Copyright Law and New Technologies

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ABSTRACT

From a Copyright Act perspective, data received electronically is, generally speaking, no different from data that is printed. Reproducing (downloading) search results from electronic databases infringes the copyright unless the use to which the downloaded information is put is fair use. There are four factors set forth in the Copyright Act that are to be considered when determining if a particular use is fair use. When in doubt, contact the copyright owner.

The federal law that protects information is the Copyright Act. Although there may be some state statutes that can also be relied upon to serve this purpose, the discussion here will focus on this federal law. The first issue to be confronted is whether data received in electronic form is different from standard printed data. The answer to this question is, generally speaking, no - if printed data is copyrightable, then that same data on a magnetic tape or a compact disc is, too. Our next issue, then, is what kind of a work is copyrightable?

In order to qualify for copyright protection, the law requires two things: (1) that a work be an original work of authorship, and (2) that a work be fixed, or set down in a tangible form sufficiently permanent "to permit it to be ... communicated either directly or with the aid of a machine or other device for a period of more than transitory duration." The Copyright Act provides that "literary works" are protectable works of authorship. "Literary works" are defined as "works, other than audio visual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, discs, or cards, in which they are embodied." The fact that information is in computer-readable form, therefore, will not preclude it from being copyrightable. What matters is the nature of the information.

The Copyright Act protects works that are compilations of other pieces, or units, of information, even if the compilation consists of an arrangement of pieces of information that individually would not be copyrightable. The reason for extending copyright protection to compilations of pieces of uncopyrightable information is that there is some originality involved in the selection and arrangement of facts sufficient to make the resulting compilation a protectable literary work. An example of the compilation concept in hard copy context is the telephone directory. The individual names and addresses are not copyrightable by themselves, but are when compiled as a directory. So electronic compilations, or databases, too, can be protected by the Copyright Act.

The Copyright Act provides protection for the copyright owner by granting him exclusive rights to reproduce the work, distribute copies to the public, perform or display it publicly, and prepare derivative works. In addition, the law permits the copyright owner to license or authorize others to do the same. Without the express permission of the copyright owner, an individual cannot reproduce the work, distribute copies to the public, perform or display it publicly, or prepare derivative works. Fortunately, at least from the perspective of users of information, the law allows certain uses of copyrighted works without the permission of the copyright owner. This use, called "fair use," originated as a defense in copyright infringement cases under the old copyright law, and is now expressly embodied in the current copyright law. In my view,
fair use provides a good conceptual framework for analyzing the activities of information specialists that obtain information on-line or via CD-ROM - downloading, editing search results, manipulating data, developing bibliographies, creating private databases, creating reports for distribution, and the like.

The Copyright Act does not define fair use, but instead lists those factors to be considered in determining whether the use made of a work in any particular case is a fair use. The factors are illustrative, which means that factors other than the ones enumerated may have a bearing on the determination of fair use. In addition, the law does not indicate if any particular factor or factors should count more than the others in making a fair use determination. The factors listed are quite general, leaving a court interpreting the law wide discretion in determining whether a factor is present in any particular case.

The factors are as follows:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes. The statute lists certain purposes that, among others, are appropriate for a finding of fair use. These are criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, and research. One way to analyze this factor is to see if the use of the original work is in a derivative work - a second work which consists of editorial revisions, annotations, elaborations, or other modifications of the original work. If it is, chances are the use may be fair use. Think of it this way - is the original being copied so someone can use it for its intrinsic purpose? Or is the user creating a work of authorship by adding his own original contribution to that which is copied? Perhaps some of you are downloading search results to perform editorial modifications of and to reformat bibliographic citations for the researchers at your universities or institutes. If so, because you are doing something else to the information that you’re downloading, and you are doing it for scholars in a not-for-profit setting, it may be that your use would be interpreted as within the confines of fair use.

   It is important to note, now that all you downloaders are breathing easier, that if a use falls within the first fair use factor, the other factors listed in the statute still have to be evaluated. In addition, the fact that a given use is commercial won’t negate a fair use determination, nor will a non-profit educational purpose necessarily compel a finding of fair use. However, the defense of fair use will be recognized more readily when a user uses a work for educational, scientific, or historical purposes.

2. The nature of the copyrighted work. The legislative history of the Copyright Act explains, for example, that it is more difficult for a school teacher to justify copying text books and other materials prepared primarily for schools than it is to justify copying material prepared for general public distribution. Similarly, copying materials contained in mass circulation periodicals or scientific journals is easier to justify than copying materials in newsletters. It has been said that some works, such as catalogs, indexes, reference materials, and other compilations, "invite" use. Courts have reasoned that these works are created more out of diligence than originality or inventiveness, a fact which gives the user a license to copy them, more so than if a creative work is involved.

   Personally, I’m not sure that the distinction between works created out of diligence and those that are more “creative” is meaningful, however. If it were, then why would works that are merely compilations of uncopyrightable facts be considered original enough to warrant copyright?

3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole. It seems pretty clear that if a user downloaded an entire database, this would not be considered fair use. Although you could make the argument in the on-line context that connect hour charges involved in downloading in this instance would more than compensate a database producer, this still doesn’t make the use fair.

   In considering the extent of the use, you must consider whether the copied portion constitutes a substantial amount of the copyrighted work. You can evaluate substantiality quantitatively - determining if the number of words or number of records taken, for example, constitutes a small or great proportion of the copyrighted work. Unfortunately, there are no mathematical formulas or guidelines that determine how much of a work may be fairly used. It all depends upon the context and the circumstances. You also should evaluate the amount and substantiality in a qualitative sense. Even if a user “borrows” a small amount of in-
formation, if it’s qualitatively important to the original work, the use may not be fair. It appears to me that the amount of material that a typical information user would download would probably not be great in the quantitative sense, but could be important qualitatively.

4. The effect of the use upon the potential market for or value of the copyrighted work. Oftentimes, this is the factor that the courts consider most important to a fair use analysis. The underlying issue this factor raises is whether the unrestricted and widespread conduct of the type the user of the copyrighted work is engaged in would adversely affect the potential market for or value of the original work.

It seems pretty clear that if a user is downloading information in order to eliminate duplicate citations and perform other editorial functions, particularly if the search results are to be used internally, then the database producer ought not be too threatened. It is most unlikely that the value of a database would be impaired by this type of activity. If, however, information is downloaded in order that it can be printed and distributed, even if it’s distributed for free in an educational setting, this might hurt the potential market for the database, and thus be considered an infringing use.

I should point out that in determining the effect of downloading search results on the value of or market for a database, the fact that the search results may be embodied ultimately on paper while the database remains in machine-readable form won’t compel a fair use finding. I mentioned before that one of the exclusive rights a copyright owner has is the right to prepare derivative works, or adaptations of the original work. With today’s technology, a database can easily be converted into a print product. Even if a database producer chooses not to publish the work in more than one medium, his right to do so is protected by the copyright laws.

Now that we’ve reviewed the contours of fair use in general terms, while focusing on downloading in particular, it would be useful to review relevant case law on downloading. Unfortunately, there isn’t any. I know this because I’ve checked my favorite legal database, which is the most current source I know for judicial determinations.

So where does this leave us? Downloading information from a copyrighted database will infringe the copyright unless the use to which the information is put is deemed to be a fair use. There are four factors set forth in the Copyright Act that are to be considered when determining if a particular use is fair use. However, as I’ve explained, the concept of fair use is less than precise. So what should database producers do to enforce their rights? And what should users do to ensure they can use the information in databases in a way that is meaningful to them?

From the database producer’s perspective, the contract with the host vendor (in an online environment) or subscriber (in a CD-ROM environment) can set forth the prohibitions imposed and/or privileges granted to users of the database. From the user’s perspective, if he doesn’t like the terms and conditions set forth in the subscription agreement, or can’t understand the legalese, or hasn’t seen his subscription agreement for years, and he hopes to re-use the search results from a particular database, he can simply contact the database publisher, secure permission, and continue on his merry way. The permission doesn’t have to be in the form of an extensive legal document. It can be a one pager that merely states the specific uses he will make of the information that he intends to retrieve from the database. Of course, a database producer is under no compulsion to sign a document of this nature. But more likely, if the use is limited to internal purposes that do not threaten the commercial viability of the database, the information is attributed to the producer, and the user erases the data after it is used, the publisher should not have a problem going along with his user’s request. To the extent the information contained in the database is time sensitive, a producer may feel even less threatened and more inclined to sign a document of this nature.

On the other hand, if a user wishes to make extensive use of a database, or if a database producer suspects that a particular user may affect the marketability of his database, perhaps a more formal license agreement is needed. For example, a user might want to engage in activities that constitute copyright infringement. The producer might find this perfectly acceptable, given appropriate compensation.

Another possible solution to the downloading dilemma is for the database producer to devise a fee structure that takes into account downloading by the user. One problem with this approach is, I think, the fact
that it isn’t sensitive to the different uses to which information is put once downloaded. It’s all well and good to charge for the sale of information, but the charge alone can’t recoup the damage that can be caused by a downloader whose use is not fair use. In addition, this solution would be inapplicable in CD-ROM settings.

Another solution might be for the establishment of a counterpart to or division of the Copyright Clearance Center to compensate database producers for downloading by users. As most of you know, the CCC was founded in 1977 to provide an efficient, centralized photocopying service for both copyright owners and users. Publishers that wish to use the services of the CCC register their works and print their photocopying policy and fees in their publications. The CCC collects the fees from the users and remits them to the publishers. From the publishers’ standpoint, the CCC puts users on notice that they can not photocopy indiscriminately. From the users’ standpoint, the CCC obviates the need to request permission from registered publishers to photocopy their publications. Perhaps this system could work for downloading as well as photocopying.

One final word - when in doubt on fair use and downloading, call your lawyer!