

## Too Quick to Copyright

*Companies cheat the law and the public by claiming ownership over too much stuff.*

By Jason Mazzone

Recent surveys suggest that Americans have lost respect for copyright laws and believe they are free to use the original work of others without proper credit or payment. But teenagers who illegally download music or who cut and paste term-paper material from Web sites are not the

### **Points of View**

worst copyright cheats. Corporations routinely flout copyright laws when they claim ownership of works that are free for everyone to use. These false claims undermine free speech, weaken copyright protections, and fuel cavalier attitudes toward intellectual property.

False claims to copyright are everywhere. Copyright belongs to the author of a work and expires 70 years after the author's death. Yet copyright notices appear on modern reprints of Shakespeare's plays, Beethoven piano scores, and greeting card versions of Monet's water lilies. Corporations that sell to libraries microfilmed versions of early newspapers and other documents too old to be copyrighted routinely attach a copyright notice to their products.

Corporate Web sites include blanket copyright notices even when they feature the U.S. flag, list stock reports, or rely on other works squarely in the public domain. Companies selling records of births and deaths claim copyright protection, although public records cannot be copyrighted. The publishers of school textbooks do not explain that their copyright notices apply only to the author's own words and not to the book's reproduction of the Declaration of Independence, the Gettysburg Address, Supreme Court cases, or "George Washington Crossing the Delaware." Compilations of *The Federalist* have prominent copyright notices without mentioning that, while the publisher's introduction and annotations may be protected, anyone can freely republish the words of Hamilton, Jay, and Madison.

#### 'PUBLIC' MEANS 'NOT FOR PAY'

False ownership claims undermine copyright's purpose under

the Constitution, which is to encourage creative production. Authors are thus allowed to collect, for a limited period, revenues from their own works. But copyright is not meant to help publishers profit from ordinary Americans forced to pay unnecessarily for the use of public domain works.

Owning a copy is not the same as owning a copyright. Yet publishers routinely require their own authors who want to use reproductions of old diaries, maps, photographs, or other images long out of copyright to obtain a license from a library, museum, or other owner of a physical copy. While a picture may be worth a thousand words, many authors find this requirement too much trouble and just omit the image.

Not only do publishers wrongly claim ownership in the public domain, but they also give overly narrow interpretations of what constitutes fair use. Too often, commercial publishers are preventing "fair uses" under the provision of the Copyright Act that allows for limited reproduction of protected works for comment, criticism, or parody.

For instance, many academic authors have faced the uphill battle of persuading their own publisher to let them include excerpts from the copyrighted works of others. Fair use is meant to allow and encourage such conversations among authors. However, publishers routinely edit out fairly used materials and require their authors to indemnify them against any claims for infringement.

Following several high-profile lawsuits, many universities now pay licensing fees for everything they reproduce and distribute to their students, even if the use is arguably fair. Rather than risk litigation, schools tell professors to use only licensed works, and students pay hefty fees for course packets as a result. Universities obtain reproduction permissions through the Copyright Clearance Center, a not-for-profit entity that offers online payment for licenses to nearly 2 million works. This system, which conveniently connects users with publishers, also encourages publishers to overreach; the center offers paid licenses for a dozen versions of *The Federalist*, with just one edition described as in the public domain.

Copyright law gives corporations an irresistible urge to claim ownership, however spurious, in everything. The Copyright Act

provides no penalty for falsely claiming ownership in public domain materials, and there is no reward for catching this form of cheating. So corporations stick copyright notices everywhere. And while the U.S. Copyright Office registers copyrighted works, there is no official registry for works belonging to the public.

### WRITING OVER THE FIRST AMENDMENT

When individuals, fearful of a lawsuit or mistaken about whether something is protected, forgo uses of public materials, false claims of copyright also chill expression. The public domain should be a large and ever-growing depository of works that everyone is—and feels—free to use. Authors should be encouraged to fairly use others' works for criticism and inspiration, not treated as though they are breaking the law.

By granting monopolistic rights to authors, copyright has always had an uneasy relationship with the First Amendment. The Constitution strikes a delicate balance between supporting authorship and protecting speech, by permitting copyrights only for "limited Times" (limited in theory, at least; earlier this year in *Eldred v. Ashcroft*, the Supreme Court rejected a First Amendment challenge to a law extending copyright terms by 20 years). Corporate publishers upset that balance when they prevent uses of public domain materials and interfere with fair uses of copyrighted works. Our nation's founders would be astonished to learn that the pocket Constitution I ask my students to buy contains on the first page a prominent copyright notice, along with a warning that further reproduction of the text requires the publisher's permission.

A robust public domain requires doing away with the current presumption that every work is copyrighted unless proved otherwise. Copyright must be treated as the exception to a general rule favoring free exchange. Authors and publishers have strong incentives to protect their own interests. A presumption against copyright will protect the interests of the public in its domain.

Protecting copyright also requires a presumption against its widespread use. False claims undermine the very value of the protection. Copyright is a special right, a privileged exception to free communication, given for a limited time to authors in recognition of their exertions. The public will only respect a copyright notice when its sole purpose is to signal that special right.

Congress should amend the Copyright Act to make actionable false claims to copyright in the same way that consumers may sue businesses for false advertising. Section 43(a) of the federal

Lanham Act already allows people injured by a deceptive or confusing advertisement to sue the offending business, and many states have their own false advertising laws. Protecting free uses of public domain materials and fair uses of copyrighted works is at least as important as ensuring that consumers do not make purchases under false pretenses. The Copyright Act should allow individuals injured by copyright cheating to collect damages from corporations that make false copyright claims. To avoid liability, publishers should be required to specify clearly which specific portions of a book or other work are protected and which are not. Publishers who use the blanket © should do so at their own peril.

A model already exists for this plan. The Copyright Act currently discourages false claims to copyright in U.S. government works, in Section 403, by restricting an author's ability to seek certain damages. Westlaw and other providers of government materials therefore carry notices on their products that they do not claim copyright over original government works. Congress should expand on this principle to protect the rest of the public domain as well.

### A LIST OF WHAT BELONGS TO EVERYONE

Congress should also create a searchable online public domain registry that lists works that can be freely used and that adds new works once their copyrights expire. One easy way to generate an instant catalog of public domain works would be to require publishers, as a condition of enforcing future copyright claims, to furnish a list of all their publications that belong in part or in whole in the public domain. The public should also be encouraged to submit titles for inclusion in the registry. If it is not clear whether a work is in fact protected by copyright, the registry should post the work provisionally and allow it to fall into the public domain if no copyright claim is asserted within six months.

Corporations are responsible if Americans, now equipped with all the tools of self-publishing, do not abide by copyright laws. After decades of claiming they own virtually everything in print, commercial publishers have made abiding by copyright law seem optional. If corporations with their teams of lawyers cannot distinguish between what is protected and what is free for public use, we can hardly expect teen-agers with their laptops to play by the rules.

---

*Jason Mazzone is an assistant professor at Brooklyn Law School.*