Protecting the Pioneers of New Media

Modern Art and the Law – AHI 592

Final Paper

May 6, 1996

The advancement of computer technology has caused the emergence of a new artistic form of communication called multimedia. This rapidly evolving field has generated many legal ramifications that need to be addressed. Many of the present laws do not take into account the complexities of this new media. My discussion will focus on particular aspects of current copyright laws and recommend changes that will give better protection to the pioneers of this new media.

What is Multimedia?

Before I discuss the legal questions that need to be considered I need to describe the term multimedia. Multimedia emerged as an extension of the field of graphic arts where the industry standard has made full use of computers as a new communication tool. Computers are now just as much a staple in the graphic design industry as is a drawing pencil. New computer technologies enable the creation of interactive presentations that have not been available in the past.

Multimedia is the recent buzzword used to express a method of communication that combines text, images and sound. It usually takes the physical form of a computer program encoded onto a floppy disk or CD-ROM, or the transfer through electronic transmission through the Internet . These programs are used in many situations to provide education, convey a message, or promote a product or organization.

Copyright Law and Invention

Copyright law was originally adapted from English law to the US Constitution to "promote the progress of science and useful arts by securing for limited times to authors and

inventors the exclusive right to their prospective writing and discoveries." Original copyright law enacted in 1790[1] protected a publication defined as, "the writings' of an author." The advancement of technology has since caused many revisions and amendments. The first major revisions to copyright law occurred in 1909. Marybeth Peters states that, "This act is based on the printing press as the prime disseminator of information," in the essay, "A General Guide to the 1976 Copyright Act."

New forms of communication such as radio, TV, audio recording devices, photocopiers, VCR's and computers, were some of the main reasons for the drastic changes that brought about the Copyright Act of 1976. The 1976 amendment attempted to summarize previous revisions. and to protect all future technologies. Ms. Peters states, "Some of the changes are so profound that they mark a shift in directions for the very philosophy of copyright itself."

The expanded definition of a publication now includes "any tangible medium of expression, now known, or later developed that can be perceived, reproduced, or otherwise communicated with the aid of machine or device." Recently, legislation has been introduced that recommends changes to current copyright laws to keep pace with today's new methods of communication. The White House has assigned a task force known as "The Working Group on Intellectual Property Rights," to review current copyright laws and issue a report on its findings.

Although copyright laws protect the work of an author, the scope of the law was put into effect to "promote science and the useful arts," for the benefit of society. The basic principal is that if a work is protected, the author will more likely reap the economic benefits, and therefore, there will be motivation to create more intellectual property available for use by the public. This premise should also apply to works intended for distribution through the Internet. The fundamental principal of the "Green Paper," submitted by the Working Group on Intellectual

Property Rights is as follows:

> What will drive the success of the National Information Infrustructure *(commonly referred to as the Internet)* is the content moving through it. Therefore, the potential of the NII will not be realized if the content is not protected effectively. Owners of intellectual property rights will not be willing to put their interests at risk if appropriate systems both in the U.S. and internationally- are not in place to permit them to set and enforce the terms and conditions under which their works are made available on the NII environment. Likewise, the public will not use the services available on the NII and generate the market necessary for its success unless access to a wide variety of works is provided under equitable and reasonable terms and conditions, and the integrity of those works is assured.

Electronic Rights

There is presently the increasing practice of many major magazines who are re-publishing back issues in electronic format over the Internet This has caused a number of lawsuits that have found in the favor of freelance authors and artists. A common practice has been to grant one-time publication licenses for books and magazine publications. The language of these contracts was usually very vague. The 1924 Memorandum of Agreement between F. Scott Fitzgerald and Charles Scribner's Sons for the publication of the Great Gatsby, reads as:

> Grants and guarantees to said publishers and their successors the exclusive right to publish the said work in all forms during the terms

of copyright and renewals.

Today it's not uncommon to include electronic rights in a standard copyright licensing contract. This is an excerpt from a standard book publishing contract by Macmillan Publishing Company:

> To license reproduction, inclusion or transmission of the work or portions thereof by copying, recording or transmitting through electronic, magnetic, laser, optical, or other means now known or hereafter known or devised, onto floppy disks, computer software media, compact disks, information storage and retrieval systems or databases or any other high technology medium, now or hereafter known or devised. In addition, Publisher may exercise any of the aforementioned rights and pay the Author a royalty of 10% of the net amount received from such exercise.

Any Device not Known

A case in point that upheld the decision to grant additional rights that was not explicitly defined in the original contract is the case of Rooney v. Columbia Pictures, Industry Incorporated. Mickey Rooney attempted to restrict the distribution of his films, through commercial television and home video sales. The films were originally made for the theater, way before the invention of the VCR. Although this case occurred before the 1976 Copyright Act, that protects a copyright owner's right to reproduce by, “any device, now known, or otherwise created,” the court granted the defendant's motion for summary judgment.

> "In light of the uniformly expansive nature" of this granting language, there could be no basis for Rooney's claim that, even if the defendant had a right to exhibit by television, that right did not include the sale of videocassettes, a technology then unknown. The court agreed with the defendants that regardless of "whether the exhibition apparatus is a home videocassette player or a television station's broadcast transmitter, the films are `exhibited' as images on home television screens."

The essay, "Enforcing Copyright," by Rutgers Computer and Technology Law Journal, states, "The video cassette recorder (VCR) is a perfect example of an entirely new platform for exploiting a work." Multimedia is also a means for redistributing books and movies in a new interactive format.

Imagine that you earlier purchased the appropriate licenses to publish an encyclopedia in a traditional printed publication. Now you wish to re-publish it using multimedia and on-line transmission over the Internet, but the original copyright license does not state that the work can be published in this fashion. According to the precedent set in the Rooney case, the original rights granted, "would be without limitation unless otherwise specified."

What's Fair?

The computer is a creative tool that is perfectly suited for the duplication and manipulation of images. Although, unauthorized copying of artwork is not a new problem, now, with the help of new technology, even the most inexperienced user can easily create an exact duplicate in seconds. Many variations of the original image can also be created much more easily

with digital manipulation than traditional photo retouching methods. A common practice using computer graphics is to combine portions of existing images to create a totally new imaginative work.

The wide spread use and availability of computers to designers and the general public threatens to create many lawsuits based on derivative rights. A further drawback to the enforcement of these rights is that digitally captured photos are not created with chemical negatives so there is no way to determine an original. "Trends in Copyright," by Gary H. Becker, states the problem as:

> Many current cases are beginning to deal with the issue of how much of a work can be used in someone else's work. This is a direct outgrowth of access to new technology tools such as scanners, digitizers, importation from CD-ROM and laserdisc and the merging of media in the multimedia platform.

Photos are no longer treated as factual items. In the article "In Digital Photography, A Picture can be a Thousand Lies," by Fred Davis, he points out that, "National Geographic once manipulated the Great Pyramids of Egypt and the Sphinx to fit them within the cover of the magazine and TV Guide once placed Oprah Winfrey's head on Ann-Margarets's body for one of covers." These examples illustrated that with the help of technology, images are being altered in many different ways to create new derivative works.

The boundaries of the concept of "fair use," will be thoroughly tested in the upcoming years. Factors that are considered when determining fair use are:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes.
2. The nature of the copyrighted work.
3. The amount and substantial similarity of the portion used in relation to the copyrighted work as a whole.
4. The effect of the use upon the potential market for the value of the copyrighted work

The issue of fair use is the ultimate gray area of copyright law. Small, unrecognizable portions of an image are allowed to be used as long as there is no financial hardship caused to the original copyright holder. Standards should be developed to determine the boundary between what is or what is not fair use.

Presently, there are no common legal standards to test fair use, and each case is based upon its own facts. The following are two examples at the opposite ends of the scale. Fair use would pertain to a small portion of sky taken from an obscure part of a very old vacation postcard used in a training program for a non-profit organization. A complete image from a book cover on aerial-photography to commercially promote a major airline would fall under infringement.

In Conclusion

The items discussed on the previous pages represent only a small fraction of the issues surrounding copyright protection in this new technological age. The original idea of copyright law is still valid today, but certain amendments need to be added to secure the best interests of both the authors of intellectual property and the public.

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