Executive summary

In an era in which copyright-protected material can be replicated and transmitted across the globe with a few keystrokes, companies need to be vigilant about avoiding lawsuits, and perhaps even criminal prosecution, for inadvertent copyright law violations. Websites are particularly vulnerable to copyright issues because of their visibility and the ease with which copyright violations can occur in digital media. The borderless nature of the Internet can subject website owners and operators to liability under copyright laws not only in their home country, but throughout the world. Copyright infringement is only one of several closely related intellectual property exposures, including trademark, trade name and trade dress infringement, but it is the exposure that most readily can lead to mammoth claims. Risk management practices can reduce the exposure, and copyright infringement coverage is available through cyberliability insurance policies.

Introduction: Copyright infringement in cyberspace

Blatant infringement of copyrighted material is rampant on the Internet. Copy-and-paste functionality makes it simple to lift digitized information – whether text, photographs, video, or music – from a website or other digital source and copy it in-full to another location. Enforcement may be a problem from a practical standpoint, but the legal issues often are cut-and-dried.

The Internet also raises a host of new legal issues. Do search engines make illegal copies when they index a web page? Is a hyperlink to copyrighted material copyright infringement? Do copyright laws apply to emails? Are Internet service providers responsible for copyrighted material published online by subscribers? Is a message board or blog host responsible for copyrighted content posted by contributors? Copyright laws have evolved to address some of these issues, but others still are unsettled, and new issues arise as technology progresses. Adding a further layer of complexity, the Internet is oblivious to national borders. Activities that may be legal in one country may run afoul of copyright laws in another.

Copyright infringement is one of a group of related intellectual property exposures that also includes trademark, trade name and trade dress infringement, but it is the exposure that most often triggers headline grabbing lawsuits and super-sized settlements. Many of the largest and most contentious copyright battles have been waged in the entertainment arena. In an early and highly publicized case, the file sharing service Napster was sued by several record companies for contributory and vicarious copyright infringement. Bertelsmann, a media company that was a Napster investor, paid around $400 million to settle the various suits. More recently, social network websites such as
MySpace and the video sharing networking site YouTube have been targeted in very large copyright infringement suits. The Universal Music Group (UMG) filed a copyright infringement suit against MySpace for allowing users to upload and download songs and music videos. UMG sought damages of $150,000 per song or video posted, claiming that millions of songs and videos on MySpace pages may infringe its copyrights. Media company Viacom filed a copyright infringement lawsuit against YouTube and its parent Google, seeking at least $1 billion in damages. Viacom charged that “YouTube has harnessed technology to willfully infringe copyrights on a huge scale.”

The typical business website is unlikely to trigger billion dollar copyright infringement lawsuits, but companies nonetheless need to be aware of the many ways they can inadvertently run into copyright infringement trouble. Developers may unknowingly use copyright-protected images without permission when building a company’s website. White papers, reports, PowerPoint presentations and other documents posted on a website may contain copyright-protected material used without permission. A company sponsored blog may be targeted by news organizations for reproducing even small excerpts of articles. Websites with message boards or similar applications may be accused of contributory copyright infringement for material posted by visitors to the site.

The law continues to evolve in response to rapidly changing technology and new forms of digital publishing, networking and communication. The fluid and ever-changing nature of copyright exposures, and the fact that the law is reactive – responding after the fact to changes – means that legal ambiguities and gray areas are inevitable. Despite the complexity of copyright law and the constantly shifting risk landscape, basic risk management steps can effectively reduce exposure to copyright infringement liability. Additionally, insurance coverage is available for the exposure.

Copyright laws

Article I, Section 8, Clause 8 of the United States Constitution, often known as the Copyright Clause, empowers the United States Congress “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Copyright was not a new idea when the Constitution was written; copyright protection had existed in England since 1710 with the passage of the Statute of Anne. The United States Congress enacted the first federal copyright law in May 1790. The 1886 Berne Convention established recognition of copyrights among sovereign nations.

The 1976 Revision of the US Copyright Act acknowledged the impact of changing technology, specifically photocopying. It also contains an exception to the exclusive rights of owners to make and distribute copies of their works, codifying the so-called “fair use” doctrine that previously had existed in common law: “the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching ..., scholarship, or research, is not an infringement of copyright.” The type and amount of material covered by the fair use provision remains a contentious issue.

US copyright law was thrust into the Internet era with the passage of the Digital Millennium Copyright Act of 1998 (DMCA). The Act criminalizes production and dissemination of devices intended to circumvent digital rights management tools that control access to copyrighted works. It also criminalizes the act of circumventing an access control, whether or not there is actual infringement of copyright. Additionally, it
shields online service providers from copyright infringement liability for simply transmitting protected information over the Internet, and requires "webcasters" to pay licensing fees to record companies. Other provisions carve out exclusions and limitations of liability for nonprofit libraries, archives, and educational institutions.

The DMCA provides “safe harbors” from copyright infringement liability for online service providers, but only if certain conditions are met. These conditions address issues such as the service provider's knowledge of the infringing material, the service provider’s control over the infringing material, the financial benefit derived by the service provider from the infringing material and the service provider’s response in removing or disabling access to infringing material when notified. The DMCA defines four categories of service providers. Organizations that may not consider themselves to be online service providers may in fact fall into one of these categories and be eligible for the safe harbor benefits provided by the Act.

Issues and exposures

Some copyright infringement issues posed by digital media and the Internet, such as fair use of news articles, are new variations on old problems. Others, such as dissemination of digital circumvention technologies, are products of the Internet era. Taken together, they comprise a bewildering and constantly shifting minefield of exposures for any company with an online presence.

Fair use of news stories. The fair use provision of the 1976 Revision of the US Copyright Act permits limited use of copyrighted material for activities such as criticism, comment, news reporting, teaching, scholarship, and research. Many legal battles have been fought over the years as to what constitutes fair use of copyrighted material, and it has once again surfaced as a hot button issue. Newspaper publishers, with dissipating revenue due to Internet competition, in particular are concerned about the widespread use of their content under the guise of fair use. The concern is that even small excerpts of news articles republished elsewhere may dissuade readers from purchasing newspapers or online subscriptions to read the full article. In some cases, websites that publish excerpts of news stories are better optimized for search engines, meaning that, for example, an excerpt of a New York Times article on the Huffington Post website may appear in search results ahead of the original New York Times article. According to concerned publishers, in that case, the Huffington Post may benefit from increased ad revenue while the reader may never visit the New York Times site. Copyright infringement lawsuits naming bloggers and other online publishers are on the rise.

The Associated Press (AP) has been particularly aggressive in trying to limit the scope of fair use. AP requires a license to use more than four words from an article, and has been vigorously enforcing its narrow definition of fair use. In one well publicized case the AP demanded a blog known as the Drudge Retort (a website offering a contrary view to the well-known conservative blog, the Drudge Report) remove seven quotes from AP articles ranging from 39 to 79 words. After a flurry of negative publicity, the AP backed off, and in a statement admitted its demand on the Drudge Retort was "heavy handed," and that the news organization would rethink its position as concerns bloggers. However, it continued to pressure the Drudge Retort to remove the seven items. Subsequently, the AP issued a statement saying it would challenge blog postings
containing excerpts of AP articles "when we feel the use is more reproduction than reference, or when others are encouraged to cut and paste."

**Contributory copyright infringement.** An issue for any website where visitors can post content is claims of contributory copyright infringement. Contributory copyright infringement is a common law theory that states that an individual or an organization is liable for copyright infringement if it knowingly induces, causes, or materially contributes to the infringing conduct of another. The contributory infringement theory has typically been applied in cases where the owner of an online discussion board or a peer-to-peer file sharing service permitted contributors to post copyrighted material. However, the concept potentially has much broader applicability.

The explosive popularity of social network sites such as MySpace and Facebook opens new vistas of potential contributory copyright infringement liability. Hundreds of millions of people around the world have pages on social network sites that display their personal information. These pages also often contain copyrighted content that has been uploaded without the owner's consent. As noted earlier, MySpace was sued by Universal Music Group, which sought damages of $150,000 per song or video posted, and YouTube has been sued by Viacom, which is seeking more than $1 billion in damages. However, copyright infringement exposure is not limited to content from published authors, motion picture studios and music publishers. Since copyright exists from the moment of a work's creation, virtually everything that is lifted from another site, including such things as personal photographs and homemade videos are protected (though the copyright owner must register the copyright before pursuing an infringement suit in court). Operators of social network sites can benefit from the safe harbor provisions of the DMCA by complying with various conditions outlined in the Act. Nonetheless, the potential for litigation is significant.

Peer-to-peer networks and the companies that make the software that power them have been targeted especially by record companies. Peer-to-peer software enables music and video files to be shared among a network of personal computers. The Napster case, discussed above, resulted in about $400 million in settlements paid by Bertelsmann, a media company that was a large investor in the file sharing service. The Supreme Court ruled on the issue of contingent copyright infringement and peer-to-peer services in 2005 in *MGM v. Grokster*. Grokster, a peer-to-peer service used to share recorded music, was sued by record companies for encouraging its users to violate copyrights. In the opinion, Justice David Souter wrote, "We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement."

Major social networking and file sharing sites are not the only types of websites that are exposed to contingent copyright infringement liability. Building a community of members or customers – a goal of many websites – may involve discussion boards, chat rooms or other applications that enable participants to post copyrighted material. In some cases, these websites have protection under the safe harbor provisions of the DMCA, but in all cases website owners are well-advised to police posted content and to have procedures in place to respond to demands to remove copyright-protected materials.

**Vicarious copyright infringement.** Like contributory copyright infringement, vicarious copyright infringement is a form of indirect copyright infringement. Vicarious copyright infringement occurs when a person or a business has a direct financial interest in
infringing actions being committed by another and has the ability to control it, even if they do not know that the infringement is taking place and do not directly take part in it.

Vicarious copyright liability is a product of the common law doctrine of agency – *respondeat superior*. Under this doctrine the superior (or "principal") is held responsible for the acts of its subordinate (or "agent"). A company (the “principal” in this case) can be held liable for the actions of its employees and others deemed agents of the company even if the agents are acting independently and, in some cases, without explicit authority of the principal.

A recent, highly-publicized case, demonstrates the potential liability of a principal for the actions of an agent in a copyright infringement situation. A judge presiding over a copyright infringement case determined that a principal-agency relationship existed between presidential candidate John McCain and the Republican National Committee (RNC). US District Judge R. Gary Klausner refused to dismiss Senator McCain from a lawsuit concerning a campaign video produced by the RNC for Internet distribution that used a segment of Jackson Browne's song "Running on Empty" without permission. The Senator claimed he was not involved in any way in the creation of the video, and did not even know it existed until after the lawsuit was filed. The suit was settled in July 2009 for an undisclosed amount.

**Hyperlinks.** A defining characteristic of the World Wide Web is the hypertext link, or "hyperlink," a reference embedded in a web page that a reader can follow directly to another web page. A number of lawsuits have alleged that linking to copyright-protected material is an infringement, but a US District Judge ruled in March 2000 that hyperlinks do not constitute copyright infringement because no copy is actually created in the process of linking (*Ticketmaster Corp v. Tickets.com, Inc*). However, courts have found that operators of websites that knowingly link to other sites containing infringing content may be held liable for contributory infringement under some circumstances. In one case, *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc*, after being ordered to remove a copyrighted handbook from its website, the defendant linked to other websites containing illegal copies of the same material. Judge Tena Campbell of the US District Court in Salt Lake City ruled that linking to the unauthorized copies of the handbook constituted contributory copyright infringement.

**Software.** According to the House Report discussing the 1976 Copyright Act, computer programs are protected under copyright law “to the extent that they incorporate authorship in a programmer’s expression of original ideas, as distinguished from the ideas themselves.” According to the Sixth Annual BSA-IDC Global Software Piracy Study, 41 percent of the software in use in 2008 was pirated. On an individual level, people may illegally share software with friends and family. Software also is shared over the Internet through peer-to-peer file sharing programs. Companies may violate software copyrights by running more copies of a software product than is permitted by their license. On a global scale, software piracy syndicates – typically located in developing countries where enforcement is lax – reproduce and sell large amounts of unlicensed software to the public.

Violations of software copyrights can take the same forms discussed above, namely contributory copyright infringement and vicarious copyright infringement. For example, file sharing networks that knowingly permit unlicensed software to be distributed may be subject to legal action for contributory copyright infringement. Software also is subject to other copyright issues. Software, for example, can be “cracked,” disabling features that
limit or control its use. A common type of crack removes the expiration period from a time-limited trial of an application. Cracking is essentially the same as circumventing digital rights management features, and is illegal under the DMCA.

Cross-border enforcement issues. Because the Internet is global in scope, individuals or companies may engage in activity that is legal in their own country, but violates copyright laws in other nations where material may be accessed.

A case with potentially wide-reaching implications is United States v. ElcomSoft and Dmitry Sklyarov, a 2001-2002 criminal case in which Dmitry Sklyarov and his employer ElcomSoft were charged with manufacturing and selling a software program that could circumvent technological protections on copyrighted material. Sklyarov, a Russian citizen employed by the Russian company ElcomSoft, was arrested while visiting the United States for allegedly violating the DMCA by writing ElcomSoft's Advanced eBook Processor software. The US government ultimately agreed to drop all charges against Sklyarov, provided he testify at the trial of his company. In December 2002 a federal jury found ElcomSoft not guilty of all charges under the DMCA. The case raised, but did not resolve, important issues about an individual being prosecuted for activities that are legal in the country where they occurred, but which run afoul of copyright laws elsewhere.

Related intellectual property infringement. Copyright infringement is one of several related intellectual property exposures. Closely allied are trademark, trade name and trade dress infringement. The legal issues are similar, and lawsuits often allege copyright infringement along with other types of intellectual property infringement. In one closely watched case, The New York Times Co. was sued by GateHouse, a chain of local newspapers. Times Co. allegedly infringed both GateHouse's copyrights and its trademarks when a subsidiary company posted headlines and article snippets from GateHouse publications on its website. The interesting twist is that the alleged trademark infringements occurred as a result of the snippets being attributed to various GateHouse brands such as Newton Tab, Daily News Tribune, and Wicked Local.

Risk management and insurance

Common sense risk avoidance practices are always the first step in managing any type of risk, but the complexity of copyright law and the rapidly evolving nature of digital communication create risk scenarios that sometimes defy common sense. As a result, almost every company needs a copyright infringement risk management program. Elements of the program should include:

- A written statement from senior management prohibiting the use of copyright-protected material without permission in any material produced on behalf of the company. A limited exception can be made for cautious use of material falling under the fair use provision of the law.
- Education in fair use for all employees who produce material to be published, whether in print or digital media, including content for a company's website.
- A written policy for responding to DMCA take-down notices and other demands for removing copyright-protected material from a website. Online service providers, as defined by the DMCA, must follow specific procedures defined by
the Act in order to avail themselves of the safe harbor provisions of the Act. Those procedures are defined in Title II of the Act, which can be found at http://everything2.com/title/DMCA%253A+Title+II.

- Review of the company’s website and its policies concerning fair use and removal of copyright-protected material by a lawyer knowledgeable in copyright law.

Insurance for copyright infringement is available in various forms. Specialized Copyright Infringement insurance provides coverage for alleged infringement of someone else’s copyright. Professional publishers and broadcasters can find protection under Media Liability policies.

Copyright infringement is one of the covered "offenses" enumerated in the "advertising injury" portion of a typical Commercial General Liability ("CGL") policy. However, companies with a clear exposure to copyright infringement may not want to rely on the limited coverage in the CGL policy, which is tied to the (albeit broadly-construed by the courts) concept of “advertisement.” Additionally, CGL policies often exclude Internet service providers, website designers and advertising companies from advertising injury coverage, and most CGL policies now exclude coverage for electronic forums or bulletin boards hosted by the insured.

Copyright infringement is one of the coverages provided by cyberliability insurance policies. Cyberliability policies provide a package of coverages relating to Internet communication, computer network activities and information assets, addressing both first-party and third-party risks. Since a great many companies now have a presence on the Internet or electronically transact some portions of their business, cyberliability insurance is increasingly viewed as a necessary part of an overall risk management and insurance strategy. One advantage of a cyberliability policy is that copyright infringement coverage, usually including plagiarism and misappropriation of ideas, typically is packaged with related intellectual property coverages such as coverage for infringement of trademark, trade name or trade dress. This is important since a copyright lawsuit also can embrace other claims, especially trademark and trade dress infringement allegations.

Most companies do not regard themselves as being in the publishing business, but the moment they go online with a website they assume the exposures of a publisher. This includes, especially, exposure to copyright infringement liability. File-sharing and social networking websites pose obvious copyright infringement risks, but they also enjoy certain protections under the law. A typical business website may seem far less exposed to copyright infringement suits, but the ease with which protected material can be reproduced in digital media creates unanticipated risks. Every company with a website is well advised to develop and implement a copyright infringement risk management program, and should consider cyberliability insurance for protection against copyright infringement and related exposures.

If you have any questions about copyright infringement risk management or insurance, you can ask the experts at Swett & Crawford at http://corner.advisen.com/swett_feedback.html.

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