Comparison of the Legal Aspect of Electronic Publishing in the USA and Asia

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ABSTRACT

The escalation of Electronic Publishing on the Internet and through other digital media has redefined the accessibility of information by the general public in unparalleled speed over the last ten years. Such remarkable advancement has racked havoc in the legal system in the USA. It has significantly altered the traditional relationship among authors, publishers, distributors, and users. Emerging Information Technology had raised new concerns in legal and business aspects that were not anticipated before. People and organizations are realizing that the traditional legal environment is just not adequate in providing the law and order needed in the new electronic world. As a matter of fact, the inadequate protection is turning the cutting-edge technology environment into more resembling the old "Wild West". There are directions of the Electronic Publishing industry that can not be advanced until more concrete and comprehensive laws are established to protect the business activities/transactions. The intent of this research is to analyze the current status and immediate development of the legal environment of the Electronic Publishing industry in the USA. Extension of such to Asia will be conjectured. Due to cultural, economical, and political differences between USA and Asia, it will not be possible to assume that whatever developed in the USA will logically be extended to Asia. Comparison between the two will be contrasted. This research will be beneficial to organizations impacted by Electronic Publishing that are planning to operate in Asia.

1. Introduction

In the early part of March, 2000, a new book, written by Stephen King, titled "Riding the Bullet", was published by Simon & Schuster. It became the fastest selling book of all time by "selling" 400,000 copies in one day. Stephen King had written the book and completed the whole cycle of publishing in less than one month, instead of the normal industry standard of six to nine months. The major difference about this book was it was an electronic book. People download it from web-sites of Barnes & Noble and Amazon rather than buying it from a traditional bookstore. Electronic book came into the publishing scene a few years ago. Even though it is still not popular due to the limitation of the technology involved and the traditional habits of readers, the publishing industry expects electronic books to play a significant role in years to come. Barnes & Noble and Amazon decided to give out "Riding of the Bullet" free of charge for promotional reason and also for a rather disturbing but real threat of the relatively lack of capability to enforce copyright of the book due to the ease and speed of illegal distribution of the material. In the following sections, the authors would like to explore some fundamental issues about legal issues regarding publishing and the impact it may have on the whole industry in the future.

2. Copyright Law – What Does It Protect?

The U.S. founded many of its laws around the principles that free an open trade or commerce and the advancement of knowledge is to be fostered, protected and encouraged. Not only was knowledge considered "power" in terms of intellectual advantage, it was also considered to be of economic value and advantage. The means by which to accomplish this with regard to the resource of intellectual knowledge became known as "Intellectual Property".

The encouragement, and even incentivization, of the creation of intellectual property was structured in the U.S. such that generally (with regard to copyright and patents) the creator would be deemed the owner and afforded a legal "monopoly" by the government on the ownership rights to the intellectual property "work". This monopoly would be granted for a reasonable time by the government, and the government would create laws, regulations and treaties to protect the owner's intellectual property rights. An owner may either enjoy a competitive advantage over others and assert a monopoly on the use of the work, and/or collect fees (licensing) for authorized use, or realize a more substantial profit for the sale and transfer of ownership rights to another. In exchange for the grant and protection of a legal monopoly by the government, and after the lapse of a reasonable period of time during which the owner could exclusively enjoy the fruits of their intellectual property labors and reap the economic benefits, the "work" of intellectual property would then legally become the right of the general public (public domain) to use freely thereafter.

Thus, the theory was that the expansion of the arts and sciences in terms of "creations" would perpetually flourish and the intellectual synergies created would advance the state of our nation.

In the days of the printing press, logistically managing and enforcing the rights of "owners" of intellectual property, usually on a "one-on-one" basis, while challenging, did not present the nearly impossible task of tracking and enforcing intellectual property rights in the electronic media age. The advent of electronic publishing has magnified the issue of copyright protection as nothing else has in the history of "print" and the "ownership" of "intellectual property".

Electronic publishing is the publication (transfer or distribution) of text, graphics, and sound via digital media, including the Internet, CD's (compact disks) or diskettes. The Internet and World Wide Web (WWW) has made it technologically as well as economically feasible to copy and then simultaneously publish to potentially a virtually infinite number of recipients legally protected works of intellectual property in a matter of seconds. This, coupled with the ability to publish in a global environment without regard to geographic boundaries and legal jurisdiction has rendered the monitoring and enforcement intellectual property rights a legal quagmire.

3. What is a "Copy"?

Copyright law defines a copy as the "physical form" the expression of the idea is embedded in, over time. Historically, the legal test was "permanency". For instance, if you were to create a song and use a stick to write it in the sand on a beach, the fact that the surf would destroy the physical form meant that it was not "fixed" or preserved. Alternatively, photographs, carbon copies, tape recordings and photocopies were deemed to be "fixed" and reasonably "permanent". The advent of computers, software and electronic mediums created new challenges for defining what constitutes a "fixed medium". Computer disks and diskettes, videotapes, video disks were logical extensions of the older mediums. But, what about ROM and RAM? Programs in random access memory (RAM), for however brief a time, has been declared to legally constitute a "copy" (Mai v. Peak, 991 F.2d511, 9th Cir. 1993). This ruling has resulted in Internet Service Providers being targeted for engaging in global-scale copyright infringement (Elias, p. 94).

If, for example, you were to creat a Web site for your work, it would be entitled to protection under copyright. If your Web site offerers data and facts, the Web sit which "expresses" the data and facts is subject to copyright protection, while the data and facts themselves are. It is the unique expression of the ideas that are protectable intellectual property interests. (Meeks, p. 2).

Some legal experts believe that Web users have an "implied license" to create copies of Web pages in order to view the pages on their computers—but, under copyright case law, it can be successfully argued that the copying of pages into frames exceeds the scope of the implied license.

Many presume that just because information and the expression of that information is available on the Internet, it is automatically within the public domain, and is subject to use or copying without restriction. This belief is in error, without legal merit. However, be that as it may, the ability to monitor and control the sheer volume of material on the WWW in many instances renders enforcement impossible.

4. Copyright – How Is It Distinguished From Other Types of Intellectual Property ?

Intellectual property is broadly divided into four categories within the legal structure of the United States: Copyright, Patent, Trade Secret and Trade Mark. This paper addresses only the single aspect of copyright, but because it is rare in today's environment to find a work of intellectual property protected solely within one category of intellectual property, a brief discussion of each category follows.

Copyright provides the "owner" of a "work" the legal right to prevent others from using the work without the owner's permission. The essence of copyright is the protection of the "expression" of the owner's idea, not the idea itself. For example, if an owner creates an original poem or song and reduces it to a tangible medium (e.g., a "writing") it is an expression of the owner's ideas. On the other hand, "ideas" are generally accorded protection under the theory of Patent Law. These "idea works" are generally referred to as "inventions"-- new ideas which are novel, useful, original and non-obvious for which the government provides the owner exclusivity for a period of time. Examples include formulas and processes. An example is the genetic coding process for cloning sheep.

However, if either the idea or the expression of the idea is protected, kept secret and not made available to the public except via licensing and nondisclosure agreements, and meets other tests under intellectual property law such as providing the owner an economic competitive advantage, then that "work" is said to be a "Trade Secret". A classic example is the formula for "Coke". If a "mark", logo, distinctive word or phrase (e.g. "Just Do It"—Nike) is associated by consumers with the originator of the work, this constitutes a "Trade Mark". The owner can prevent others from using the mark so as not to confuse consumers or "palm off" their goods as being that of the true owner.

Determining how best to protect a "work" becomes a complex task. A combination of some or all of the above categories of protections is often used to ensure maximum coverage. This most frequently occurs with software products. Portions of software may constitute an "expression" (the appearance of the "Windows" tool bars) of an idea, the idea (the process or formula of software coding), trade secret (nondisclosure agreements) and trade mark (the apple for Apple Computer products).

5. Copyright – How is it Established?

Protection under the U.S. Copyright Act of 1976 (applicable to all works published on or after January 1, 1978) is established by a satisfying the following elements: The work must be (1) original (created, not copied), (2) fixed in a tangible medium (e.g., reduced to writing, whether handwritten, or in electronic format), and (3) possess some inherent creativity (new). The Copyright Extension Act of 1998 generally provides that a copyright is protected for the life of the author (creator) plus 70 years. It can extend protection between 95 and 120 years, depending on the date the work is published. If the work was created, but not published (made available to the public) or registered after 1978 the copyright period extends to December 31, 2002 if the work remains unpublished, or until December 31, 2047, if the work is published before December 31, 2002.

It is not necessary for an owner to register a filing with the U.S. Copyright Office for a copyrighted work, but there are added protections and benefits in terms of legal remedies if one does so. For instance, simply

by placing the "copyright bug" (©) plus the year of publication and the name of the author or owner on the work it will constitute formal "copyright notice" which prevents unauthorized users from claiming it was "innocent infringement" and that they were not aware the work was not in the public domain (available to the general public to use freely). (Elias, p. 71)

If the work is registered with the U.S. Copyright Office within three months of publication and before any claim of infringement arises, the owner is entitled to assert a legal presumption, which means the owner does not have to prove injury and damages. This presumption entitles the owner to a recovery statutory damages (money) from $500 to $20,000 per infringed work (per copy), up to $100,000 for the infringement in the case of willful or intentional infringement (in addition to the owner's attorneys fees), without having to prove actual damage (loss of profits, etc.) in court.

In the U.S., a creative work is protected at the inception of creation. The moment one reduces the original and creative work in a tangible (permanent) medium (on paper, on a hard drive, a diskette, a CD, etc.) the owner possesses a legal right to prevent others from using the work without the owner's permission. The rights of ownership include: (1) the individual or collective right to make copies, (2) the right to authorize others to make copies (license), to make derivative works (similar works which build on the owner's work, including translations), (3) the right to sell (transfer legal ownership), (4) the right to display the work (e.g., if a drawing or a painting, or a screen associated with computer software), to perform the work (such as musical compositions) and, most importantly within the legal framework of the U.S., (5) the right to obtain a legal remedy to prevent others from use without content ("infringement") of the owner's work.

There is one noteworthy exception to the subject of copyright protection and infringement. This is the "Fair Use Doctrine". Under the "Fair Use Doctrine" a copyrighted work is not legally considered to be "infringed" upon in certain limited situations because of its noncommercial or incidental nature. The doctrine of Fair Use is applied in the areas of teaching, research, scholarship, criticism or journalism. It should be noted that the Doctrine of Fair Use is a legal defense, not a users "affirmative right". (Elias, p. 114)

The term "innocent infringer" is applied to one who infringes a copyright (uses someone's protected work without permission) but did not believe the use was illegal. These infringers typically do not end up paying damages to the copyright owner, but are prevented from continuing to adversely use the protected work. The mechanism used is an injunction (a court order to cease and desist from doing some particular act, e.g., using a protected work without permission

6. Copyright – How Is U.S. Law Applied To Internet Users In the U.S.?

In an attempt to deal with the global implications of copyright infringement on the Internet, the Digital Millenium Copyright Act of 1998 addressed Internet Service Providers (ISP's). An exemption was carved out to proved ISP's from liability for information (intellectual property) which is merely "passing through" its systems, but only if the following criteria are met:

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process, without selection of the material by the ISP;

(3) the ISP does not select the recipients of the material, except as an automatic response to the request of another person;

(4) no copy of the material made by the ISP in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than the anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily

accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing or provision of connections; and, finally

(5) the material is transmitted through the system or network without modification of its content.

The Act grants ISPs relief from claims of infringement not only for transient transmissions automatically passing through their computers but also for more permanent materials if the ISP promptly removes the infringing materials upon request. The Act sets up a procedure so that if the owner of the removed materials complains, the designated agent of the ISP can accept service of legal documents and the courts can determine the parties rights, without the ISP becoming liable.

The Act is consistent with current legal views on copyright infringement on an individual basis in that even the simple viewing of information on the WWW requires temporarily downloading a "copy" of the work into the RAM of the user's computer. "Theoretically, this downloading also is a violation of the copyright act if the copyright owner has not given permission and this type of copying has not been addressed by the Digital Millenium Copyright Act of 1998. On the other hand, and also theoretically, much of this copying activity may constitute fair use and allow the people and companies responsible for the copying to escape liability." (Elias, p. 109)

There are, however, some exceptions to the Act. For example, nonprofit libraries, archives and educational institutions who need to determine whether to add the protected work to their collections are exempted from the provisions.

There are also liabilities raised in linking Web sites. A hyperlink (hypertext link) typically appears to a reader as an underlined or highlighted word on a Web site. When accessed (clicked upon) it takes the reader to the referenced site. The use of a hyperlink may subject an electronic publisher to trademark as well as copyright infringement claims. In *Ticketmaster corp. v. Microsoft Corp.* (No. 97-3055, C.D. Cal., complaint filed apr. 28, 1997) that was ultimately settled prior to trial, Ticketmaster alleged that Microsoft misappropriated its name and trademarks by placing a hyperlink on a Microsoft-affiliated Web site that led to Ticketmaster's site. Generally, the act of linking on the Web is not viewed in and of itself a violation of trademark or copyright law, unless the use of the copyrighted or trademarked image or dilutive use of a trademark occurs. The potential exists for contributory infringement liability when a publisher links to a site that it reasonably knows (or should have known) to contain infringing material. (Perle, Williams and Fischer, Vol. 17, No. 2, 2/2000 p. 20).

7. Copyright – How Is U.S. Law Applied Outside The U.S.?

Over 120 nations have signed treaties in which they agree to extend reciprocal copyright protection to works authored by nationals of the other signing countries as well as works first published in one of the other signing countries. This reciprocal approach is commonly called "national treatment".

The two principal copyright treaties are the Berne Convention and the Universal Copyright Convention (U.C.C.). The provisions of these two treaties sometimes overlap, and thus the owner of a protected work is entitled to the most liberal protection, which is generally speaking contained in the Berne Convention.

In 1995 a majority of the countries around the world ratified the GATT (General Agreement on Tariffs and Trade). This binds those countries to comply with the provisions of the Berne Convention (except for its moral rights provision, which proclaims authorship of a work, for example) whether or not they were already members. The Berne convention establishes minimum protections that a county must afford and specifies that no formalities, such as a copyright notice, are required for establishing such protection. The Berne Convention does not impose on any country a definition of what can or cannot be copyrighted, but virtually all of the signing countries (including GATT members) have agreed to protect traditional items such as books, works of art, movies and plays. The GATT requires all members treat computer programs a "literary works" under the Berne convention. The GATT treaty renders the Berne Convention the most significant international instrumentality by which rights to intellectual property are determined. The

relatively few countries that have not signed the Berne Convention or the GATT Treaty must use the copyright notice, including the copyright bug, discussed above.

In 1996 a major diplomatic conference was held in Geneva and two major international treaties were negotiated. One was the WIPO (World Intellectual Property Organization) Copyright Treaty and the other was the WIPO Performances and Phonograms Treaty. The WIPO Copyright Treaty amended the Berne Convention, and are only binding on Berne Convention member countries which ratify it. The objective was to update the Berne Convention in line with technological developments. (Mayer, p. 3)

Countries who are members of the Berne Union, as of July 29, 1997, do include Asian countries such as China, Japan, and Thailand. But, for instance, a user who has grown up with the traditions of a country such as China views "imitation" ("copying") as the essence of respect and honor; it is the foundation of all learning and education. (Perle, Williams and Fischer, Vol. 17, No. 2, 2/2000, p. 18). The ordinary individual user would more than likely be unaware of the provisions of the GATT or other country's copyright laws, and therefore the "threat" of legal sanctions are only minimally effective. Any assertion of rights would be dependant in totality upon effective monitoring and enforcement efforts of the true copyright owner. In the context of the WWW, this is a daunting task and would probably reserved only for the high profile instances.

Japan, on the other hand, in anticipation of the WIPO Copyright Treaty of December 1996, amended its copyright law. The amendment was adopted on June 15, 1999 and provided for:

(1) unauthorized removal of copyright protection becoming a criminal offense; (2) removal or modification of electronic control information, such as electronic watermarks used for copyright protection, will be restricted; (3) distribution rights, subject to first sale doctrine, will be extended to music, publications, computer software, etc.; (4) rights to show art works and photographs will be provided in line with those for screening rights for movies; and (5) reproduction of music from recording media and use of it as background music at hotels and restaurants currently exempted from copyright infringement will now be deemed protected works for which fees can be collected much like Karaoke and discos operations. (http://www.okuyama.com/news.html visited 5/8/2000).

In addition, an "Intellectual Property Basic Law" provision is being considered by the Ministry of International Trade and Industry (MITI). The law is intended to provide a framework within which the government will form comprehensive policies for patent, trademark and copyright matters. Currently patent and trademark policies are administered by MITI and copyright policies are handled by the Ministry of Culture. MITI hopes to submit a bill for this new law to Diet next year (2001) at the earliest.

In an effort to "broadcast" intellectual property regulations, Japan was to have placed all Patent and Trademark information on the Internet by March, 1999 (http://www.jpo-miti.go.jp).

In addition, the concept of copyright is rather new throughout the world. For example, in Asia, for thousands of years, before the modern advancement of technology in mass printing at very low per unit cost, authors often times considered it a honor to have others reading/enjoying their creations. The idea of selling their writings for financial gains or writing just for the sake of money was not of major significant. Of course, proper recognition and acknowledgement of ones work was always important and practiced. This concept also helps partially explain the lack of desire and interest in enforcing copyright regulations in recent years.

8. The Future of Electronic Publishing

Some, such as author Peter McWilliams, believes copyrights are a thing of the past. With the revolution of the WWW and electronic publishing, enforcement of copyright is virtually impossible. Writers and publishers, in his opinion, must instead explore new ways of collecting payment. For example, receiving five cents from each of a million people e is the same as receiving $2.00 from 25,000 people. The difference is the economies of scale realized in the electronic publishing media and passed along to the user

makes paying for the accessible copies more palatable to users. McWilliams even goes one step further. His company, Prelude Press publishes his books for profit in traditional markets, but posts the entire contents of his books online (http://222.mcwilliams.com) for free. McWilliams compares the on-line service to users picking up a book in a bookstore and leafing through it to decide if they want to purchase it. McWilliams asserts that since placing his books on the Web, his sales numbers have risen. Paying a relatively small fee to access books on-line is the answer, he believes. (Meeks, p. 3)

But, if as McWilliams says, "There's no way to control the Internet . . . It's as though the printing press has been invented again . . . . You can move text around the world at the speed of light at almost no cost", why would users pay even nominal fees, if they can use it without penalty?

The ultimate answer will more than likely lie in-between; technology will advance and provide copyright owners the ability to more effectively monitor and enforce their rights, and, because of the cost reductions in delivering electronic as opposed to print materials, the copyright fee (license) will likewise be significantly reduced to a level that the "market can bear".

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