Case Studies in Copyright Law: The Myth of Abandoned Copyright

This paper will examine two hypothetical situations, examining the relevant copyright issues, as well as comparing and contrasting the two scenarios to determine the difference between them. Both given scenarios include the caveat that the material being copied is out-of-print, which begs some discussion of the now controversial topic of abandoned copyright.

In the first scenario, we are presented with the following situation:

A staff member scans photographs from some out-of-print books for use by a professor on his course web site for an online course.

In the second scenario, we are similarly presented with this situation:

A professor has been using a particular book for his course, but it's now out of print. He asks his assistant to scan the book through the library's new book scanner and put the digital file on the university's course management system to make it available for his distance learning students.

It would appear that the key element in both scenarios is the idea that the book is out of print, and thus fair game for use, since there is no ready legal source for the material. This concept has recently gained notoriety through the emergence of websites offering copies of “abandoned works”, which are works where “the identity of the copyright owners may be known or even locatable, but the owners are not willing or interested in supplying [the works]” (Khong, 2007, p. 56). The concept of the abandoned copyright stems from the idea of no-harm use – the legal
copyright holder has ceased to make the work commercially available, and thus has no apparent interest in profiting from it, and so it defaults to the public domain until such time as the copyright holder decides to re-release the work as a commercial interest. Khong (2007) defines this situation as “commercial abandonment”, noting “many books and copyrighted works go out-of-print before the end of their copyright terms” (p. 57). The idea of no-harm transfer of so-called commercially abandoned copyrights stems from similar laws that exist in laws regarding property, chattels and salvage, where laws have been developed to “transition ownership in situations where property is not being cared for” (Loren, 2012, p. 1439). In such a case, as Loren (2012) described, physical property that is not being maintained or where no apparent interest of ownership exists may have its ownership transferred to a new interested party to reduce waste or to promote the common good by preventing goods or property from being under- or unutilized by a negligent owner (p. 1439). It would appear that the concept of no-harm use of commercially abandoned works comes from some confusion regarding those laws pertaining to conventional ownership of real property, chattel and salvage, and applying those same rules to copyrights. Unfortunately, copyright law, as written, does not support the salvage of a work, regardless of the copyright holder’s interest in the work, or whether commercial gain is made. The work in question is automatically protected, even without positive action by the owner, regardless of any commercial use or potential of the work.
As Khong (2007) points out, this often leads to a “grey market” situation, where abandoned work is often offered – especially in digital format – as though it were in the public domain, as long as the owner “does not make objection to its distribution” (p. 81). This has recently become particularly prevalent in the case of old or outdated software, no longer offered for sale and collectively known as ‘abandonware’ (p. 56). Again, the concept of salvage is being wrongly applied – a work is found adrift in the seas of creative works, with no apparent commercial interest by the copyright holder. It seems natural that any interested party that can make use of it can lay claim to it and use it for non-commercial purposes. This concept is not only not supported by copyright law, but it wrongly places the burden upon the copyright holder to prevent use instead of forcing the person wishing to use the work to respect the copyright holder’s rights and seek a proper license. As Khong (2007) points out, this “relies on the inaction of the copyright holder to solve the unavailability problem” (p. 81) instead of potential users correctly requesting permission from the work’s creator – as long as no one complains, no one minds. In reality, if enough people show interest in a work, it is likely that the copyright holder would seek to profit from that use, and so proponents of abandoned copyright attempt to fly under the radar in order to avoid this. Khong (2007) notes that “the existence of a demand which is not being fulfilled by the market indicates a problem of [a] missing market” (p. 56), and so the argument of violating copyright because of commercial unavailability becomes self-defeating. The rationale behind the abandoned works movement is that someone can use a work in violation of
copyright because it isn't readily available through legal avenues, but the unspoken counter argument is that if you do ask for permission, the copyright holder may well ask for compensation. Returning to our hypothetical scenarios, regardless of whether the books being used are in print or not, copyright protection still applies, and assuming the works are still within their protected timeframes, both of our hypothetical professors must respect those copyrights within the boundaries of the law.

The real issue at the heart of these hypothetical situations pertains to the concept of fair use, and whether the actions of the professors fall within the acceptable bounds of fair use. U.S. copyright law speaks to the nature of fair use in 17 USC § 107 (1994) by giving us four conditions to consider:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit education 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.

In the first point, in both examples, the use of the respective works is clearly for educational purposes, and under the second point, both works are relevant to the business of education and are germane to the professors’ intended use. It is the third point, the question of quantity of copied material that the difference lays in our
hypothetical scenarios. In the first scenario, the professor is copying images from an out-of-print book for educational use. Regardless of the commercial availability of the book, he is using only portions of the work in accordance with the spirit of 17 USC §107(3). The second professor, in contrast, is copying the *entire* textbook with the explicit intent of making it available for distribution. In this case, any claim of fair use is dubious at best. In the fourth point, the question of damaging the commercial viability of the work is fairly negligible, but this point does lend itself to the concept of abandonment discussed previously since no one is trying to profit from the copyrights in question.

U.S. copyright law, as expressed in 17 USC § 107 is not exactly clear in terms of what defines acceptable quantities of material copied. The professor in the second scenario could claim that the process of obtaining copyright clearance for an out-of-date work is onerous at best – however, guidance from the U.S. Copyright Office (2012) states that “when it is impractical to obtain permission, you should consider avoiding the use of copyrighted material unless you are confident that the doctrine of fair use would apply.” Since there is already some doubt as to whether the copying of an entire textbook, regardless of its commercial availability, is protected under fair use, then it is probably safe to assume that it is not. Still, without concrete guidance as to what 17 USC § 107(3) considers appropriate, the professor could easily argue that 17 USC § 107 (2) and (4) permit him to use the book, since it is relevant to his educational purposes, and there is no commercial conflict, which brings us back to the concept of abandonment.
In order to clarify situations such as this, the American Distance Education Consortium [ADEC] published fair use standards for educators in 2003. According to ADEC, section 4.2.4 of their fair use guidelines (2003) limits the use of illustrations and photographs to not more than 10% of a total work or 15 images, whichever is less. Section 4.2.2 (2003) limits text generally to 10% of a total work or 1,000 words, whichever is less.

Applying these guidelines to our two hypotheticals allows us a clearer lens through which to view the actions of our hypothetical professors. While we do not know the exact number of photographs that the first professor scanned, it is likely that he or she is generally within the bounds of fair use. In contrast to this, our second professor, in scanning and entire work for redistribution, has likely exceeded the reasonable boundaries of fair use as defined by ADEC, and has probably committed a copyright violation.

It is easy to view an unutilized or underserved copyrighted work in the same way that we would view any other abandoned property – as something that is eligible for salvaging, especially where no apparent commercial interest is concerned. The key issue here is that copyright does not actually protect ownership; it protects the right of the holder to copy and distribute his work. In the concept of salvage, a claimant lays physical claim to an abandoned thing, assuming ownership and responsibility for it. You cannot lay claim to someone else’s creative work, and you cannot claim their right to control the copying and distribution of their creative work in the same manner as physical salvage. The lack of commercial availability
does not excuse one from the duty of respecting a copyright, regardless of the end motive. Fair use must still be considered, and where fair use does not apply, a proper license must be requested of the copyright holder before a work can be used. In the case of our hypothetical scenarios, the availability of the books is a distractor to the real issue of fair use, which must be the overriding concern for both professors.
References


