

On copyright

Copyright in a networked world: ethics and infringement

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Abstract

The statutes themselves are not the only basis for deciding whether an intellectual property rights infringement has occurred. Ethical judgments can also influence judicial rulings. This column looks at three issues of intellectual property ethics: the nature of the property, written guidelines for behavior, and enforcement mechanisms. For most active infringers digital property seems unreal, the rules ambiguous, and the enforcement statistically unlikely.

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Property is theft.

(Proudhon, 1994)

The property which every man has in his own labour . . . is the most sacred and inviolable.

(Smith, 1976)

The categorical imperative . . . is this: act according to a maxim that can at the same time be valid as a universal law.

(Kant, 1965)

Introduction

What are the ethical rules for intellectual property? Is claiming exclusive ownership in creative works a sacred and inviolable right, or is it the theft of property that ought to be freely available? Should the privileges of copyright holders have the force of a universal law, or should that law give precedence to the rights of those using works for educational and scholarly purposes?

The statutes themselves are not the only basis for deciding whether an intellectual property rights infringement has occurred. Ethical judgments can influence judicial rulings about whether or not an infringement was sufficiently “willful” to add extra penalties. Ethical judgments about intellectual property can also influence jobs, grades, and the respect that one professional has for another.

Plagiarism, for example, is a universally condemned form of intellectual property theft within academic society. Its rules allow no fair use exclusion for short passages like those quoted (and footnoted) above, and its duration has no limit. Authors like Proudhon, Smith, and Kant retain their rights to attribution well beyond the statutory life-plus-70 rule. Faculty members can lose jobs because of plagiarism, and plagiarism is an unexceptional reason for failing a student.

Ethical rules are socially constructed norms that can vary from segment to segment of contemporary society. Presumably the students who shared music using Napster and now KaZaA do not share the sentiments of Jack Valenti, president of the Motion Picture Association of America, who argued that:

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... unless we control piracy, one of America's greatest creative and business enterprises could be in incredible peril (Green, 2003).

The students are not criminals who would take a physical CD from a music store. In their ethical world view, sharing is different.

This column will look at three issues of intellectual property ethics:

- (1) the nature of the property;
- (2) written guidelines for behavior; and
- (3) enforcement mechanisms.

Types of theft

Both law and society have well-developed ethical standards regarding physical objects. While the law has attempted to extend the same rules to digital versions, it remains difficult for many to believe that copying a stream of bits that in no way lowers the quality or availability of the original constitutes theft, since nothing has visibly been taken from the owner. In other words, theft for many means removal.

Ethically legitimate instances of copying are so ubiquitous that they seem invisible. Every art student begins by copying the drawings, paintings, or sculptures of others. Every musician begins by trying to imitate the sounds of teachers and performers. Every programmer begins by copying simple code, such as the famous "Hello World". Much of this copying is imperfect, not from an attempt to invest the new work with originality, but from simple inability to extract (for example) exactly the same sound from a violin as Itzhak Perlman. The copying is for educational purpose or personal use, not commercial gain, but the copy might well be shared with friends via a music performance or given away to friends, if a work of art. The owner of the original loses nothing through any of these copies.

The Sony decision reinforced this ethical rule by making it legitimate to make private copies of television shows for later use, repeated use, or even sharing with friends:

In summary, the record and findings of the District Court lead us to two conclusions. First, Sony demonstrated a significant likelihood that

substantial numbers of copyright holders who license their works for broadcast on free television would not object to having their broadcasts time-shifted by private viewers. And second, respondents failed to demonstrate that time-shifting would cause any likelihood of non-minimal harm to the potential market for, or the value of, their copyrighted works. The Betamax is, therefore, capable of substantial non-infringing uses. Sony's sale of such equipment to the general public does not constitute contributory infringement of respondents' copyrights[1].

The broadcaster lost no physical copy and no ability to rebroadcast and, with reasonably well-functioning video-recorders, the copy resembled the original enough for almost no one to care whether they saw a live broadcast or a taped version some days or hours later.

TiVo technology offers a situation even closer to copying music, because the recording takes place in digital form on a hard disk, not as an analog stream on easily-stretched tape, where the deterioration with each generation of copying becomes evident. In fact broadcasters themselves use tools similar to TiVo to queue and manage programming. If saving broadcasts on TiVo is ethical, and if showing a saved program to a group of friends is legitimate, the boundary between that and sharing a copy with a friend not in the room at the time quickly grows indistinct.

In the TV series *Star Trek: The Next Generation* the computer on the *Enterprise* routinely produced plates of food. While the food lacked copyright protection, the design of the plates and cups would meet the originality minima for US copyright protection today.

Perhaps *Star Fleet* had an unmentioned site-license for copying that design, but the implication seemed to be that anyone could make as many copies of the dishes as they wanted without legal or ethical consequences. Nor was it clear what limits the *Enterprise's* computer had on copying. It could probably make a paper copy of a Klingon book or a CD of a hit Vulcan song. The apparently unrestricted copying by the *Enterprise* computer served as subliminal propaganda for a generation growing up in a network-connected world.

Written guidelines

Many colleges establish written ethical rules and require students to sign a social contract that specifies rules of conduct. Plagiarism is traditionally the form of intellectual property violation that gets the most attention. At George Mason University (1994), for example, the Honor Code defines plagiarism as:

1. Presenting as one's own the works, the work, or the opinions of someone else without proper acknowledgement.
2. Borrowing the sequence of ideas, the arrangement of material, or the pattern of thought of someone else without proper acknowledgement.

As the risk of liability grows, institutions may also begin to detail ethical rules for copyright. One class at George Mason has added this extension to the honor code that deals specifically with copyright:

I understand that I need written permission from the copyright holder for any graphics, photos, animations, or other materials that I put on my Web site. I understand that I must attribute the source of all graphics and that citing the source of a graphic does not absolve me from the copyright rules (George Mason University, 2003).

The Simmons Graduate School of Library and Information Science (2003) also has an explicit reference to copyright in their honor code:

Violating copyright law (Title 17, United States Code, Section 101, *et seq.*). Students should pay particular attention to section 107, which allows photocopying of copyrighted materials under the guidelines of "fair use" and to section 108, which describes some of the photocopying regulations in academic libraries.

These are just a few examples that appeared at the top of a Google search for "honor code" and "copyright". Including copyright explicitly in honor codes is still relatively rare. Because no consensus exists on how the copyright rules should explain what is, and is not, fair use, institutions within the USA tend to fall back on the language of the fair use statute itself.

The preamble to Section 107 suggests a very broad scope for the ethical use of copyright-protected materials:

... 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 criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or

research, is not an infringement of copyright (Cornell University, 2003).

Students, faculty, and others who read this preamble outside the context of the statute's four tests that form the basis of most case law generally feel fully justified in any use that fits into those broad exclusions. This includes putting protected materials on a freely accessible Web site, as long as the intention arguably falls within the list, regardless of whether that use has consequences for the rights holder.

Consequences do, however, matter for ethics, and the fourth test in the statute offers a way to measure the consequences of fair use. It says that, for a use to be fair, consideration must be given to:

... the effect of the use upon the potential market for or value of the copyrighted work (Cornell University, 2003).

The justices in the Michigan Documents decision considered that this test "is at least *primus inter pares*" and considered it first in deciding the case[2].

As an ethical guideline, the fourth test appears to empower the use of works either that are out of print and have little apparent potential for being republished, or that have never been sold and seem unlikely ever to be sold. Since a work with no known market value cannot suffer a loss, no one should be losing money.

But proving that no potential market exists can be hard. An angry rights holder could argue that new uses such as online databases have created vast new untapped markets for unsold, unpublished, and out-of-print works, and a court could (potentially) agree. The fact is that a reasonable fair use in ethical terms could still be an infringement in strict legal judgment. Whether the risk is worth taking depends on enforcement.

Enforcement mechanisms

The enforcement of copyright law is even less certain than being caught for speeding on the highway, since there are no official, state-authorized copyright police out looking for violators. The law leaves enforcement to the

rights owners or those owners' legal representatives. Lately some rights owners groups in the recording industry have begun a kind of vigilante process to find violators:

Last spring industry groups sued individuals and specific institutions in an attempt to force administrators to provide the names of college students who had used campus networks to download or distribute digital content – both music and movies (Green, 2003).

Only well-organized groups can afford to hire staff to undertake this kind of action in order to find instances of infringement, and to bring suit in a Federal Court. While it can be difficult for individual consumers to pay the court costs to defend themselves, they have some advantages when they can reasonably claim a non-commercial fair use, because (according to the Appeals Court in the Michigan Documents case) the:

... burden of proof as to market effect rests with the copyright holder if the challenged use is of a "non-commercial" nature[2].

While attempts at legal enforcement have captured most of the headlines, it is peer pressure based on ethical judgments that enables or discourages most intellectual property infringement. Peer pressure varies significantly depending on whether the use is educational or purely personal.

At most educational institutions, faculty favor a very aggressive form of fair use over more risk-adverse administrative guidelines. Any educational or scholarly use seems like justifiable fair use, especially when the prices that rights owners charge for access seem outrageously high. Administrative pressures have made faculty more aware of copyright issues, but two problems frustrate efforts to increase compliance.

The first is the difficulty in getting permission for an educational or scholarly use. The Copyright Clearance Center can help with standard, currently published materials from major publishing houses for a cost that is far from trivial. Non-standard materials require more research, patience, and time to track down than most people possess.

The second is the lack of an acceptable economic model for paying the royalties. Universities already license large numbers of electronic resources (over 30,000 titles at

Michigan State University, for example), and few funds remain to cover other items. Paper-based course packs have long shifted the burden of paying royalties to students, but faculty balk at charging for something they could legally just have put in paper version on a library reserve – and students balk equally at paying.

Within a password-protected course management system like Blackboard or Angel, the potential damage to any rights holder seems small, and the likelihood of the infringement being discovered seems even smaller. In other words, enforcement tends to be limited to a small group of colleagues and students with similar viewpoints and economic motives, and to personal ethical judgments.

Harper's (2001) *Copyright Crash Course* warns that penalties can be up to \$150,000 per infringement in cases of willful infringement, but the reality is that no one knows of any cases where faculty members or students were convicted of infringement for a genuine educational use involving no monetary gain. What happens inside the password-protected space of a course management system seems much like what happens in the privacy of one's home, where Americans feel anything goes.

Private use of entertainment works is different. University administrations have made strenuous efforts to make students aware of penalties for music and video file sharing, and have cut off network access to first time violators, which seriously disadvantages them in their course work. Other penalties can include dismissal from the university. Many students remain unconvinced that file sharing is an ethical (or legal) problem, and few educational institutions want or have mechanisms in order to invade the privacy of network use to find out what they are doing with their own private machines. The likelihood of being caught has increased dramatically recently, but still remains fairly low.

The number of people with Internet access outside the academic community has grown enormously, and ways of influencing their ethical judgments and altering their behavior are harder to find. University-based infringers are currently a tempting target for rights holders but, if speeding on the highway is any

indication, public behavior will change little as long as people believe that file sharing does no real harm, except to an industry famous for its wealth.

Conclusion

At best ethical judgments provide rules for navigating between the lee shore of literal copyright compliance and the wild seas of unrestrained fair use. Sail near the shore is the universal law of those making money from intellectual property, and brave the seas is the mantra of intellectual property consumers. Each side can invoke Kant's categorical imperative for their own defense.

The challenge for libraries and academic communities is to find a middle way or, in Hegelian terms, a synthesis. In social terms the debate has less to do with the law than with ethical understandings about the nature of intellectual property, the written rules, and the social mechanisms for enforcement.

For most active infringers digital property seems unreal, the rules ambiguous, and the enforcement statistically unlikely. Such attitudes are difficult to change. Since enforcement is expensive and its invasiveness contrary to the principles of US society, those wanting change may find it more cost-effective:

- to concentrate on altering ideas about the real nature of intellectual property; and
- to offer balanced rules-of-thumb that do more than merely repeat an already ambiguous legal code.

Notes

- 1 *Sony Corporation of America et al. v. Universal City Studios* (17 January 1984), United States Supreme Court.
- 2 *Princeton University Press v. Michigan Document Services* (8 November 1996), US Court of Appeals for the Sixth Circuit.

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