The Battle for Internet Freedom: (3)
Restrictions on Intellectual Property

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This is the third in a series of articles presenting the legal foundations of Internet expression.

What can one post on the ‘Net without fear of legal reprisal for violating other people’s rights to control their intellectual property (IP)?

IP is “property from original thought protected by law: original creative work manifested in a tangible form that can be legally protected, e.g. by a patent, trademark, or copyright.” (Microsoft® Encarta® 2008)

In countries that have signed treaties< http://www.wipo.int/treaties/en/ > administered through the World Intellectual Property Organization (WIPO< http://www.wipo.int/portal/index.html.en >) such as the USA and the European Union among many others, IP law covers such topics as

- Copyright
- Patents
- Trade secrets
- Reverse Engineering
- End-User License Agreements.

In considering what one posts on the Web or on Internet-accessible servers, the most important element is copyright. Granted, posting other people’s trade secrets on a public Web site can get one into serious trouble, but it doesn’t happen very often.

Trade secrets are “Any formula, pattern, device, or compilation of information that is used in business, that is not generally known, and that gives the owner an opportunity to obtain an advantage over competitors who do not know it. A trade secret must also be the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”< http://www.nolo.com/dictionary/trade-secret-term.html > Trade secrets are sometimes referred to as confidential information or proprietary knowledge.

An interesting case involving trade secrets occurred in late 2004 when the 19-year-old Nicholas Ciarelli was sued under his pseudonym (Nick dePlume) for posting restricted information about the Mac Mini on his Think Secret Web site.< http://www.macobserver.com/tmo/article/Think_Secret_Apple_Settle_Suit_Think_Secret_to_Cease_Publishing/ >

Posting or otherwise sharing copyrighted material without permission or license, however, can get a Webmaster into deep waters quickly.

Copyright law in the US is traced to the Copyright Act of 1790< http://www.earlyamerica.com/earlyamerica/firsts/copyright/centinel.jpg >, which itself was rooted in the Statute of Anne< http://www.copyrighthistory.com/anne.html > (1710) in England.
Intended to stimulate creativity by allowing creators of new knowledge to benefit financially from their inventiveness, copyright law protects

- Reproduction of copyrighted materials
- Preparation of derivative works
- Distribution
- Performance
- Display in public.

There are limited exceptions to the posting of other people’s work on a Web site; these fall under the fuzzy rules of *Fair Use Doctrine*. Fair Use is intended to allow what would otherwise be infringing use of copyrighted work for certain purposes:

- Criticism
- Comment
- News reporting
- Teaching (with specific limitations)
- Scholarship
- Research.

In their wonderful 1996 e-mail course, *Cyberspace Law for Non-Lawyers*, Professors Larry Lessig, David G. Post, and Eugene Volokh wrote that the more “YES” answers you can give to the following questions, the better your chances of pleading Fair Use in a court case against accusations of copyright violations:

1. Is your use noncommercial?
2. Is your use for purposes of criticism, comment, parody, news reporting, teaching, scholarship, or research?
3. Is the original work mostly fact (as opposed to mostly fiction or opinion)?
4. Has the original work been published (as opposed to sent out only to one or a few people)?
5. Are you copying only a small part of the original work?
6. Are you copying only a relatively insignificant part of the original work (as opposed to the most important part)?
7. Are you adding a lot new to the work (as opposed to just quoting parts of the original)?
8. Does your conduct leave unaffected any profits that the copyright owner can make (as opposed to displacing some potential sales OR potential licenses of reprint rights)?

There are thousands of cases of prosecutions under US law for posting illegal materials on the Web such as copies of music, pictures, cartoons, movies, articles, books, and even plagiarized text incorporated into different-looking material. Bottom line: if you want to use someone else’s stuff on your Web site, ASK THEM FOR PERMISSION! It’s not that hard. In my course materials, I routinely write to the people who seem to own images I would like to use to decorate slides; around 99% of them cheerfully grant permission for such use. For other images, I have happily subscribed for several years to the iCLIPART service where a $40 subscription grants me
And if you prefer to fight the whole concept of copyright, you can always post your own materials using the Copyleft< http://www.gnu.org/copyleft/> which allows you to stipulate what you do and do not allow to be done with your materials.

You can download a number of lectures on intellectual property law from my CJ341 Cyberlaw & Cybercrime course pages.< http://www.mekabay.com/courses/academic/norwich/cj341/lectures/index.htm>

In the next article, I’ll turn to another area of restricted content for Internet distribution: defamation.

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