

## GUEST EDITORIAL

## Safely Using Others' Copyrighted Content Online

*This month's editorial was written by Lisa A. Dunner, Esq. and Adam W. Sikich, Esq.<sup>1</sup>*

It can be tempting to incorporate content, images, music, or videos that others have created into one's own project, so cooperative staff must be mindful of the legal principles that govern what is and is not permissible with respect to using the works of others. The following hypothetical story illustrates some key aspects of copyright law in order to provide general guidance as to when works can be used without seeking permission from the person or entity controlling those rights.

John is the Communications Director for an electric cooperative in Nebraska, and he is tasked with creating an online portal, including a Facebook page, for his cooperative on the topic of the rich history of electric cooperatives in the Great Plains. The portal is dubbed "Great Plains Electric," and his employer requested that John include as much information as possible, including articles, reports, links to other sites, pictures, and governmental data. John decides that he will find all of these materials on the Internet, the local historical society and speaker materials that were submitted last month for his cooperative's upcoming annual meeting.

John has learned during the course of his employment that copyright law protects works that are original and fixed in some tangible form of expression<sup>2</sup>—meaning that ideas can be expressed in various original ways, and once one expresses oneself

on paper, on a website, in a book, on a canvas, in a musical work, in a film recording, or in other ways, copyright attaches to that work. John also knows that unless permission is granted, only the author or copyright owner has the right to control how and when the work is reproduced, distributed, publicly performed, publicly displayed, and changed into a work that is derived from the original.<sup>3</sup>

#### **Using Online Materials**

Applying these principals to the Internet, John knows that a good place to look for permission is on a website's "Terms of Use." Not all Terms of Use are the same, but he knows that some websites expressly grant others broad permission to use content or graphical works in any way that one pleases. Other Terms of Use are not so generous, and the permission grant is either not included, or it is much narrower, granting users permission for a one-time personal use of an article, picture or whatever is on that particular site.

John begins his Internet search for photographs that he can post on Great Plains Electric. He finds two great sites, one that appears to be someone's personal site and includes various postings by an individual interested in all things electric; the other site is a commercial clip art site where users can peruse thousands of

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downloadable photos. John reads the Terms of Use on both sites.

The site owned by the individual includes a very specific Terms of Use, and it only allows use, reproduction and printing of one copy of each picture, as long as the use is personal and noncommercial. Since John would be using the photo on behalf of his employer, he knows that he needs to reach out to the owner of this site and obtain permission to go beyond the site's Terms of Use.

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The Terms of Use on the clip art site is confusing because there is a provision stating that the user receives a “personal, non-exclusive, non-transferable, royalty-free right” to use images. John had always thought that clip art photos were free to use and the words “royalty-free” seem to confirm that. However, “royalty-free” simply means that ongoing payments are not required to use an image once permission is acquired through payment of a one-time fee.<sup>4</sup> Since the fees are typically minimal, John just needs to decide if it would be worth incurring this cost for Great Plains Electric.

Aside from photographs, John really needs to beef up Great Plains Electric by including articles and reports on the history of electric cooperatives in the Great Plains. He not only wants to include this history on the Great Plains Electric web portal, but he also hopes to link to articles on other sites and even share some articles on the Great Plains Electric Facebook page.

John finds some really good content on a fellow cooperative's website. This site prominently features a report that was commissioned on the topic of cooperatives during World War II, and John is hoping to link directly to this report from the Great Plains Electric portal. John has heard some stories about lawsuits that arose from companies “deep linking” to other sites without checking the Terms of Use and without receiving permission from the owner.<sup>5</sup> In those cases, the deep linking resulted in making it look to the Internet user like the content on the linked-to site was part of the site from which the link came. It was as if the linking site was trying to pass off another's content for its own. John wants to avoid that issue, so he will just ask permission to link to the site.

In addition to linking, John would like to “share” on Facebook the report on World War II cooperatives. Since Facebook is all about posting and sharing, he believes that will be allowed, however, he is also aware of the caveats with social media—especially for commercial entities. John knows that it is generally permissible and encouraged to “share,” “re-Tweet” and “like” content through social media, but it is important that the integrity of the original post is maintained.<sup>6</sup> So, it is okay to share another's post but it is not okay to copy content from another's post and use it to create one's own post, because creating a new post from other's content may confuse the reader as to who authored the content.<sup>7</sup> John also knows that sharing another's work can only be for noncommercial purposes.<sup>8</sup> Since John's employer intends to make money from the Great Plains Electric portal through online advertising, John realizes that he should not share anyone else's content without receiving permission from the rightful owner.

John would love to find some materials that are publicly available and free to use on the Great Plains Electric site. Through various conversations, he learns that the Bing search engine (www.bing.com) allows users to filter image results by license type, including the option “public domain.” John knows that works identified as being in the “public domain” are not protected by copyright and are free for anyone to use without restriction.<sup>9</sup> Works are deemed “public domain” in a variety of ways, and one of those ways is when an author makes a conscious and public decision to dedicate all rights to the work throughout the world.

### **Using Historical and Government Materials**

John knows that copyright protection is limited to certain durations, and the older a work the more likely it is in the public domain. He hopes to locate more public domain materials at the local historical society, which is full of old photos, books and reports. He finds two photographs, a government report and a business directory, and he asks the curator whether these items have fallen into the public domain. The curator explains that all works published prior to 1923 are in the public domain because the copyright has expired<sup>10</sup>, so John can use anything in that category without restriction. An old photo of a power grid, circa 1921, has caught John's eye, and now he can use it any way he likes. Had the photo been taken in 1978 or more recently, it would not be considered a public domain work, since works created by individuals (not for an employer) after January 1, 1978 are generally protected for the author's life plus 70 years.<sup>11</sup>

There are a number of other things that can trigger public domain status, including the lack of a copyright notice applied to the work. In earlier years, a copyright notice was required for protection; so, for example, between 1923 and 1977 and also 1978 and March 1, 1989, if a work was published without a copyright notice, those works ultimately fell into the public domain for everyone to freely use.<sup>12</sup> In addition, works published from 1923 through 1963 that did include a copyright notice and also were not renewed with the U.S. Copyright Office after the initial 28-year period of protection fell into the public domain.<sup>13</sup> John realizes how complicated the law is, so he is hopeful that the curator is able to give him accurate information.

With regard to the government report that John finds, he learns that it is not in the public domain, but he can use it anyway, because all works created by the U.S. government are excluded from copyright protection.<sup>14</sup> So, the U.S. Department of Agriculture Rural Electrification Administration (REA) report published in 1952 can be used by John freely. However, the curator informs John that federal law does not extend this rule to state and local government works, so John would need to seek permission if the work is not from the federal government.

John also comes across a business directory that lists the addresses of certain cooperatives, and he thinks that it would be great to post online. Fortunately, John can do this, since purely factual information is not protected by copyright unless there is an element of creative expression added to the facts, like biographical works where an author sets forth a unique narrative using certain facts.

When John comes across an uncredited photo from an unidentified year of publication, he runs into his first obstacle. The curator does not recall how or when the society acquired it, so John decides that he better not use it, since it is possible that it is still protected under copyright law. Works where there is no readily available owner or publication information are called "orphan works." Orphan works are presumed to be protected, but because no information is available as to who the owner is, interested users are unable to seek permission.<sup>15</sup> As a result, using the orphan work could subject John and his employer to copyright liability, but only if the owner of the orphan work surfaces and learns of the unauthorized use. This is a risk that John does not wish to take.

### **Using Speaker Presentation Materials from One's Own Conference**

John believes that the easiest place to find materials for the Great Plains Electric portal resides with his employer, since it collected PowerPoint presentations and articles from each of its speakers for its upcoming annual meeting. John knows from his prior job that speakers typically retain the copyright in their presentation materials, and he also knows that a license is often requested by the meeting organizers so that the organizers can use the speaker materials in the program book for attendees and post them online. John checks with his employer to make sure that it has a license to use the materials, but when he reads the fine print, he learns that the license grant is very specific, and it would not allow John to post the materials on Great Plains Electric. That is unfortunate, since John found two presentations that would be perfect for the new portal; so, John decides to reach out to the speakers individually and seek an expanded license grant, which he ultimately obtains.

### **Maybe Permission Isn't Really Needed**

After all of the effort John has gone through to make sure that he can safely use others' works on the Great Plains Electric portal, he recently read an article that indicated that one doesn't always need permission to use someone else's work if the use of that work would be considered "fair." He discovered that copyright law includes an exception that allows people to use copyrighted works, but only in certain situations such as for criticism, comment, news reporting, teaching, scholarship, or research.<sup>16</sup> This is called the "Fair Use" doctrine,

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and it is based on a four-factored test that one must apply to the facts of the intended use. The factors include: (1) the purpose or character of the use<sup>17</sup> (is it commercial; is it educational; does it present the work for a purpose that the original work did not, such as parody?); (2) the nature of the copyrighted work<sup>18</sup> (unpublished creative works are entitled to greater protection against fair use than published nonfiction works); (3) the amount and substantiality of the portion used<sup>19</sup> (is it a substantial percentage of the previous work or essentially the heart of the previous work?); and (4) the impact on future commercial exploitation of the work<sup>20</sup> (would unauthorized copying deprive the copyright owner of income?). These factors are neither rigid nor exhaustive, but John already knows that the Great Plains Electric portal is a commercial site, and he would be taking entire works of others and posting them on this site. So, he assumes correctly that his use of these works would not be considered “fair” under the law.

### Conclusion

What John has learned throughout this project has been invaluable. He now knows that no matter how easy it is to access and share content online, traditional copyright laws apply just the same as in the analog world. He knows to check a website's Terms of Use first and then seek an owner's permission when terms are not clear or too restrictive. He will be careful with linking and checking commercial terms as well. And, he will look for works that have fallen in the public domain whenever possible, since those are the safest works to use.

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<sup>2</sup> 17 U.S.C. § 102(a) (2011).

<sup>3</sup> *Id.* § 106 (2011).

<sup>4</sup> *Jarvis v. K2 Inc.*, 486 F.3d 526, 533 n.7 (9th Cir. 2007).

<sup>5</sup> See *Jones Day v. BlockShopper LLC*, 2008 WL4925644 (N.D. Ill. 2008) and *Gatehouse Media Massachusetts I, Inc. v. The New York Times Co.*, No. 08cv12114 (D. Mass. filed Dec. 28, 2008).

<sup>6</sup> Such use is generally accepted as a Fair Use under the Copyright Act, 17 U.S.C. § 107 (2011). See *supra* text accompanying notes 14-18.

<sup>7</sup> Creating a new post from someone else's post without using the designated share function conflicts with the copyright owner's exclusive right to reproduction, creation of derivative works, and distribution. See 17 U.S.C. § 106 (2011).

<sup>8</sup> The determination of whether an unauthorized use is for a commercial versus noncommercial purpose is one of the four Fair Use factors to analyze under 17 U.S.C. § 107. In the social media space, commercial uses are disfavored.

<sup>9</sup> Merriam-Webster defines “public domain” as “the realm embracing property rights that belong to the community at large, unprotected by copyright or patent, and are subject to appropriation by anyone.” Merriam-Webster, <http://www.merriam-webster.com/dictionary/public%20domain> (last visited April 27, 2015).

<sup>10</sup> 17 U.S.C. § 304(b) (2011).

<sup>11</sup> *Id.* § 302(a) (2011).

<sup>12</sup> For the 1923 to 1977 period, see 17 U.S.C. §§ 9, 18 (1909) (current version at 17 U.S.C. §§ 300-400 (2011)); for the 1978 to 1989 period, see 17 U.S.C. § 405(a)(2) (2011).

<sup>13</sup> 17 U.S.C. § 304(b) (2011).

<sup>14</sup> *Id.* § 105 (2011). This rule does not preclude the federal government from acquiring copyrightable works from others such as federal contractors.

<sup>15</sup> For more information on orphan works, please see the U.S. Copyright Office website page on this topic located at <http://copyright.gov/orphan>.

<sup>16</sup> 17 U.S.C. § 107 (2011).

<sup>17</sup> *Id.* § 107(1) (2011).

<sup>18</sup> *Id.* § 107(2) (2011).

<sup>19</sup> *Id.* § 107(3) (2011).

<sup>20</sup> *Id.* § 107(4) (2011).

*The comments and opinions in this editorial are the author's, and may or may not be consistent with NRECA's.*