information about users who are alleged to be infringers.<sup>20</sup> (Internet privacy advocates have expressed concern about this aspect of the law.<sup>21</sup>)

There is no requirement that the service provider investigate or try to ascertain whether the material actually does infringe copyright. The Fair Syndication Consortium was founded in 2009 to rally publishers around a new syndication model based on Attributor Corporation's freely available FairShare service. FairShare places digital "fingerprints" on online content and then tracks which sites are picking up the content. The Consortium hopes to track down unauthorized aggregators and negotiate a share of their ad revenue. If the negotiations fail, the Consortium will demand the removal of the advertising running alongside the copyright-protected material.<sup>22</sup> Between March and July 2010, Attributor contacted 107 unauthorized aggregators deemed "systematic infringers," for-profit sites that make a practice of running unlicensed original work and placing ads near the copied content.<sup>23</sup> Seventy-five percent of the sites removed the unlicensed content or started licensing discussions after receiving only one or two emails from Attributor—the second of which notified the site that if no response was forthcoming, Aggregator would contact search engines and request that the unauthorized copies be removed from their indexes and ad networks to request removal of the ads. The Fair Syndication consortium hopes that the trial results will help provide a new framework for enforcing copyright on the Internet. The Associated Press recently created the News Licensing Group, naming former ABC president David Westin CEO of the organization whose mission will be to help hundreds of publishers track and get payment for their content when it is used by other websites.<sup>24</sup>

## "Hot News"

Journalists have always drawn on the work of other journalists to create news stories, and the U.S. Supreme Court has repeatedly asserted that there can be no copyright protection for facts: "The most fundamental axiom of copyright law is that 'no author may copyright his ideas or the facts he narrates.'"<sup>25</sup>

But a few publishers have filed lawsuits against businesses that repeatedly appropriate ideas and facts that others have researched, articulated, and published, citing their right to protection under the "hot-news misappropriation" doctrine. In 2008, the Associated Press (AP) filed suit in New York against All Headlines News Corp. (AHN), alleging, among other claims, that AHN was illegally copying, rewriting, and transmitting AP stories to paying clients, in violation of AP's quasi-property right to breaking news.<sup>26</sup> AP's claim relied on a long-neglected doctrine created by the U.S. Supreme Court during World War I when it ruled in *International News Service v. Associated Press* that INS's policy of rewriting AP's European war-coverage stories that were written for East Coast papers, then telegraphing them without attribution to papers farther west, violated AP's right to profit from its reporting efforts.<sup>27</sup> The practice did not violate any AP copyrights, because no direct plagiarism was involved, yet the U.S. Supreme Court wrote:

"Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of [AP's] legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not..."<sup>28</sup>

While it is no longer binding federal law, the 1918 ruling established it as a common-law doctrine, granting news producers a pseudo-property right to the news stories they break. The right can only be asserted against competitors, and only for as long as the news has commercial value.<sup>29</sup> And it can only be applied in situations where another party rewrites the news without independent investigation and verification.<sup>30</sup> Because it is a common-law doctrine,

each state's judicial system has the freedom to decide whether to recognize the validity of a hot-news claim. The doctrine is considered valid in the U.S. Court of Appeals for the Second Circuit, which has jurisdiction over New York, where most news publishers are based.<sup>31</sup>

The hot-news doctrine had lain dormant until 1997, when the National Basketball Association (NBA) resuscitated it in order to bring suit against Motorola for its subscription text messaging service, which provided immediate access to NBA scores on an ongoing basis.<sup>32</sup> The court ruled against the NBA, but the case gave legitimacy to a doctrine that had not been called on for 80 years.<sup>33</sup>

The doctrine gained further momentum in 2010, when it was invoked in *Barclays v. FlyOnTheWall.com*.<sup>34</sup> The plaintiffs were Wall Street research analysts who distributed stock tips through password-protected sites to paying clients, mostly large institutional investors whose licensing agreements forbade them to redistribute the information. The defendant, FlyOnTheWall.com, had obtained Barclays's information through leaks, and then sold it to its own clients. The trial judge found in favor of Barclays, declaring, "It is not a defense to misappropriation that a recommendation is already in the public domain by the time Fly reports it."<sup>35</sup> (The injunction was lifted once Fly filed its appeal.)

A major cross-section of the American media, including news services, publishers of major weekly and monthly news and opinion magazines, and major broadcasting chains, filed a brief in the Barclay's case supporting the continued existence of the doctrine.<sup>36</sup> Google and Twitter filed a brief urging the court to strike down the doctrine, as did the Electronic Frontier Foundation, Citizen Media Law Project, and Public Citizen.<sup>37</sup> It should be noted that this fight does not uniformly pit traditional media companies against digital companies. Many traditional media companies fear an expansion of copyright laws, too.<sup>38</sup>

Some have suggested that instead of tightening the "fair use" rules, policymakers should focus on ensuring that content creators get proper credit. Patricia Aufderheide and Peter Jaszi of American University's School of Communication note that their efforts to help develop codes of best practices in fair use for filmmakers, scholars, and online video makers have shown them that non-corporate creators are often primarily concerned with receiving credit whenever their work is used,<sup>39</sup> prioritizing "recognition, rather than monetary reward."<sup>40</sup> They therefore suggest a "limited general right of attribution," guaranteeing that content creators be properly credited, even if they are not financially compensated.