

Repurposing content and copyright – bouquets that become brickbats
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Repurposing content and copyright – bouquets that become brickbats

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‘Content repurposing’ is defined in various ways. One online commentator describes the term as a potential entrant to the 2013 Hall of Fame for digital buzzwords. Online platforms describe it as taking raw materials and presenting them in a different way or taking a finished product and repackaging it to suit alternative media (eg, converting visuals and blog posts into presentations, or transforming data into a form that serves a different function).

Commercially, repurposing your own content can have various implications, linked generally to an upturn or downturn in business, although it does not attract legal penalties of the sort attached to copyright violations. However, the situation is different should you happen to repurpose third-party content, particularly in a situation where facts form the bedrock of the primary content. “Good artists borrow, great artists steal” – this venerable quote is allegedly attributed to Pablo Picasso, among countless other artists.

Third-party content repurposing is rampant. Some examples include:

- news aggregation (which has caused many people to stop paying for newspaper subscriptions);
- transformation (where the repurposed work replaces the original work);
- use of content without attribution (acknowledgement) – although acknowledgement has been considered insufficient in some circumstances;
- ‘hot news’ updates, such as live sports scores, where one or more parties has exclusive rights to report the hot news;

- framing or superimposing ads onto embedded websites; and
- inline linking or incorporation of content from multiple websites into one single third-party site.

In many such instances, claims of infringement of copyright and/or common law rights result. Let us first broadly understand what copyright is and what the objectives of copyright law are.

In *Feist Publications Inc v Rural Telephone Service Co* the US Supreme Court set out the following 10 commandments:

- Facts are not copyrightable, whereas compilations of facts generally are.
- No author may copyright his or her ideas or the facts that he or she narrates.
- Common sense tells us that 100 uncopyrightable facts do not magically change their status when gathered together in one place. Yet copyright law seems to contemplate such compilations within its scope.
- The mainstay of copyright is originality. The term ‘original’ means only that the work was independently created by the author and that it possesses some minimal degree of creativity.
- Originality does not signify novelty; a work may be original even though it closely resembles other works.
- The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. The same is true of all facts – they are not copyrightable and form part of the public domain.
- Factual compilations, on the other hand, may possess the requisite originality where the author typically chooses which facts

to include, the order in which to place them and how to arrange the collected data, thereby rendering his work original. However, copyright protection may extend only to those components of the work that are original – for example, the author’s written expression.

- Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another’s publication to aid in preparing a competing work. The same facts and ideas may be restated by second comers, even if the author was the first to discover the facts or to propose the ideas.
- It may seem unfair that much of the fruit of the compiler’s labours may be used by others without compensation. This result is neither unfair nor unfortunate. By encouraging others to build freely upon the ideas and information conveyed by a previous work, copyright advances the progress of science and art.
- Originality rather than ‘sweat of the brow’ is the touchstone of copyright protection in fact-based works – copyright rewards originality, not effort.

On to some seemingly innocuous situations involving repurposing and the resultant court maelstroms.

News aggregators

These have been accused of free-wheeling on news that has been painstakingly compiled by other media organisations, repurposing it at a fraction of the cost and building a great source of revenue. A PwC study showed that internet advertising revenues in the United States exceeded \$35 billion in 2012. It is hardly a surprise that news aggregators have been the target of litigation in this area.

In the US case of *Agence France Presse v Google Inc* Agence France Presse (AFP) sued Google for copyright infringement in its photos (thumbnail images), headlines and ledes (the introductory portion of a news story) as part of its news aggregator service Google News and other claims revolving around the misappropriation of hot news – although Google did also provide a link to the original story as it appeared on the website from which it was accessed. AFP – like others of its ilk –

produces and licenses content to news service providers. AFP thus took issue with Google’s unlicensed (repurposed) use of its content. AFP hit out at the commercial (albeit indirect) nature of Google’s product, which was back-ended by information to which it did not have licensed access.

Google countered by submitting that headlines are short, akin to titles, and based on facts, and thus are not protectable under copyright law. It also submitted that it was benefiting the news service provider by directing traffic to its website.

While the case was eventually settled with Google obtaining a licence from AFP, a decision on the merits would have resolved the question of whether the search giant was violating AFP’s copyright and whether its overall product offering illegally piggy-backed on AFP’s hard work. Put differently, did Google’s exploitation of its product (however rewarding it might be) harm AFP commercially?

In Europe, in *Google Inc v Copiepresse* the news aggregation side suffered a setback. In May 2011 a Belgian appellate court upheld a lower-court decision holding Google liable for copyright infringement in an analogous situation. On the key issue of whether Google infringed copyright by reproducing the title and extracts of news articles, the court ruled that Google could not reproduce the same without authorisation. While arriving at its decision, the court rejected Google’s fair-use defence, indicating that Google News deprived rights holders of reasonable compensation for new publications of their works. The court also held that Google had violated the moral rights of authors of paternity and integrity: the former because authors’ names were not mentioned in the search results and the latter since extracts of articles constituted modification of the works. The court ruled that even though an internet user would know that what he or she was viewing was only an extract and that it was possible to read the content in its entirety by clicking on the hyperlink, this did not imply that the author had given his or her consent to Google News. The parties have since arrived at a commercial understanding to resolve outstanding disputes.

A similar decision was issued in the landmark UK judgment in *The Newspaper*

Licensing Agency Ltd v Meltwater Holding BV, in which the UK Court of Appeal held that copying headlines and short extracts infringed copyright in an article.

In Europe – where evidently the interpretation of law has not favoured news aggregators – legislation is being considered as a solution. Some would say that this fails to acknowledge the significant benefit that news aggregators provide to media houses, whose online traffic sees a substantial upsurge, thereby increasing brand identity. The internet clicks run into billions and it would not be unreasonable to assume that a reasonable percentage (eg, 50%) lead to whole articles being read.

All in all, when confronted with the choice and ability (software) to decide whether news aggregators can crawl through your website, the motives for litigation appear somewhat extraneous. There are clear benefits in letting the “content kleptomaniacs” (as Rupert Murdoch has dubbed them) indulge themselves.

As regards transformative use, in *Kelly v Arriba Soft Corp*, where the plaintiff’s photographs were reproduced as thumbnails by the defendant as a result of its search engine function (akin to an image search on Google), the court found that the thumbnails were transformative, as the search engine’s use of them served an entirely different function, resulting in improved access to the photographs, as opposed to violating the photographer’s right to publish them exclusively. The court comprehensively discussed the four tenets of fair use, as propounded and approved by US courts (ie, purpose and character of the use, nature of the copyrighted work, amount and substantiality of the portion used and effect of the use on the potential market), and found that the defendant’s use was covered by the doctrine of fair use.

Hot news

Although facts are not copyrightable, the concept that certain other rights can be asserted over facts is not new.

In *NBA v Motorola* a US court constituted the hot news tort as follows:

- A plaintiff generates or gathers information at a cost;

- The information is time sensitive;
- A defendant’s use of the information constitutes free riding on the plaintiff’s efforts;
- The defendant is in direct competition with a product or service offered by the plaintiff; and
- The ability of other parties to free ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.

The National Basketball Association (NBA) sued Motorola over a pager service by which Motorola provided its customers with game scores and other statistics, which it acquired independently. While there appeared to be no apparent repurposing of content (fact), the NBA categorised this as a tort harming its exclusive right to deal with factual content resulting from its administration of basketball games.

The court held that some limited copyright-like protection for facts could be said to exist in some circumstances. However, on the facts of the case, the court concluded that the NBA had failed to make out a hot news claim because the operation of Motorola’s pager service did not undermine the NBA’s financial incentive to continue promoting, marketing and selling professional basketball games.

In *Barclays Capital Inc v TheFlyOnTheWall.com*, which concerned the defendant’s reporting of financial analysis of three different Wall Street firms, the trial court found that the defendant had engaged in hot news appropriation and issued an injunction ordering it to delay publication so as to allow the plaintiffs to benefit from the hot news first.

On appeal, the court held that the defendant was not free riding on the work of the banks, because it was not really in the same business as the banks. “In this case, a Firm’s ability to make news – by issuing a Recommendation that is likely to affect the market price of a security – does not give rise to a right for it to control who breaks that news and how,” stated the court.

In an analogous situation in India, the High Court’s decision in *Star India Pvt Ltd v Piyush Agarwal* in March 2013 followed the trial

court's reasoning in *Barclays* and ordered the reporting of hot news by the defendant (ball-by-ball updates in cricket matches) 15 minutes after the plaintiff, which had paid a huge sum of money to obtain exclusive rights for this purpose. On appeal, this was reversed, with the appellate court (a two-judge bench of the same court) holding that the plaintiff could not claim an injunction based on either the doctrine of unfair competition or unjust enrichment.

The appellate court went on to state: "Doing what the plaintiff invites this court to do would be to enclose from the public match facts and information which are not protectable in any manner known to law. Such an injunction would tend to, insidiously, and in a creeping manner, denude the fundamental right to free speech and dissemination of topical information to members of the public."

Terms of service

In *Agence France Presse v Morel*, a US court held that AFP had infringed copyright by copying and repurposing photographs posted to the complainant's Twitter account. AFP countered that Twitter's terms of service (TOS) created a broad licence for it to engage in such conduct.

Finding that there was direct copyright infringement, the court held that the TOS did not provide AFP with a licence as AFP was not a partner as defined in Twitter's TOS, and notwithstanding the fact that Twitter permits re-tweeting of content, considering that the TOS clearly specifies that the original 'tweeter' retains rights in any content submitted, posted or displayed by him or her – allowing third parties to remove and license it to others would render the TOS otiose. AFP's defence that Twitter welcomes and encourages the use of Twitter in broadcasts, and that it was simply rebroadcasting the complainant's photographs, failed as the court held that commercial licensing of the photographs did not amount to re-broadcasting.

Trip wires – beware!

These cases highlight that the repurposing of content is mired in many shades of grey. Each case seems to create piecemeal jurisprudence, while all of it put together offers cold comfort to the average netizen. That said, the average netizen does not see himself or herself regularly rubbing shoulders with law

enforcement. He or she can carry out many checks and balances to avoid minefields. It is, for instance, relatively easy to check whether one is repurposing (copying) written content through software tools that can compare multiple documents. Detection, on the other hand, can be followed up with resort to takedown mechanisms. Most search engines and other intermediaries provide such mechanisms. Software tools are available to check whether a site links to your site/post and/or someone has mentioned your content online.

Prevention is better than cure. Mark your copyright immediately post-creation to render ownership indisputable. Carefully draft terms of consent to demarcate third-party use. Create checklists (read Atul Gawande's Checklist Manifesto for inspiration) to anticipate situations and avoid pain.

Meticulously peruse privacy settings and terms of use on social media platforms. Legalese appears onerous, but actually is not. If it is, seek clarifications. Check Facebook's 'sponsored stories' class action lawsuit for things that you might not have realised could happen to you.

The Internet is no longer a Pangaea of free expression, even though many of us might prefer otherwise. Some may lament, but the realists will prepare checklists and set off on their Magellanic quests for cyber stardom. Pots of gold and blazing fires await the brave. Lawyers – well, we get along fine with a view on the sidelines. **iam**



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Vishnumohan Rethinam is a partner in the firm's trademark department, engaged in contentious trademark work, particularly oppositions, cancellations and appeals before the Trademark Office and the Intellectual Property Appellate Board. He has counselled a wide array of clients across a diverse spectrum of trade and industry, developed and implemented enforcement strategies, facilitated complex negotiations and successfully argued several opposition/cancellation cases. Additionally, Mr Rethinam has authored articles and delivered presentations on diverse subjects in IP law.