

Developing A Copyright Risk Management Plan

Locating a copyright owner can be a daunting and often impossible task. The Internet has made the task somewhat easier but the problem still remains. You want to reproduce a certain work, for instance, and despite all your online searches, telephone calls, emails, faxes and snail mails, you are at a dead end. Should you use the work anyhow? It is unlikely that any copyright laws around the world would consider all your efforts as an exception to the copyright law and consequently permit you to use the work without permission. So what do you do?

If you live in Canada, you may apply for an "unlocatable copyright owner" license from the Copyright Board of Canada. Licenses may be granted for a five-year period, for the use of published copyright works, in Canada. However, before a license is granted, you must prove to the Copyright Board that every reasonable effort has been taken to locate the copyright holder. Publishers, archives, television producers and others have obtained these licenses since they were first made available under the 1998 amendments to the Canadian Copyright Act. See <http://www.cb-cda.gc.ca/>.

If you do not live in Canada, you have two choices. First, do not reproduce the work and find another appropriate copyright work that suits your needs. Second, reproduce the work, fully aware of the risks you are taking. What exactly are those risks?

Risks Involved in Unauthorized Use of a Work

There are several risks you may face when using a copyright-protected work for which you do not have permission, or for which you think the defense of fair use/dealing may apply. First, you may face paying a copyright fee after using the copyright-protected work. In the worst case scenario, you may be subject to a law suit (which would more than likely be settled out of court.) Second, you may face public embarrassment by the fact that you used copyright-protected materials in which you did not have the permission. This may be damaging especially for a publicly-funded organization or an organization that either creates, licenses or distributes copyright-protected works or other intellectual property. Third, you may need to stop using the non-cleared work(s) which may encompass such things as removing an image from your website, or re-printing a print publication which includes the work(s). Of course, if your use is on a website, the unauthorized work is much easier to remove than, let's say, if it is in a print publication.

Assessing Your Risks

To assess your risk of using non-cleared materials, consider the following:

- The origin of the work(s). Is the author well known? This may be riskier. Does the author or copyright holder have a reputation for strictly guarding uses of its works? Is the copyright owner likely to pursue legal action or to negotiate a copyright fee? Is the copyright owner likely to proceed through a trial if he commences an action?

- Who will have access to the work(s)? If it is being reproduced on the web, then it is accessible to a huge number of people around the world.
- Analyze your budget for after-the-fact royalty payments, settlements out of court, court-related fees, and infringement-related legal advice.
- What are the "political" consequences of using materials without permission? Would bad publicity mean less public funding? What would be the message to the public about respect for copyright law? Would it harm your organization in any non-monetary manner?
- Do you have insurance coverage for copyright infringement? Would this use be covered? How would this affect your coverage and premiums?
- What are the "emotional" costs of a claim against you for copyright infringement? How would this affect your employees and governing body?
- Weigh the time and inconvenience of dealing with an infringement claim with the advantages of using authorized materials.

Consider the Alternatives to Unauthorized Use

Before using non-cleared work, consider all possible alternatives to using the work without permission. Are there similar works you could use with permission? Are there works in the public domain? Could an employee create a new work?

Steps You Can Take to Decrease Your Risk

There are several things you can do to lessen your risk of copyright infringement. These include:

- Immediately consult your lawyer if you think you may be infringing copyright.
- Where appropriate, purchase insurance that will pay costs such as “after-the-fact” licenses and monetary payments to the copyright owner.
- Implement a written procedure on obtaining copyright permissions. Make sure the procedure is consistently used throughout your enterprise.
- Educate your staff and end users of your content (perhaps licensed content) about fair use/dealing and any applicable copyright exceptions, and the penalties for violating copyright, as your organization may be liable for an employee's infringement.
- Be familiar with the provisions of any licenses you have signed, as these are often more restrictive than copyright law. Understand your licenses before signing

them, and educate those who use licensed content about the terms and conditions of that use.

- Keep a register of computer software you have purchased, how many licenses you have purchased for each program, and who is currently using those licenses. You should also lock original software in a secure location.
- Conduct periodic copyright compliance spot checks in your organization.
- Research and track developments related to your country's copyright statute, international developments, court cases interpreting the law, and policies and procedures implemented at similar organizations.
- Attend lectures and workshops on copyright law and license agreements.
- Develop a written copyright policy and keep it regularly updated. Include permission guidelines and fair use/dealing guidelines. Make your policy and guidelines available to all in your enterprise.

Be Proactive

It is best to consider your organization's policies, guidelines and copyright risk management now and to contemplate how you would proceed in a variety of unclear situations. Organize on-going dialogues of the relevant issues in your workplace, possibly form a discussion group and role play various scenarios, and develop written policies, guidelines and procedures to guide you through copyright risk assessment situations. This will help you manage real copyright risks when they arise.

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