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Comments welcome--msvh@pobox.com

FAIR USE BY (THE COPYRIGHT HOLDER'S) DESIGN

Molly Shaffer Van Houweling*

Introduction

The fair use exception to copyright permits some creative reuses (and recopying, and redistribution) of copyrighted works.[1] Unfortunately for potential re-users, the contours of fair use are vague and subject to unpredictable judicial interpretation.[2] This uncertainty is at the heart of one apparent conflict between digital rights management tools and fair use: It is difficult enough for humans to determine which uses are fair and which are not—how could computers possibly tell the difference?

One source of clarification could be the copyright holder herself. If a copyright holder announced to the world that, notwithstanding the uncertainty of copyright law, certain uses of her work were explicitly permitted, then both humans and computers could be confident that at least those uses could safely be pursued. Clarifying what uses of copyrighted works are expressly permitted by the copyright holder is no substitute for preserving the legal protection of fair use—which can of course privilege uses to which the copyright holder expressly objects. But such clarification might eliminate *some* of the uncertainty that chills creative reuses of copyrighted works.

I currently manage a non-profit project, "Creative Commons," that is attempting to facilitate this type of copyright pre-clearance. Creative Commons plans to help copyright holders dedicate their work to the public domain; and it plans to build a menu of customizable licenses appropriate for use by scholars, artists, musicians, filmmakers, and other creators who want to retain some rights while sharing their work with the public on terms more generous than copyright. Creative Commons is also developing methods for making public domain status and generous license terms machine-readable, so that search engines, peer-to-peer networks, and as-yet-unimagined applications can recognize the terms on which digital works are available. The project will thus be using one of the techniques employed by digital rights management systems—specifically, the concept of a rights expression language—but with the primary goal of releasing (rather than reserving and enforcing) intellectual property rights.

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* Fellow, Stanford Law School Center for Internet and Society; Executive Director, Creative Commons Corporation.

[1] 17 U.S.C. §107.

[2] See generally Rebecca Tushnet, *Copyright as a Model for Free Speech Law*, 42 B.C. L. REV. 1, 24 (2000).

The New Default of Copyright Protection

When a work is not copyrighted at all, all uses are fair uses. Before 1978, U.S. law made non-copyright status the default for published creative works. "[C]opyright protection was lost permanently if the [copyright] notice was omitted from the first authorized published edition of a work or if it appeared in the wrong form or position. . . . [A] basic failure to comply with the notice provisions forfeited copyright protection and put the work into the public domain in this country."[3] If the author did not take the trouble to put a copyright notice on her work, it passed into the public domain once published. Public domain status was the default.

After January 1, 1978 (the effective date of the Copyright Act of 1976), omission of a copyright notice could later be corrected, and thus did not result in outright forfeiture of copyright protection.[4] As of March 1, 1989 (the effective date of the Berne Convention Implementation Act of 1988), notice of copyright is now entirely optional.[5] Today, copyright status, rather than public domain status, is the default for all "original works of authorship fixed in any tangible medium of expression."[6] As the Copyright Office puts it, "copyright is an incident of creative authorship not dependent on statutory formalities."[7]

This shift in the copyright default rule has practical impacts that are especially striking in an age of inexpensive self-publishing and information retrieval. First, the author who does want to exercise the rights that copyright law makes available to her now bears the burden of signifying the public domain status of her work. Caselaw suggests that a rights holder

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[3] U.S. Copyright Office, Circular 22: How to Investigate the Copyright Status of a Work, http://www.loc.gov/copyright/circs/circ22.html; see also, *e.g.*, Canfield v. Ponchatoula Times, 759 F.2d 493, 497 (5th Cir. 1985); Burke v. Nat. Broad. Co., Inc., 598 F.2d 688, 691 (1st Cir. 1979).

[4] Copyright Act of 1976, Pub. L. 94-553, §§405-406, 90 Stat. 2541; see also U.S. Copyright Office, Circular 22: How to Investigate the Copyright Status of a Work, http://www.loc.gov/copyright/circs/circ22.html

[5] Berne Convention Implementation Act of 1988, Pub. L. 100-568, §7, 102 Stat. 2853 (amending 17 U.S.C. §§401-06); U.S. Copyright Office, Circular 22: How to Investigate the Copyright Status of a Work," http://www.loc.gov/copyright/circs/circ22.html. Although notice is no longer a prerequisite for copyright, it does offer an advantage to the copyright holder in the event of litigation. Specifically, if proper notice appeared on an infringed work, the infringer may not use the defense of innocent infringement to mitigate damages. 17 U.S.C. §401(d).

[6] 17 U.S.C. §102.

[7] U.S. Copyright Office, Circular 22: How to Investigate the Copyright Status of a Work, http://www.loc.gov/copyright/circs/circ22.html. The Copyright Act does impose the requirement that two copies of every work published in the United States be deposited with the Library of Congress. 17 U.S.C. §407. But the penalty for failure to deposit is a fine, not loss of copyright protection. *Id.* §407(a), (d).

must perform some "overt act" demonstrating her intent to surrender her rights.[8] The amateur Internet author who has no intention of limiting the ways in which other people may use her work unintentionally imposes copyright limitations unless she knows to comply with the overt act requirement. Even if she has no intention of bringing a copyright infringement action, would-be re-users cannot safely assume that she won't—even if the work bears no copyright notice. Of course, the elimination of the notice requirement means that the author who does want his work protected by copyright is relieved of the burden of affixing a proper copyright notice to his work. The point is that the burden has shifted to the author who prefers public domain status, and that many of the authors who can now self-publish their work on the Internet likely fall into the newly-burdened category.[9]

The second practical impact of the shift in the copyright default rule has yet to be realized. When the copyright expires on a work that is created today, it may be extremely difficult to establish that the work has passed into the public domain. In the absence of a copyright notice or registration requirement, there will not necessarily be a publicly-available record of the date of creation of the work (or even of the identity of its author), and therefore no practical way to determine whether copyright has expired.[10] Public domain works that might otherwise be made widely available via the Internet (or whatever method of information retrieval is relevant by the time modern copyrights expire) may never be identified.[11]

Some copyright holders are mobilizing to cut through the murkiness about the copyright status of their works. Although the Copyright Act no longer requires notice, these rights holders are determined to make it crystal clear that their work *is* protected. In fact, the digital rights management tools that some copyright holders advocate would recognize and enforce protections automatically; they are designed to make it nearly impossible to use works in ways that infringe upon copyrights—or even in ways that do not infringe but are nonetheless against the wishes of the copyright holder.

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[8] See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §13.06 (2001) (citing caselaw); see also, *e.g.*, National Comics Publications, Inc. v. Fawcett Publications, Inc., 191 F.2d 594 (2nd Cir. 1951).

[9] See generally JESSICA LITMAN, DIGITAL COPYRIGHT 103-107 (2001) (suggesting that many Internet publishers are not motivated by the possibility of exploiting intellectual property rights).

[10] See generally U.S. Copyright Office, Circular 22: How to Investigate the Copyright Status of a Work, http://www.loc.gov/copyright/circs/circ22.html (cautioning that "[t]he complete absence of any information about a work in the [Copyright] Office records does not mean that the work is unprotected").

[11] The Copyright Office currently maintains no list of public domain works. See U.S. Copyright Office, Questions Frequently Asked in the Copyright Office Public Information Section, at #11, http://www.loc.gov/copyright/faq.html#q11.

In conjunction with development of digital rights management systems, machine-readable languages are being designed to enable rights holders to describe clearly the rights they are claiming in association with their works, and the uses that are prohibited or permitted.[12]

For the rights holders who are advocating digital rights management, such "rights expression languages" would ensure that devices used to deliver digital content could recognize and enforce the terms of use specified by the rights holder.[13] But similar techniques could be used to make it easier to identify works for which any use is permitted—that is, works in the public domain. Rights languages developed to facilitate digital rights management—or analogous machine-readable labeling techniques—could be harnessed by those rights holders who want to cut through the murk that obscures the *public domain* status of works they created. A "public domain" label could alert both humans and computers (and search engines, peer-to-peer applications, etc.) that the labeled work may be used, copied, distributed, and modified without limitation.

One goal of the Creative Commons project is to alert creators who do not intend to copyright their work to the "overt act" requirement and to help them comply with it. Then we hope to help creators label works in a way that makes it clear to potential re-users that the work is in the public domain. And we intend to develop mechanisms for attaching "public domain" labels to digital works in a way that computer applications can recognize and process—enabling easy location and retrieval of digital works in the public domain.

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[12] See, *e.g.*, American Association of Publishers, Digital Rights Management for Ebooks: Publisher Requirements (2000), available at http://www.publishers.org/home/drm.pdf (calling for development of "rights specification language" to describe the "author/publisher rights associated with an ebook"); see also Mark Stefik, "Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing," 12 BERK. TECH. L. J. 137, 140-41 (1997) ("A trusted system is aware of the rights associated with a digital work because the rights come with the work. Every approach to digital property rights requires a means of expressing rights. They can be attached to the work itself or can be stored in a database."); Neil McAllister, "Freedom of Expression: Emerging Standards in Rights Management," New Architect, March 2002, http://www.newarchitectmag.com/documents/s=2453/new1011651985727/index.html (describing multiple efforts to develop machine-readable languages to define access rights for DRM).

[13] See generally Neil McAllister, "Freedom of Expression: Emerging Standards in Rights Management," New Architect, March 2002, http://www.newarchitectmag.com/documents/s=2453/new1011651985727/index.html (describing various "rights expression languages").

The Not-Quite-Public Domain

Some copyright holders may be unwilling to abandon their work to the public domain before their copyright expires, but happy to relinquish some of the rights that copyright affords them. Copyright holders with the resources to negotiate licenses can voluntarily cede some of their rights. And organizations like the Free Software Foundation offer ready-made licenses that authors may use to give the public permission to copy and distribute copyrighted works (primarily software) without seeking the authors' permission, so long as certain conditions are observed.[14]

Inspired in part by the work of the Free Software Foundation, Creative Commons plans to build a menu of customizable licenses appropriate for use by other types of creators who want to retain some rights while sharing their work with the public on terms more generous than copyright. We hope to draw attention to and complement existing efforts like the Electronic Frontier Foundation's Open Audio License;[15] and we hope to improve on such efforts by making it easier for potential re-users to identify works that they may safely use without worrying about the intricacies of fair use. Just as a work could be labeled "public domain" in a way that humans and machines could recognize, works could be labeled according to license terms like "This work may be used for any noncommercial purpose," or "Derivative works may be created based on this work so long as the derivative works are licensed under these terms." We envision a system of licensing and labeling that would make it possible, for example, for an artist compiling a digital collage easily to use a search engine to locate all online images that are freely available for copying and modification.

A Far Cry From "Fair Use by Design"

Helping creators give others explicit permission to use their work does not address a key purpose of the fair use exception—allowing certain reuses of copyrighted works even though the copyright holder objects.[16] The Creative Commons project operates on the notion that it is nonetheless

[14] See GNU General Public License, http://www.fsf.org/licenses/licenses.html.
[15] See EFF Open Audio License, http://www.eff.org/IP/Open_licenses/eff_oal.html; see also, *e.g.*, Design Science License, http://dsl.org/copyleft/dsl.txt; Open Publication License, http://opencontent.org/openpub/; Public Library of Science Open Access License, http://www.publiclibraryofscience.org/ploslicense.htm; GNU Free Documentation License, http://www.gnu.org/copyleft/fdl.html; Open Music License, http://openmusic.linuxtag.org/showitem.php?item=209.
[16] See, *e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 585 n. 18 (1994) ("If the use is otherwise fair, then no permission need be sought or granted.")

a step in the right direction to lower the costs for creators who wish to return to the default of the public domain, and to ensure that potential re-users can find and identify those works for which designated uses are undeniably fair. Ironically, our effort may share some of the tools employed by digital rights management systems that are designed with quite different goals in mind.