Copyrights Uneasy Transition Into The Web 2.0 Environment

By Robert J. Kasunic

At a speech at Harvard University in 1943, Winston Churchill presciently stated that the empires of the future are the empires of the mind. Rapid advances in technology have produced our information society. We are less and less dependent on tangible venues as the convenience and robustness of intangible locations on the Web develop. The public square of the past is being replaced with virtual locations where the public congregates and communicates. Physical locations such as libraries, bookstores, and record stores are being replaced or supplemented by Google Book Search, Amazon, iTunes, and many other emerging models. Moreover, the Web 1.0 version of a noninteractive, one-to-many website that was the highlight of the first decade of the World Wide Web is transforming into Web 2.0 collaborative and participatory sites in many forms such as wikis, interactive blogs, participatory media sites like YouTube, social networks like MySpace and Facebook, and other user-generated contributory sites on Flickr and Blogger. In each new iteration of the Web, technology and copyright have experienced a tumultuous, symbiotic relationship.

The changes in technology and their effect on the dissemination of intangible creative expression have been the impetus for changes in the law. In most cases, the legal response to technology is initially inspired by fear. Technology disrupts settled practices, and for those who have a stake in legacy business models, disruption is something to be avoided or minimized. Even though new technologies can offer benefits to existing business models, the disruptive effect that new technology can pose to existing relationships needs to be considered when a transition will occur. Thus, it is very common for changes in technology to be met with resistance by copyright owners. Lawsuits are filed and legislative proposals are proffered. The law often becomes the means for erecting barriers to the scope of technological change, sometimes simply in an effort to create speed bumps to slow the rapid pace of change. Despite what technology enables individuals to do, the law can impose legal limitations on those technological capabilities. At times, the law is a means of replicating the practical barriers that previously existed—an artificial impediment to the efficiencies that technology offers. This creates a tension between technology and the law and between creators of copyrighted expression and users of that expression. Yet this tension has been at the core of copyright since its inception.

Historical Perspectives

It was the advent of the printing press in 1439 that first gave rise to the genesis of copyright law. The Crown and the Church, fearing a loss of control over the dissemination of information, granted a monopoly to the Stationers Company through which the dissemination of information could be funneled. In this design, unfavorable publications could be prevented through control of the publishers, who in turn controlled the use of this nascent technology of reproduction and dissemination. In this way, the law was used to limit the inherent functionality and capabilities of the technology.

Ultimately, the Stationers Company lost their monopoly in England. The monopoly was replaced by the Statute of Anne, which, for the first time, gave rights directly to authors. The United States followed this approach of granting exclusive rights to authors but also purposely chose to use the law to encourage the creation of expression. Copyright law is not an unlimited or inalienable property right, but a means to an end—the encouragement of expression in all forms. This pragmatic approach to incentivizing creativity for the benefit of the public was an important step toward building our unique empire of the mind.

But even that decision was not the end or even the beginning of the end, but merely the end of the beginning. Copyright in the United States, as articulated in the Copyright Clause, inherently seeks to achieve the proper balance between the incentive to create and the social benefit that results from such creativity. While the act of creating works furthers the public interest in and of itself, access to and use of copyrighted material are also essential considerations. Common law doctrines were created to further adjust this balance between the incentive to create and society's use of the ideas and expression of others. The fair use privilege and the idea/expression dichotomy are two important examples of the recalibration of the law in the courts. Copyright's purpose of encouraging creativity is of little value to society unless creative expression can be accessed and used by the public in a reasonable manner. The idea/expression dichotomy and the fair use privilege have played an essential role in society and in the development of technology by providing flexibility in an otherwise rigid system of exclusive rights.

Technology does not, however, remain static, and copyright law must adapt to changing circumstances and fundamental changes in technology. More and more, we

Robert J. Kasunic is a principal legal advisor at the U.S. Copyright Office and an adjunct professor at American University's Washington College of Law, the Georgetown Law Center, and the University of Baltimore School of Law. All of the views in the essay are his own and do not represent the views of the Copyright Office or any other institution. He can be reached at rkas@wcl.american.edu.

 Published in Landslide, Volume 1, Number 4, March/April 2009.

find that the pace of technological change makes finding the proper balance increasingly difficult. A legislative solution for one technological problem today has the capacity to create, or even foster, myriad unintended consequences in relation to tomorrow's technology.

The Rise of the Internet

The advent of the Internet provided many previously unimaginable benefits to society, but the Web also posed many new unforeseen problems for copyright law and the creators of expression. At no time in the history of man has the capacity for the freedom of speech and the distribution of expression by an individual been as robust as it is today. The ability of one person to reach many around the world instantaneously truly freed speech from the restrictions of intermediaries. But with this newfound freedom also came new responsibilities. On the Internet, people were not only interested in disseminating their own speech, but they also had a tendency to disseminate other people's speech, often in the form of copyrighted works. The technological capacity of Internet to allow viral distribution of copyrighted works posed a threat to the very purpose of copyright law—the encouragement of creative endeavors.

A case in point is the current litigation by Viacom against YouTube. Users of YouTube may post original expression, but they may also post the expression of others. Copyright law seeks to encourage the former and, generally speaking, prohibits the latter. While this sounds clear-cut, the difficulty lies in the details. Who should be liable for the infringing expression available on YouTube? Do the section 512 "safe harbor" provisions of the Digital Millennium Copyright Act, which provided limited copyright immunity to Internet service providers, apply to YouTube or should YouTube be required to take affirmative action, such as filtering infringing content? If YouTube has a duty to filter, how do we avoid ensnaring fair uses of copyrighted works in the nets of these filters intended to prevent infringement? After all, not all uses of copyrighted works are infringing and some transformative or productive uses are at the heart of copyright's very purpose.

In the past, most people did not need to know much about the subtleties of copyright law, and copyright law was largely transparent to the average person. The distinctions and requirements of copyright law were left to the intermediary distributors of expression such as publishers, record companies, studios, and other sophisticated entities. Creators created and then turned their work over to others to reproduce and distribute. Users of copyrighted works were limited by practical restrictions of reproductive and distributive technologies. Digital technology and personal computers connected to the Internet changed that transparency. When anyone connected to the Web could be a creator, publisher, and worldwide distributor at the click of a mouse, copyright law ceased to be transparent. Not only did the law pose potential liability for the individual creator/distributor and users of technology, but it also raised liability issues in relation to the intermediaries who provided access to the Internet—the online service providers.

Copyright as Intermediary

Copyright may be seen as an intangible legal fence around intangible expression. The law exists to encourage authors to create and the fence is adjusted, often in response to changing technologies, to achieve the appropriate balance.

In this context, pure legal barriers work fairly well when they are accompanied by two other variables: (1) when there are practical limitations on copying and distribution (in other words, when the technology of reproduction and distribution limits what individuals can do); and (2) when those who can efficiently copy and distribute to the public are guided by the law (these typically are responsible commercial entities such as publishers, broadcasters, distributors, etc., whose behavior is visible to copyright owners).

Before the Web, the technology of reproduction and distribution limited the practical consequences possible to copyright owners. While certain reproduction technologies like the photocopier, the cassette recorder, and the VCR presented new challenges to copyright owners by allowing reproduction to occur that was either difficult or impossible before the advent of these technologies, their effect was nonetheless limited. An individual had to take the time to copy, the quality of the copy was usually inferior to the published version, and the redistribution of that copy was limited by the tangible nature of the reproduction. Similarly, the activities of major sources of mass reproduction and distribution were visible and identifiable to copyright owners.

The personal computers connected to the Internet and the Web (and many now forget that the Web was an add-on to the Internet) posed dramatic new challenges for copyright owners in addition to the enormous benefits offered. The practical limitations on copying, distribution, and public performance and display were removed by the Web. Individuals, rather than commercial entities, could reproduce and disseminate works on a massive scale and could often do so under a veil of anonymity. While copyright owners of any size now had the ability to display and distribute from one website to many, the ease of reproduction and redistribution on the Web also led copyright owners to fear placing material online. The vast benefits of this new technology concomitantly created enormous dangers that were capable of undermining the purpose of copyright.

Web 1.0

At the time I began my practice of copyright law in the early 90s, there were significant questions about the applicability of traditional laws to the Web environment. I remember well attending the first and second annual conferences on Internet law where professors and practitioners discussed how courts would apply traditional legal principles to bulletin board operators and nascent online service providers like CompuServe, Prodigy, and America Online. At the time, most big law firms did not even have email addresses and virtually none had websites or any form of Web presence. These law firms were hesitant to represent clients regarding online issues because there simply was no precedential guidance. Many, at the time, simply viewed the Web as a passing fad that was not worth the investment of time or resources.

We now know that the Web was not a passing fad, but

rather one of the most significant changes to the technology of reproduction, adaptation, distribution, public performance, public display, and communication since the creation of the printing press. Moving from a legal premise in which copying is unlawful to a technological medium in which copying is functionally necessary, it was obvious that we had an inherent contradiction. The law was about to undergo a period of growing pains.

In part, the response was the Digital Millennium Copyright Act (DMCA). Rather than simply imposing another intangible fence around copyrighted works to meet the challenges of the Internet, the DMCA provided legal support to technological self-help measures by copyright owners to protect their works. In a sense, this law supported copyright owners' efforts to use technology to limit the capabilities of technology. Since individuals often did not know anything about copyright law, and since the Internet and personal computers allowed these individuals to do many things that were prohibited by the law, technological protection measures could be used as a barrier to infringing uses and unlawful access. Copyright owners could technologically restrict what individuals could do with works. At the same time, the DMCA provided copyright owners with an incentive to place their works online—to move to new business models that would benefit the public.

The DMCA has received mixed reviews. It may be debated whether there is a causal relationship between the DMCA and the creation of new business models, but putting causation aside, it is clear that there have never been more copyrighted works available in so many different forms as are currently available. Perhaps this is simply a result of the technology or perhaps it is the result of copyright owners' sense of security that was enhanced by the DMCA. We will never know the answer to that question, but it is clear that copyright owners are not the best arbiters of what constitutes a noninfringing use. Legal protection for technological self-help measures can be used to eliminate the opportunity to legally determine whether a particular use is noninfringing since the use cannot be accomplished with the technological restrictions in place. For instance, if there is no applicable defense to circumvention, it would be irrelevant whether a use was noninfringing or not because engaging in the noninfringing use would require an unlawful act of circumvention. Legal protection of technological barriers also has the capacity to limit the development of lawful noninfringing uses. By granting the legal authority to impose technological restrictions, many feared that copyright owners would leverage this authority to eliminate or impede the development of noninfringing uses. As a general proposition, it does not appear to be the case that the DMCA has adversely affected most traditional noninfringing uses, but it has created an obstacle to the development of the doctrines of noninfringing use by limiting the manner in which claims for noninfringing use may now arise.

Charting Web 2.0

But as is always the case, the pace of technology continues. The concerns about bulletin board services and website distribution were replaced by peer-to-peer file sharing, BitTorrent distribution, and other forms of ad hoc networks, none of which were anticipated by the DMCA. In addition, Web 2.0 variations such as social, participatory, and interactive media sites have further challenged the efficacy of the DMCA to address the new problems facing copyright owners on the Web. To a certain extent, the evolution of technology has bypassed, or circumvented, the legal obstacles of the DMCA. At the same time, these Web 2.0 variations are providing new opportunities for existing copyright owners and new creators inspired by this new interactive medium.

I recently read a statement that surprised me. It alleged that there is currently more audiovisual material on YouTube than cumulatively existed prior to the advent of YouTube. Whether or not this is true, I do not know. But it does seem possible, and that in itself is quite incredible. Many would be quick to point out that there is a significant qualitative difference between major motion pictures and the audiovisual works found on YouTube, and that is very likely true. Nevertheless, the medium is fostering enormous creativity, and copyright law exists to foster creativity. Justice Holmes long ago cautioned us that neither judges nor copyright law should be a vehicle for judging artistic merit. Copyright law merely exists to encourage creativity, and these new forums appear to be serving that very purpose.

But once again, this is not the end, and it is not even the beginning of the end. But it is, perhaps, the end of another beginning. How do we proceed in the Web 2.0 environment? How do we deal with the massive amounts of infringement that take place on YouTube and other social and participatory networks? Are existing laws such as the notice and takedown procedures of section 512 sufficient? Do we need new laws? Should we impose filtering requirements on online service providers? If we do, how do we prevent the "fair use dolphins" from being ensnared in the infringement filtering nets?

How do we proceed in the Web 2.0 environment? It would appear that the answer is: cautiously. While this area is growing quickly, we are still at a nascent stage, or, at most, the end of the beginning. The fact that technology changes quickly does not mean that copyright law should change quickly. Copyright law has the capacity to develop and respond to changing circumstances. Just as courts found a way to resolve early Internet disputes without immediate legislative change, existing laws can develop in the courts to respond to new factual situations. It may be wise to see how existing laws can be applied to this new environment. Court cases are currently pending in some significant disputes. The Viacom suit against YouTube will produce new information or negotiation. As we recently witnessed in the consequential litigation over Google Book Search, agreements can be reached even in the most difficult of cases. The benefits of a negotiated settlement to the parties and to the public can vastly outweigh the risks of litigation. The uncertain application of the law in this new environment presents risks to both sides of a suit and thereby encourages negotiation. If suits must be litigated, factual situations can percolate through the courts in a manner that can establish a reasoned approach to factual differences. If the outcomes in the courts identify a need for legislative attention and intervention, Congress should provide

guidance. But preemptive congressional action is seldom capable of anticipating the changing technologies on the horizon. The law can never hope to get ahead of the technology. That is simply the reality of copyright.

With regard to the issue of secondary liability, section 512 may not be working as efficiently as some copyright owners would like and may be working too efficiently by some users' standards, but an equilibrium may well occur. Google has voluntarily offered filtering and fingerprinting technologies for the benefit of copyright owners, as well as options for how to proceed after identifying a match. For instance, copyright owners can restrict infringing content from being viewed, can monetize that content through ad revenues, or can leverage the content to redirect traffic to their own sites. Cooperation between responsible technologists and reasonable copyright owners can yield enormous benefits for the public.

Appreciation for the benefits of the technology can also serve to further the fundamental purpose of copyright law since the Web 2.0 environment is a rich source of creativity. Commercial entities are taking notice of this creativity to mine new marketing tools and vehicles. The YouTube video "Where the Hell is Matt" was created as a gag and documented the travels of Matthew Harding in locations around the world doing a silly dance. It became an online sensation and Stride Gum recognized its potential as a marketing vehicle. Stride paid Matt to travel further and give credit to Stride as a sponsor. Rather than trying to create a marketing strategy, companies are recognizing the creativity and success that is spontaneously occurring in this new medium.

In addition, there is an enormous amount of recontextualized and transformative use of copyrighted content. Will.i.am's song "Yes We Can" was transformed into a powerful political video and introduced on the Dipdive website and then propagated on YouTube, resulting in well over 15 million viewings. That video spawned additional creative, recontextualized efforts such as "John.he.is" and "No, You Can't." The precise effect of these new forms of speech in the outcome of the election is unknown, but their impact cannot be discounted and may well have been significant. This is but one example of the creativity that is being inspired by the medium. The creativity that is emerging from remixing culture and using audio and audiovisual quotation is the beginning of a wholly new form of expression. While infringement undoubtedly occurs, so does noninfringing use. We also are beginning to see the development of accepted use or the acquiescence of copyright owners for uses of their works that are transformative or simply do not harm the copyright owner's intended markets. In fact, such acquiescence may reveal copyright owner understanding of the positive effect on copyrighted works of such uses in society.

Finding ways to make Web 2.0 networks profitable is a challenge, and a negotiated relationship between technologists and copyright owners may provide the answer. The current standoff cannot last forever. For instance, Google hasn't seen a major return on its investment of YouTube, in part due to its fear of placing advertising on YouTube pages in a manner that might place it outside the scope of section 512's safe harbor. At the same time, copyright owners and other businesses are just beginning to realize the marketing potential that Web 2.0 networks present. The symbiotic relationship between technology and copyrighted content can benefit both interests while at the same time fostering new creativity that further benefits the public.

What about new ventures that are fearful of entering this uncertain legal environment? Again, the answer would appear to be: caution. Technology companies would be well-advised to seek legal counsel early in their development. There are many technicalities in copyright law that should be addressed at the developmental stage of a technological business model. Moreover, finding ways to work within the law from the start may lead to profitable relationships with creators and content owners. For every careless start-up that is sued out of existence, there is well-counseled start-up that finds innovative ways to work within the law using new technology.

Finally, there is an ever-increasing need for education about copyright law, not just for technologists and businesses, but for members of the general public, who are all capable of becoming creators and distributors. This can't be achieved merely through threats and warnings. People need to understand that they are now creators and that copyright law can benefit them as well. Efforts to establish a comprehensible application of copyright law and fair use has the capacity to further this goal. The approach taken by the American University's Center for Social Media in its Documentary Filmmakers' Statement of Best Practices for Fair Use has yielded significant results on both an individual and market level. Not only has this Statement helped guide creators in reasoned and reasonable use of copyrighted materials in their works, but it led to the issuance of insurance policies for asserting such claims of fair use. The success of this approach set the stage for an examination of the Web 2.0 environment. In January 2008, the Center for Social Media released its report entitled "Recut, Reframe, Recycle: Quoting from Copyrighted Material in User-Generated Video." Such efforts foster public awareness of the copyright issues involved in this new medium. Educational efforts of this sort should be encouraged.

The only thing that is certain is that technology will continue to change. If we view this through the lens of opportunity rather than fear, perhaps the symbiotic relationship between copyright and technology will benefit us all. After all, copyright seeks to foster creativity, and there is evidence that the Web 2.0 environment is meeting this goal. Web 3.0 is on the horizon and there is little doubt that it too will cause turbulence. We just need to make sure that we don't overreact or act out of fear. Copyright and technology can and will continually clash and harmonize. This dialectic is the natural progression of copyright and invariably leads to a synthesis that serves to build our empire of the mind. ■

 Published in Landslide, Volume 1, Number 4, March/April 2009.