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Essence of Copyright By Raheel R Daureawo LLM

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THE ESSENCE OF COPYRIGHT ©

Introduction - Copyright is and has always been about policy. And what I intend to discuss in this paper is a list of topics which have always been center of debate in copyright courts. Although each topic is a book in itself, but my attempt here is to consolidate this list. The goal of the law of copyright has always been to promote scientific, literary and artistic creativity and protect as well as limit these rights in order to prevent monopolies. The war, to put it in simple term is between the world who like to use information without giving any benefit to the owner of the work and between the people who own the protected work by law. The war will always remain between control and access.

Copyright history

In order to understand the present and future of copyright it is imperative to know its past. There is a debate between scholars whether copyright law always existed in common law or had a definite beginning. However most historians agree about the emergence of copyright law. It was England sometime in the middle of the 17th Century and the printing press was a booming business. Only the rich and powerful people could afford to have printing presses. Books were in great demand because it contained lot of information to educated class which sometime contained blasphemous information which the church did not approve. This market was dominated by a couple of people called a printers or booksellers and they made a sort of guild with purposes of exclusion of other people into getting into the business. The licensing act in 1662 changed this and they got monopoly and the guild got a formal monopoly. The guild set up
a registration system which would determine who would get priority to print a particular book. They also agreed to edit the content of the books which would be in cooperation and self-censorship with the help of the crown.

The monopoly was suddenly stopped as the Licensing Act was discontinued. So they started by lobbying with good writers. Something to take place with the Licensing Act. So at that time it was lobbied that piracy was bad for the writer and their families who produced their books and it is bad for everyone as this piratical behavior will affect the market. And so the Statute of Ann came to be and all this lobbying did take effect which can be seen in the Statue of Ann.

The preamble of Statue of Ann, as many would argue was nothing more than a tool for the monopolistic publishers. However the Statute of Ann had many aspects, it was the author rather the publisher which was given rights. Some rights extended from 14 years or 21 years for others and the legislation also talks about the price control. The book trade was international back then; and foreign language books could be sold without any regulation (free importation). In order to get benefits of this system writer has to register but there was another point in the Statute of Ann contain that if guild refuses to register a particular book then an alternate method of registration was established. So much detail can go into the statute of Ann but that is far beyond the scope of this article, however the proper codification of copyright law was done in the Copyright Act of 1909. However there were still many works which did not receive protection and therefore in December 31, 1977 in one fell swoop all unpublished works came into federal government protection.
Elements of Copyright

These are the essential elements of Copyright and the majority of the issues faced by the courts in dealing with copyright cases.

**Public domain** - One of the biggest war zones is that what comes under public domain and what is protected. We first had books as a source of information but with the advent of internet we are now in the information era. It now takes us less than a minute to log onto our computers and access other people’s works like music art etc. In such a situation how do we know where do we need to draw a line between works which are protected and works in the public domain. Let us first understand the concept of public domain. By definition a public domain work is a creative work that is not protected by copyright and which may be freely used by everyone. The reasons that the work is not protected include: (1) the term of copyright for the work has expired; (2) the author failed to satisfy statutory formalities to perfect the copyright or (3) the work is a work of the U.S. Government.

So far so good but here comes the troubling parts. In public domain there are multilayered works which often cause confusion as to what is or is not public domain. Let’s take for example the movie “It’s a wonderful life” which came into the public domain as there was a failure to renew copyright. For years anyone could copy and sell the movie on videotape. Recently a production company acquired the rights of the music of the movie. And therefore now the copyright holder could successfully not only stop anyone from copying the music of the movie but also in turn the movie itself unless the entire sound track is removed. This process can
therefore cause confusion as to what works are actually protected which are in the public domain. The same is for works currently in the public domain are used are given copyright protection but not the original work itself. Let's take the example of the story of Mahabharata is a religious scripture and in the public domain but TV serials made from its plot are copyright protected. The same is for works protected in other countries to compilation. Most often a determination of a work and what parts of it are in the public domain and what parts are protected decides the case. There may be times when we have sat at our computers and not even known whose copyright laws have been encroached upon.

Subject Matter – What is the subject matter of the issue of copyright infringement is of prime importance as it depends upon case by case. We need to understand that not all works are protected. Some works enjoy absolute protection depending on its original content and others are degrees of improvement made to original works in public domain which get protection. Alphonse de Lamartine attitude towards photography was that it was not an art as compared to painting. Therefore this issue of photographic copyright was in issue as the subject matter as to acknowledge whether photograph can be given copyright protection. In BLEISTIEN V DONALDSON CASE employer filed a case against the infringers and this was one of the landmark cases dealt with work for hire doctrine, etc. Congress can authorize copyright in “the personal reaction of an individual upon nature .. others are free to copy the original they are not free to copy the copy” the question was what was copyrightability of the photos was discussed. In this 1903 case represents the pivot that copyright was not just for the few but for many.

Fair Use - A defendant can avoid liability for infringement if the defendant’s activity constituted a “fair use “of the copyrighted work: determining “fair use” involves balancing the
interests of the authors and right owners against various legitimate interests of individuals or the public. But that is where the paradox lies as this is a broad and an easy defense in copyright cases. The “fair use” doctrine does not have clear definitions and boundaries the decisions are reached by case by case basis and that is what makes it so interesting.

To determine whether a defendant’s use was a fair use the trier of fact considers whether the defendant’s purpose was a public interest purpose such as criticism, commentary, news reporting, teaching, scholarship, research or other legitimate purpose.

The purpose and character of the use (commercial, non profit or educational) and the nature of the copyrighted work (whether the work is designed or expected to be quoted by others). The amount and sustainability of the copied parts compared to the copyrighted work’s size or the length (e.g. a single line from a popular song may be proportionally larger and meaningful than a whole page from a book.) It is very much possible that a plot line has been copied and improved upon which makes it a new product then we need to understand what was the proportion of the work which was copied. The effect of the use upon the potential market for or value of the copyrighted work – as in the Obama photo Hope case: Fairley v A.P case or whether the infringing work is a satire or parody.

One on hand people love to save money and watch the latest movie on their computer but on another they know that this is wrong. All know that this is wrong but because of the vastness of the internet they still do it. Piracy is rampant throughout the internet world in the name of Fair use. From piracy to just attaching music to a video broadcasted on YouTube. The thought process is that we made a beautiful video and good music will only enhance the experience and so we attach music without contacting the music company and upload it on YouTube and
thereby infringe the rights of the holder. Many are of the opinion and often question themselves where will this control end and what is use of this entire world if we can’t be free in it. But there are others who advocate for complete control of the internet. I believe that a middle ground will have to be reached where frivolous copyright suits can end and an agreement can be reached whereby a user can have access if the intention is correct. What I mean by that is that if a mother make a video of her child and uses great music with it and uploads it on YouTube it should be permissible but if music is just being copied with the intention of earning revenue from other persons work than that should be punished. My greatest compliments go to the initiative taken by the creative commons team and just hope that other countries too join this movement. It is initiatives like these which really need to be “copied” by other countries especially in Asia where their attitude is access is opportunity: although copyright laws may be in place but enforcement of those laws are rare if not nonexistent.

**Originality**– The question here which comes to mind as to how much should a person who makes a derivative work add to the work inorder to get copyright for his derivative work. A person originally gets copyright work when his work is original but the debate always comes under derivative works.

A famous bollywood actor said that in the world there are only eight types of scripts which are made or recycled into a new product. If there is a movie known as “A” and has been inspired from another script which was inspired from a mythological story. Than in that case whose copyright has been actually infringed? I don’t mean this in the legal sense, but I mean it in real life: themes like love revenge and hatred have always been recycled in a new setting and background and presented to the public. Although the law may be very definite in defining what
is original and what original content has been taken and what content has been added to make a new product. Cases are won on the amount factor of what has been copied and exactly what was copied which was protected by law. If something is taken from the public domain and some additions are made than that is protected by law.

So we need to understand what is "original content" and what is an addition to the original content. There are people who make a living by copying the original content and without infringing the rights of the owners they can make additions and sell the products as their own. They may just slip through the courts but I ask is that correct. Should the person be punished or what he did is right as by making additions he has made it into something new and probably more valuable. I think this is a statement which cannot be generalized but is rather a case by case answer. Just like in the case Fairley V A.P the person who made the portrait himself said that he Google the photo of President Obama and then made a poster giving it a different shade as per the characteristics attached to the persona of the president and the poster was called “Hope” This product was even more popular than the original photo. On one had we have the A.P saying their rights have been violated and on the other we have the person who made the portrait claiming he was willing to pay what would have been the licensing fees but will not pay damages for the simple reason that the portrait is now even more valuable than the original photo. There may be people who would say that this is copyright infringement but I think by making the additions in a particular light and color and shade he made a mere photo in a symbol of “hope” which people could identify with and that in itself is a product of the person who made the posters and not the person the clicked the photo and definitely not the product of the company who hired the photographer. What is so fascinating is that originality is so much fact oriented and on a case to case basis and that is why this has been in debate and will be in debate for sometime.
Moral Rights –

It is the right of the author to have a work published anonymously or pseudonymously, and the right to the integrity of the work. Many jurisdictions are recognized in many jurisdictions but in the US they are applied to the visual media. It is the inherent right of an author to have his name removed but also to protect the work from any slander. But here is where the big question and debate comes about: there are some who say if an author is releasing his work anonymously what right does he have to claim it when it is successful. And because there is no one attributed to the work, shouldn’t the work be treated as though it is in a public domain? Then when the work becomes famous and successful how can a person claim it now. And there are others like me who believe that an author has an inherent right in his work and attribution is one of them and therefore should be able to release his work anonymously for whatsoever reason that may be. This has always been a matter of debate and therefore if this point has been sorted than, that the second point that the author should be able to protect his work is hardly debated and accepted by all.

Federal exclusivity –

Copyright has always been a federal subject and that in itself has been controversial. I come from Mauritius where it is the federal / union government which has given power to the states and therefore in our constitution; the state and federal power are separately given and there is a third list which enumerates the powers which are shared by union as well as the states. Copyright is in the third list of shared power between state and union. Here it is the states which give the power to the Federal government and whatever power is not given to the federation the
state will have power over it. I am fascinated by the working of this system. And I can understand that without the third list of shared power there can be controversy.

From the beginning states have had their reservation as to copyright having federal exclusivity. And this continues even today as states would want more power but logically speaking it make every sense that federal government keep jurisdiction over copyright in the interest of interstate commerce. But I personally believe that this should be a shared power between state and the union and this has its own benefits.

**Proof of claims of infringement**

This is probably the most important of the elements of copyright law. Firstly we have to understand that copying to one person may be just considered a fair use to another. Here although intent is sometimes the case but most of the time intent may be immaterial. This is a factual determination and one which depends upon case to case basis and that is why it is so contested. Sometimes there is direct evidence that a person has intentionally copied a copyrighted work and that is easy but when it comes to the point that there is no direct evidence than there are problem as then circumstantial evidence is used which is a constant inspiration for debate. What can be considered as circumstantial evidence in a world of ever changing technology and new innovative idea is for the court to decide. The term used is either there is a “word for word “copy or is the work “strikingly similar” to the original is an important factor.

There are scholars who advocate that what rules apply for our physical selves should never apply to the cyber world, that world is in the mind and it is free from any bias. Then there comes the activists who say that without rules it would just be a barbaric rule like any other
world. The war has always been between control and access and therefore proof of claim of infringement is not a set form of rules but an ever changing one.

I believe that restrictions are for the good of people and rights created by copyright only give us additional scope for creativity. But there is something which tells me that there should never be a restricted cyber world. If we completely apply all the rules to cyber world, the attraction will go away. The main reason why people are drawn towards the internet is not only to get information but it is a world free of whom we are as a person. We can reverse the roles in life which restrict us and are free from any bias. A person from a poor country is the same as the person from an advanced country when he is logged on to the internet. These and many more society barriers are broken in cyber space. I believe it is an important time for all involved in copyright today. From where we have come to where we intend to go depends on us and how we shape our own future. Do we restrict and get restricted ourselves or do we find a perfect middle ground.

Remedies –

Upon providing copyright infringement, the plaintiff has the following remedies. Injunctive relief to block further infringement and this in itself according to me is the most effective relief available. As always there are two sides to everything. In certain cases like movie piracy if a particular movie is uploaded on one website and injunctive relief has been successfully achieved the same movie is uploaded to another server and can be easily viewed from there. Therefore it practically becomes impossible for a movie make to go after individually each and every website. But in cases where there is copyright infringement like in the recent case where a college student was fined for selling music to a website. If injunctive relief is sought
against the major website at least a huge proportion of copy of that music is possible. This in itself is a weak example as there are others who will contend that once music has reached the desktop of an individual user who knows how and where it will be transferred to next. Then there are damages which include actual damages suffered and even statutory damages going up to impoundment and/or destruction of the infringing items although that may not always be possible any costs and even attorney fees.

The point I am trying to get at is that is a case to case basis and although the law has given remedies. The question her is whether the remedies are sufficient and give a solution to the problem. As in the ever changing cyber world if one thing is stopped there are hundred other loopholes which are used to achieve the same result. This has been a source of debate for so many years as a remedy should be the solution to the problem but in cyber world this does not apply as until the problem is solved from the users end no solution will be reached to the problems of piracy hacking etc and no law would be sufficiently be able to address the issue. There are others who will contend that freedom itself is the most attractive part of the internet world and should not be tampered.

**Secondary liability –**

It has been a trend to attach to the lawsuit as many parties as possible. There is however two point which we need to remember here. Contributory infringement liability is when a person knows and has reason to know about the infringing activity too can be added as he too is liable.
And anyone who intentionally induces or materially contributes to the infringing activity too are added as parties to the lawsuit.

This has been a matter of debate for the simple fact is that there are people from the school of thought who believe even if there has been slightest of contribution towards infringement even that person should be punished and there are others who believe that only the offender should be punished. In the Mauritian copyright case even the person who owned the cyber café was added as a party to the suit. (State V Dolluir) M.U. 345. This, I think was an extreme case where the cyber café owner testified that it was practically impossible for him to monitor each computer and what users sitting on those computers are doing. I do believe is that was an extreme case but I too believe that if we are to give successful copyright protection we need to find out the parties who contributed to the offence and even those that were in a supervisory position but failed to exercise their right to prevent infringement only then can we achieve give and get copyright protection in the true sense.

Conclusion – From the beginning to the end these are and will remain contested arguments in copyright courts. Rights on one hand or public interest on another is over simplified but extremely important. And is thought by some as not being achievable at the same time. But I am of the opinion that private right and public good are in fact the same and therefore achievable. We will need to find a middle ground where in users can free use the content on the internet without feeling completely controlled without infringing anyones intellectual property rights.

In the future that we are heading towards, we will need a stronger and more effective copyright regime especially with regards to the internet. As internet is still in an earlier stages
and there are many thing which we will see through the coming years. These are very exciting times for law with regards to copyright. We are more and more attached to this thing called cyber world and things can only improve from here on.

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