10 Big Myths about copyright explained

An attempt to answer common myths about copyright seen on the net and cover issues related to copyright and USENET/Internet publication.

- by Brad Templeton

Note that this is an essay about copyright *myths*.It assumes you know at least what copyright is -- basically the legal exclusive right of the author of a creative work to control the copying of that work. If you didn't know that, check out my own brief introduction to copyright for more information. **Feel free to link to this document, no need to ask me**. Really, **NO** need to ask.

1) "If it doesn't have a copyright notice, it's not copyrighted."

This was true in the past, but today almost all major nations follow the Berne copyright convention. For example, in the USA, almost everything created privately and originally after April 1, 1989 is copyrighted and protected whether it has a notice or not. The default you should assume for other people's works is that they are copyrighted and may not be copied unless you know otherwise. There are some old works that lost protection without notice, but frankly you should not risk it unless you know for sure.

It is true that a notice strengthens the protection, by warning people, and by allowing one to get more and different damages, but it is not necessary. If it looks copyrighted, you should assume it is. This applies to pictures, too. You may not scan pictures from magazines and post them to the net, and if you come upon something unknown, you shouldn't post that either.

The correct form for a notice is:

"Copyright [dates] by [author/owner]"

You can use C in a circle © instead of "Copyright" but "(C)" has never been given legal force. The phrase "All Rights Reserved" used to be required in some nations but is now not legally needed most places. In some countries it may help preserve some of the "moral rights."

2) "If I don't charge for it, it's not a violation."

False. Whether you charge can affect the damages awarded in court, but that's main difference under the law. It's still a violation if you give it away -- and there can still be serious damages if you hurt the commercial value of the property. There is a USA exception for personal copying of music, which is not a violation, though courts seem to have said that doesn't include widescale anonymous personal copying as Napster. If the work has no commercial value, the violation is mostly technical and is unlikely to result in legal action. Fair use determinations (see below) do sometimes depend on the involvement of money.

3) "If it's posted to Usenet it's in the public domain."

False. Nothing modern and creative is in the public domain anymore unless the owner explicitly puts it in the public domain**(*)**. *Explicitly*, as in you have a note from the author/owner saying, "I grant this to the public domain." Those exact words or words very much like them.

Some argue that posting to Usenet implicitly grants permission to everybody to copy the posting within fairly wide bounds, and others feel that Usenet is an automatic store and forward network where all the thousands of copies made are done at the command (rather than the consent) of the poster. This is a matter of some debate, but even if the former is true (and in this writer's opinion we should all pray it isn't true) it simply would suggest posters are implicitly granting permissions "for the sort of copying one might expect when one posts to Usenet" and in no case is this a placement of material into the public domain. It is important to remember that when it comes to the law, computers **never** make copies, only human beings make copies. Computers are given commands, not permission. Only people can be given permission. Furthermore it is very difficult for an implicit license to supersede an explicitly stated license that the copier was aware of.

> **Note** that all this assumes the poster had the right to post the item in the first place. If the poster didn't, then all the copies are pirated, and no implied license or theoretical reduction of the copyright can take place.
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> **(*)** *Copyrights can expire after a long time, putting something into the public domain, and there are some fine points on this issue regarding older copyright law versions. However, none of this applies to material from the modern era, such as net postings.*
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> **Note** that granting something to the public domain is a complete abandonment of all rights. You can't make something "PD for non-commercial use." If your work is PD, other people can even modify one byte and put their name on it. You might want to look into Creative Commons style licenses if you want to grant wide rights.

4) "My posting was just fair use!"

See EFF notes on fair use and links from it for a detailed answer, but bear the following in mind:

The "fair use" exemption to (U.S.) copyright law was created to allow things such as commentary, parody, news reporting, research and education about copyrighted works without the permission of the author. That's vital so that copyright law doesn't block your freedom to express your own works -- only the ability to appropriate **other people's**. Intent, and damage to the commercial value of the work are important considerations. Are you reproducing an article from the *New York Times* because you needed to in order to criticise the quality of the New York Times, or because you couldn't find time to write your own story, or didn't want your readers to have to register at the New York Times web site? The first is probably fair use, the others probably aren't.

Fair use is generally a short excerpt and almost always attributed. (One should not use much more of the work than is needed to make the commentary.) It should not harm the commercial value of the work -- in the sense of people no longer needing to buy it (which is another reason why reproduction of the entire work is a problem.) Famously, copying just 300 words from Gerald Ford's 200,000 word memoir for a magazine article was ruled as not fair use, in spite of it being very newsworthy, because it was the most important 300 words -- why he pardoned Nixon.

Note that most inclusion of text in followups and replies is for commentary, and it doesn't damage the commercial value of the original posting (if it has any) and as such it is almost surely fair use. Fair use isn't an exact doctrine, though. The court decides if the right to comment overrides the copyright on an individual basis in each case. There have been cases that go beyond the bounds of what I say above, but in general they don't apply to the typical net misclaim of fair use.

The "fair use" concept varies from country to country, and has different names (such as "fair dealing" in Canada) and other limitations outside the USA.

Facts and ideas can't be copyrighted, but their expression and structure can. You can always write the facts in your own words though

See the DMCA alert for recent changes in the law.

5) "If you don't defend your copyright you lose it." -- "Somebody has that name copyrighted!"

False. Copyright is effectively never lost these days, unless explicitly given away. You also can't "copyright a name" or anything short like that, such as almost all titles. You may be thinking of trade marks, which apply to names, and can be weakened or lost if not defended.

You generally trademark terms by using them to refer to your brand of a generic type of product or service. Like a "Delta" airline. Delta Airlines "owns" that word applied to air travel, even though it is also an ordinary word. Delta Hotels owns it when applied to hotels. (This case is fairly unusual as both are travel companies. Usually the industries are more distinct.) Neither owns the word on its own, only in context, and owning a mark doesn't mean complete control -- see a more detailed treatise on this law for details.

You can't use somebody else's trademark in a way that would steal the value of the mark, or in a way that might make people confuse you with the real owner of the mark, or which might allow you to profit from the mark's good name. For example, if I were giving advice on music videos, I

would be very wary of trying to label my works with a name like "mtv." :-) You can use marks to critcise or parody the holder, as long as it's clear you aren't the holder.

6) "If I make up my own stories, but base them on another work, my new work belongs to me."

False. U.S. Copyright law is quite explicit that the making of what are called "derivative works" -- works based or derived from another copyrighted work -- is the exclusive province of the owner of the original work. This is true even though the making of these new works is a highly creative process. If you write a story using settings or characters from somebody else's work, you need that author's permission.

Yes, that means almost all "fan fiction" is arguably a copyright violation. If you want to publish a story about Jim Kirk and Mr. Spock, you need Paramount's permission, plain and simple. Now, as it turns out, many, but not all holders of popular copyrights turn a blind eye to "fan fiction" or even subtly encourage it because it helps them. Make no mistake, however, that it is entirely up to them whether to do that.

There is a major exception -- criticism and parody. The fair use provision says that if you want to make **fun** of something like *Star Trek*, you don't need their permission to include Mr. Spock. This is not a *loophole*; you can't just take a non-parody and claim it is one on a technicality. The way "fair use" works is you get sued for copyright infringement, and you admit you did copy, but that your copying was a fair use. A subjective judgment on, among other things, your goals, is then made.

However, it's also worth noting that a court has never ruled on this issue, because fan fiction cases always get settled quickly when the defendant is a fan of limited means sued by a powerful publishing company. Some argue that completely non-commercial fan fiction might be declared a fair use if courts get to decide. You can read more

7) "They can't get me, defendants in court have powerful rights!"

Copyright law is mostly civil law. If you violate copyright you would usually get sued, not be charged with a crime. "Innocent until proven guilty" is a principle of criminal law, as is "proof beyond a reasonable doubt." Sorry, but in copyright suits, these don't apply the same way or at all. It's mostly which side and set of evidence the judge or jury accepts or believes more, though the rules vary based on the type of infringement. In civil cases you can even be made to testify against your own interests.

8) "Oh, so copyright violation isn't a crime or anything?"

Actually, in the 90s in the USA commercial copyright violation involving more than 10 copies and value over $2500 was made a felony. So watch out. (At least you get the protections of criminal law.) On the other hand, don't think you're going to get people thrown in jail for posting your E-mail. The courts have much better things to do. This is a fairly new, untested statute. In

one case an operator of a pirate BBS that didn't charge was acquited because he didn't charge, but congress amended the law to cover that.

9) "It doesn't hurt anybody -- in fact it's free advertising."

It's up to the owner to decide if they want the free ads or not. If they want them, they will be sure to contact you. Don't rationalize whether it hurts the owner or not, **ask** them. Usually that's not too hard to do. Time past, ClariNet published the very funny Dave Barry column to a large and appreciative Usenet audience for a fee, but some person didn't ask, and forwarded it to a mailing list, got caught, and the newspaper chain that employs Dave Barry pulled the column from the net, pissing off everybody who enjoyed it. Even if you can't think of how the author or owner gets hurt, think about the fact that piracy on the net hurts everybody who wants a chance to use this wonderful new technology to do more than read other people's flamewars.

10) "They e-mailed me a copy, so I can post it."

To have a copy is not to have the copyright. All the E-mail you write is copyrighted. However, E-mail is not, unless previously agreed, secret. So you can certainly **report** on what E-mail you are sent, and reveal what it says. You can even quote parts of it to demonstrate. Frankly, somebody who sues over an ordinary message would almost surely get no damages, because the message has no commercial value, but if you want to stay strictly in the law, you should ask first. On the other hand, don't go nuts if somebody posts E-mail you sent them. If it was an ordinary non-secret personal letter of minimal commercial value with no copyright notice (like 99.9% of all E-mail), you probably won't get any damages if you sue them. Note as well that, the law aside, keeping private correspondence private is a courtesy one should usually honour.

11)"So I can't ever reproduce anything?"

Myth #11 (I didn't want to change the now-famous title of this article) is actually one sometimes generated in response to this list of 10 myths. No, copyright isn't an iron-clad lock on what can be published. Indeed, by many arguments, by providing reward to authors, it encourages them to not just allow, but fund the publication and distribution of works so that they reach far more people than they would if they were free or unprotected -- and unpromoted. However, it must be remembered that copyright has two main purposes, namely the protection of the author's right to obtain commercial benefit from valuable work, and more recently the protection of the author's general right to control how a work is used.

While copyright law makes it technically illegal to reproduce almost any new creative work (other than under fair use) without permission, if the work is unregistered and has no real commercial value, it gets very little protection. The author in this case can sue for an injunction against the publication, **actual** damages from a violation, and possibly court costs. Actual damages means actual money potentially lost by the author due to publication, plus any money gained by the defendant. But if a work has no commercial value, such as a typical E-mail message or conversational USENET posting, the actual damages will be zero. Only the most vindictive (and rich) author would sue when no damages are possible, and the courts don't look kindly on vindictive plaintiffs, unless the defendants are even more vindictive.

The author's right to control what is done with a work, however, has some validity, even if it has no commercial value. If you feel you need to violate a copyright "because you can get away with it because the work has no value" you should ask yourself why you're doing it. In general, respecting the rights of creators to control their creations is a principle many advocate adhering to.

In addition, while quite often people make incorrect claims of "fair use" it is a still valid and important concept necessary to allow the criticism of copyrighted works and their creators through examples. It's also been extended to allow things like home recording of TV shows and moving music from CDs you own to your MP3 player. But please read more about it before you do it.

In Summary

- These days, almost all things are copyrighted the moment they are written, and no copyright notice is required.
- Copyright is still violated whether you charged money or not, only damages are affected by that.
- Postings to the net are not granted to the public domain, and don't grant you any permission to do further copying except **perhaps** the sort of copying the poster might have expected in the ordinary flow of the net.
- Fair use is a complex doctrine meant to allow certain valuable social purposes. Ask yourself why you are republishing what you are posting and why you couldn't have just rewritten it in your own words.
- Copyright is not lost because you don't defend it; that's a concept from trademark law. The ownership of names is also from trademark law, so don't say somebody has a name copyrighted.
- Fan fiction and other work derived from copyrighted works is a copyright violation.
- Copyright law is mostly civil law where the special rights of criminal defendants you hear so much about don't apply. Watch out, however, as new laws are moving copyright violation into the criminal realm.
- Don't rationalize that you are helping the copyright holder; often it's not that hard to ask permission.
- Posting E-mail is technically a violation, but revealing facts from E-mail you got isn't, and for almost all typical E-mail, nobody could wring any damages from you for posting it. The law doesn't do much to protect works with no commercial value.

DMCA Alert!

Copyright law was recently amended by the Digital Millennium Copyright Act which changed net copyright in many ways. In particular, it put all sorts of legal strength behind copy-protection systems, making programs illegal and reducing the reality of fair use rights.

The DMCA also changed the liability outlook for ISPs in major ways, many of them quite troublesome.

Linking

Might it be a violation just to link to a web page? That's not a myth, it's undecided, but I have written some discussion of linking rights issues.

It should be noted that the author, as publisher of an electronic newspaper on the net, has at times made his living by publishing copyrighted material in electronic form and has the associated biases. However, **DO NOT E-MAIL HIM FOR LEGAL ADVICE**; for that use other resources or consult a lawyer. By the way, did I mention: **do not e-mail me for legal advice**? Also note that while many of these principles are universal in Berne copyright signatory nations, some are derived from U.S. law, and in some cases Canadian law. This document is provided to clear up some common misconceptions about intellectual property law that are often seen on the net. It is not intended to be a complete treatise on all the nuances of the subject. Consider the U.S. Library of Congress copyright site. Australians try this. This site has Canadian Copyright Info. I should also mention sorry, but please **do not e-mail me your copyright questions**.

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