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IP maven Ron Coleman on developments in trademark, copyright, new media and free speech

« Libel in the blogosphere
Stickup over smiley »

Who owns the copyright in scans of public domain works?

I love Plan59.com. If you're my age or a little older, almost any click on this smartly designed and comprehensive website can recreate a certain feeling that comes with recalling a much more secure, confident and simple America — kind of like the grown up version of Dick and Jane.

I would use the graphics from Plan59.com every day if I could, but I don't have their permission. On the other hand… whose graphics are they, really? They put it this way:

> **PLEASE NOTE:** The images on this site are embedded with an invisible digital watermark and IPTC metadata. Are you free to scan and market images out of that nifty 1936 Hupmobile brochure you got at the flea market? Yes, if it was published without a copyright, or if the copyright has expired. Is it okay to use the images we've made from the same catalog? Ahem, cough. We own the scans we've made — they represent a considerable investment in equipment, source materials and labor over the past five years. Every jpeg and gif on this site is **copyrighted** and marked as belonging to us. Please, no borrowing without getting permission.

Hmm. What they're saying is that the Hupmobile image is in the public domain, but that they have made a new, derivative work from it by virtue of their "considerable investment in equipment, source materials and labor." Well, that sounds fair. If they thought they couldn't protect their work, they probably wouldn't have gone through the trouble. But does it comport with copyright law?

Probably not. Ultimately, Plan59.com seems to be claiming the right copyright based on the now-defunct "sweat of the brow" concept: We went through the cost and trouble of getting this stuff together, so we should own the copyright. But that concept was rejected by the U.S. Supreme Court, and in Canada as well. The U.S. case is *Feist Publications v. Rural Telephone Service Company*, summarized here, which held that without original "authorship," as is usually the case regarding compilations, there is no copyright — no matter how much work goes into it. The practical application of the law is well summarized by Project Gutenberg, which scans public-

domain books and makes them downloadable, mostly for free, over the Internet. The issue is addressed by at Library Law Blog, too.

There might be something to talk about here — naturally, it's talked about on Bill Patry's blog (see the comments) — but it seems like a stretch to say that these scans are protected by copyright. One of Patry's commenters suggests scans could be protected the same way photographs are because scans "can involve a lot of decisions in the their making"; this is alluded to, as well, in the copyright notice at another site.

Rockwell copy copy copy

This site, which features — appropriately enough — the art of highly realistic illustrator Norman Rockwell, states:

> **Our Copyrights Explained**
>
> After this introduction to copyrights and public domain, you may still be asking how our scans are covered by copyright protection.
>
> Another aspect of copyrights is the concept of derivative works. Derivative works are simply works created by taking a public domain work and adding to or modifying it to create a new work. An easy to understand example of this would be to take a 1909 hobby book or article, change the title, write extra chapters or modernise the language, and, viola, a new copyrightable work has been produced. Credit should always be given to the original source, of course.
>
> The scans of public domain material published on this website are all derivative works.
>
> Each scan takes up to three hours work to finish. Some have taken up to six hours. Best-Norman-Rockwell-Art.com will be very zealous protecting its copyright proctected derivative works.
>
> We start with a real magazine cover, advertisement, etc. We scan it at full size. Sometimes this means scanning top, bottom and middle and piecing the scans together. Then we clean all the soiling, staining and other damage out of the scan. Then we repair the actual image. Then we clean around any text.
>
> We strive to present each image as it actually appeared, but it cannot be *exactly* as it originally appeared because of the process mentioned above. Hence our image is a derivative work, protected by a new copyright.

I have no trouble understanding the reasoning, as a matter of fairness and logic. I just don't believe copyright law backs them up and, unlike in trademark, in copyright there is complete federal preemption — meaning that you cannot assert a common law or state law cause of action to protect works otherwise governed by copyright. I don't think cleaning and lighting up someone's creative work so you can get a good scan is "authorship."

So does that mean I am going to start using Plan59.com's (and that Norman Rockwell site's) graphics on Likelihood of Confusion? No. As tempting as it is, I don't think it's the right thing to do. I can respect the sweat of the brow argument as a matter of principle. But I don't think a judge would respect it as a matter of law, if it came to that.

I welcome comments on this topic, and if you're a copyright maven, email me at likelihoodofconfusion [at] gmail.com if you have more insight into this topic.

UPDATE: IP attorney Michael F. Brown (great website — great "contact us" page) writes in:

I've had a number of people ask about this situation, and it seems to me that the "Bridgeman Art Library vs Corel" case (50 USPQ2d 1110) is exactly on point. It's a Southern District of New York case from 1999.

Bridgeman produced slides of public domain artworks, and sued Corel for including the photos on one of CDROMs, claiming that they had expended a great deal of work to make their copies as accurate as possible.

> *"In this case, plaintiff by its own admission has labored to create "slavish copies" of public domain works of art. While it may be assumed that this required both skill and effort, there was no spark of originality — indeed, the point of the exercise was to reproduce the underlying works with absolute fidelity. Copyright is not available in these circumstances."*

That makes sense to me - otherwise, you would be essentially recreating copyright every time you fed something into a scanner and edited out the dust, or fixed the odd typo. Every copy of Huckleberry Finn would be subject to a different copyright, because somebody had to enter the text into a typesetter, proofread it, etc.

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