

# Copyright Compliance Issues and Resources for Law Firms

by Kelly C. Fanning

In conducting the business of law, attorneys and their firms may inadvertently infringe copyright<sup>1</sup> by distributing a work not in the public domain<sup>2</sup> without permission from the copyright owner. Infringement may occur, for example, under one of the following scenarios:

- using and archiving work product without permission
- mirroring websites and posting images without permission
- distributing and archiving articles and newsletters without permission.

This article highlights real-world examples of the above scenarios and provides Internet resources that can help law firms achieve copyright compliance.<sup>3</sup>

## Work Product

Using other attorneys' work product is generally accepted within the legal industry,<sup>4</sup> and it has been argued that the fair use doctrine applies when work-product use occurs.<sup>5</sup> Nevertheless, some commentators suggest that this practice, though customary, may amount to copyright infringement.<sup>6</sup> According to *Nimmer on Copyright*, "[t]here appear to be no valid grounds why legal forms such as contracts, insurance policies, pleadings, and other legal documents should not be protected under the law of copyright."<sup>7</sup>

It is not surprising, then, that in 2001, "the reputable plaintiffs' side securities law firm of Milberg Weiss Bershad Hynes & Lerach LLP publicly threatened to sue a number of other law firms for copyright infringement" arising out of unauthorized copying of language in its complaints.<sup>8</sup> A year later, Milberg Weiss placed copyright notices on its complaints and registered the complaints with the U.S. Copyright Office.<sup>9</sup>

## Websites

Website "mirroring"<sup>10</sup> and the unauthorized reposting of original work on websites also pose potential copyright pitfalls. In *Brayton Purcell LLP v. Recordon & Recordon*,<sup>11</sup> a federal district court held that Recordon & Recordon had violated Brayton Purcell's copyright by copying the substance and look of its website.<sup>12</sup> In another case, *Neimark v. Ronai & Ronai LLP*,<sup>13</sup> a federal district court held in favor of the plaintiff, finding that the defendant firm had infringed copyright by reproducing for its website a cartoon appearing on the plaintiff's website.<sup>14</sup>

## Articles and Newsletters

Copyright infringement also may occur when firm members copy and distribute publications, such as articles and newsletters, without the copyright owner's permission. In *Lowry's Reports v. Legg Mason, Inc.*,<sup>15</sup> a newsletter publisher prevailed against a law firm that allowed its employees to repeatedly circulate copies of a newsletter for which the firm had only one subscription.<sup>16</sup> The *Lowry's* decision indicates that fair use is not an appropriate defense when monetary gain is the ultimate goal of the distribution.<sup>17</sup>

Linking to Internet sources is another common mode of potentially infringing behavior. Hyperlinking to articles is not necessarily a violation of copyright.<sup>18</sup> Under certain circumstances, however, it can present legal challenges,<sup>19</sup> including infringement.<sup>20</sup> In *Intellectual Reserve v. Utah Lighthouse Ministry*,<sup>21</sup> for example, a federal district court noted that

[w]hen a person browses a website, and by so doing displays [copyrighted material], a copy of the [copyrighted material] is made in the computer's random access memory (RAM), to per-



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mit viewing of the material. And in making a copy, even a temporary one, the person who browsed infringes the copyright.<sup>22</sup> In contrast to the view espoused by the court under the specific circumstances presented in *Intellectual Reserve*, other courts have noted that “hyperlinking per se does not constitute direct copyright infringement because there is no copying.”<sup>23</sup> Nevertheless, *Intellectual Reserve* serves as a reminder that the mechanisms associated with hyperlinking are worth at least passing consideration.

## Archiving

Archiving copies of others’ original work also may be considered a violation of copyright. Unless the work is the archiving firm’s property or the firm has obtained permission from the copyright owner, infringement is likely. As one commentator has noted, corporations that conduct archival copying “should carefully evaluate the need to obtain permission and compensate the copyright holder before proceeding.”<sup>24</sup>

## Solutions and Resources

An effective method of avoiding inadvertent copyright infringement is to implement a firm-wide copyright compliance policy. In a 2009 *Tech Trends* article, the authors recommend achieving copyright compliance by following these steps: (1) create and communicate a policy; (2) generate and communicate compliance procedures; (3) evaluate the impact of the new policy on your organization, as well as its training needs; (4) offer training, assess the new compliance process, and consider feedback for improvement; and (5) maintain compliance.<sup>25</sup>

The following Internet resources should prove helpful to those who wish to develop and maintain a firm-wide copyright compliance policy:

- The U.S. Copyright Office<sup>26</sup> offers everything from a “Copyright Basics” publication to information regarding copyright-related legislative developments.
- Cornell University has a chart that tracks copyright terms in the United States by type of work product and publication date.<sup>27</sup>
- Stanford University provides summaries of judicial opinions relevant to copyright and fair use.<sup>28</sup>
- The Copyright Clearance Center<sup>29</sup> offers extensive, fee-based copyright compliance services, as well as free webinars on various topics, including copyright at work.

- The Copyright Clearance Center also lists ten steps to creating a copyright compliance policy for the workplace, as well as recommendations for policy implementation.<sup>30</sup>
- The Association of Corporate Counsel offers information and resources on copyright protection in the digital age.<sup>31</sup>
- Various document retrieval services, such as Research Solutions<sup>32</sup> and Infotrieve,<sup>33</sup> include copyright compliance in their services.
- TinEye<sup>34</sup> is a reverse image search engine that can be used to locate the owner of an image to request permissible use.
- The American Society of Media Photographers<sup>35</sup> offers helpful information regarding the use of copyrighted images.
- Creative Commons<sup>36</sup> lists works identified by copyright owners that are available for different uses and require attribution.
- The Artists Rights Society<sup>37</sup> includes information about the relationship between dates and lengths of copyright, as well as information about the public domain.
- Stock Photo Rights<sup>38</sup> offers information on the use of copyrighted images.
- The American Society of Composers, Authors and Publishers<sup>39</sup> provides music licensing information (pertinent, for example, if a firm plays music for clients while they are holding on the telephone).

## Conclusion

Attorneys and their firms can avoid liabilities associated with inadvertent infringement through the effective implementation of a firm-wide copyright compliance policy. The resources listed in this article provide information and guidance in developing such a policy.

## Notes

1. Copyright consists of a bundle of rights: the rights to reproduce, prepare derivatives of, distribute, publicly perform, and display an original work. Besenjak, *Copyright Plain and Simple* 22-23 (Career Press, 2000). See *Harper & Row, Publishers, Inc. v. Nat’l Enters.*, 471 U.S. 539, 546-47 (1985) (“Section 106 of the Copyright Act confers a bundle of exclusive rights to the owner of the copyright.”).

2. See generally Hirtle, “Recent Changes to the Copyright Law: Copyright Term Extension,” *Archival Outlook* (Jan./Feb. 1999), rev. Jan. 1, 2011, available at [www.copyright.cornell.edu/resources/publicdomain.cfm](http://www.copyright.cornell.edu/resources/publicdomain.cfm).

3. This article does not address related claims of plagiarism. For information regarding that topic, see Moise, “Rocket Docket: The Joys and Per-

ils of Online Court Documents,” 22 *S.C. Law.* 46, 47 (May 2011) (citing various cases involving plagiarism on the part of counsel); Bast and Samuels, “Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty,” 57 *Cath. U. L.Rev.* 777, 800-805 (2008) (discussing plagiarism as it applies to judges and practicing attorneys).

4. See Bast and Samuels, *supra* note 3 at 804 (“Practicing attorneys customarily borrow from the writing of others, especially for transactional documents; in fact, it is fairly rare for an attorney to produce wholly original writing.”).

5. See Isaacs, “The Highest Form of Flattery? Application of the Fair Use Defense Against Copyright Claims for Unauthorized Appropriation of Litigation Documents,” 71 *Mo. L.Rev.* 391, 444 (2006) (analyzing the application of the fair use defense to the “appropriation and adaptation of others’ litigation documents” and concluding that “attorneys should be able to defend against those claims using section 107’s ‘fair use’ provision”). The fair use defense requires the application of the following four factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107.

6. See Bast and Samuels, *supra* note 3 at 806 (“Borrowing from another’s transactional and litigation documents without identifying the source of the writing, a customary practice for practicing attorneys, is currently a gray area in legal scholarship.”); Stueber, “Due Diligence in Drafting: Copyrights in Legal Documents,” 64 *Bench & Bar Minn.* 18, 20 (April 2007) (“So simply going to the clerk’s office or website and copying a brief or some pleadings is perfectly fine. But this right to inspect and copy doesn’t create a right to incorporate portions of those briefs or pleadings into your own.”). See generally Cheskis, “Copyright of Legal Materials: From Wheaton to West—Shaping the Practice of Law in America,” 20 *Comms. & The Law* 1, 35-36 (1998) (“Normally, no lawyer impedes the use another lawyer might wish to make of a document the former has drafted. The second lawyer, if doing a complete job, will . . . tailor it accordingly.”).

7. Nimmer and Nimmer, 1 *Nimmer on Copyright* § 2.18[E] (Matthew Bender, 2010). But see Valoir, “Deposition Transcripts: Are They Subject to Copyright Protection?” 17 *Intell. Prop. & Tech. L.J.* 1, 2-3 (2005) (noting that court opinions and judicial records including trial testimony constitute public documents not subject to copyright claims, and arguing that deposition transcripts should not be subject to copyright); *Craig v. Harney*, 331 U.S. 367, 374 (1947) (“What transpires in the courtroom is public property.”).

8. Isaacs, *supra* note 5 at 392.

9. Wang, “The Copyrightability of Legal Complaints,” 45 *B.C. L.Rev.* 705 (2002).

10. “Mirroring” websites occurs when “offending firms simply remove the original logos and staff biographies and replace them with their own.” Androvett, “Solo/Small Firm Practice: Midyear Legal Checklist: Making an Impact Online,” 74(4) *Tex. Bar J.* 342 (April 2011).

11. *Brayton Purcell LLP v. Recordon & Recordon*, 487 F.Supp.2d 1124 (N.D.Cal. 2007).

12. *Id.* at 1126 (explaining that plaintiff firm had filed suit against defendant firm, asserting several claims including copyright infringement based on defendant firm’s “alleged copying” of plaintiff firm’s “website on elder abuse”). *Brayton Purcell* prevailed both at trial and on appeal. See *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124 (9th Cir. 2010). One author suggests that if a firm intends “to assert a claim of copyright in its work product, it should establish a copyright-evolution file relative to the work documenting what, if any, predicates were utilized in

the drafting and creation of the final product.” Birch, Jr., “Copyright Protection for Attorney Work Product: Practical and Ethical Considerations,” 10 *J. Intell. Prop. L.* 255, 259 (Spring 2003).

13. *Neimark v. Ronai & Ronai LLP*, 500 F.Supp.2d 338 (S.D.N.Y. 2007).

14. *Id.* at 339. For commentary regarding *Neimark*, see Bialek *et al.*, “Attorney Websites: Ethical Issues are Only the Beginning,” 81 *N.Y. St. Bar J.* 10, 18 (June 2009).

15. *Lowry’s Reports v. Legg Mason, Inc.*, 271 F.Supp.2d 737 (D.Md. 2003).

16. *Id.* See DeBenedictis, “Law firm that photocopied newsletter sued for \$14 million,” 91 *A.B.A.J.* 32 (May 1991) (explaining that the producer of “a newsletter costing \$675 a year” sued a law firm for “\$14 million in statutory damages” for repeatedly photocopying and passing around the newsletter). See generally Dreyer and Aguiar, “Do Not Forward This Article!” *L. Tech. News & The N.Y. L.J.* (June 3, 2011) (“Many electronic publishers of subscription-based publications now use technologies that can track any forwarding activities of subscribers.”).

17. “The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from the exploitation of the copyrighted material without paying the customary price.” *Lowry’s Reports*, *supra* note 15 at 748, quoting *Harper & Row*, *supra* note 1 at 539, 562 (1985). See “Copyright and Fair Use,” 34 *ASHE Higher Educ. Report* 31, 32 (2008) (discussing “acceptable fair use” under the Copyright Act and stating that “copying an entire work for profit-making motives fails to adhere to fair use standards”).

18. “[H]yperlinking does not itself involve a violation of the Copyright Act . . . since no copying is involved.” Dreyer and Aguiar, *supra* note 16 at n.22, quoting *Ticketmaster Corp. v. Tickets.com Inc.*, No. CV 99-7654 HLH(BQRX), 2000 WL 525390 at \*2 (C.D.Cal. March 27, 2000).

19. See, e.g., Quinn, Jr., “Web Surfing 101: The Evolving Law of Hyperlinking,” 2 *Barry L.Rev.* 37, 68-71 (2001) (discussing various legal issues associated with hyperlinking, such as violations of the Anticircumvention Provisions of the Digital Millennium Copyright Act and “click-on agreements” that can contractually prohibit users from hyperlinking to sites).

20. See Downing, “Using Fair Use to Stop a Copyright Troll from Threatening Hyperlinkers,” 12 *N.C. J. L. & Tech. On.* 155, 161-64 (2011) (discussing copyright infringement in the context of hyperlinking).

21. *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F.Supp.2d 1290 (D.Utah 1999).

22. *Id.* at 1294. See also Downing, *supra* note 20 at 163-64 (examining the court’s findings in *Intellectual Reserve*).

23. *Online Policy Group v. Diebold, Inc.*, 337 F.Supp.2d 1195, 1202 n.12 (N.D.Cal. 2004). See also Dreyer and Aguiar, *supra* note 16 at n.22.

24. Besenjak, *supra* note 1 at 120.

25. Butler and Parker, “Proactive Copyright: Workplace Compliance,” 53(3) *TechTrends* 9 (May 2009).

26. [www.copyright.gov](http://www.copyright.gov).

27. [copyright.cornell.edu/resources/publicdomain.cfm](http://copyright.cornell.edu/resources/publicdomain.cfm).

28. [fairuse.stanford.edu/primary\\_materials/#caselaw](http://fairuse.stanford.edu/primary_materials/#caselaw).

29. [www.copyright.com](http://www.copyright.com).

30. [www.llrx.com/features/informationsharingcopyright.htm](http://www.llrx.com/features/informationsharingcopyright.htm).

31. [www.acc.com/legalresources/quickcounsel/icpitucaeu.cfm](http://www.acc.com/legalresources/quickcounsel/icpitucaeu.cfm).

32. [www.researchsolutions.com](http://www.researchsolutions.com).

33. [www.corporate.infotrieve.com](http://www.corporate.infotrieve.com).

34. [www.tineye.com](http://www.tineye.com).

35. [asmp.org](http://asmp.org).

36. [creativecommons.org](http://creativecommons.org).

37. [www.arsny.com](http://www.arsny.com).

38. [www.stockphotorights.com](http://www.stockphotorights.com).

39. [www.ascap.com](http://www.ascap.com). ■