Chapter 9

Who "Owns" Electronic Texts?

Tharon W. Howard
Clemson University

New information technologies make it increasingly difficult for authors and corporations to claim that ideas and information are property which can be sold. To understand the problems of authorship in electronic environments, this chapter examines the historical development of U.S. copyright and three historically distinct theories of ownership upon which it is based. The author ultimately argues that a revised social constructionist perspective best addresses the challenges of ownership created by new technologies.

> The Congress shall have the power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.
>
> —U.S. Constitution, Art. 1, Sec. 8

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified in that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.
>
> —17 U.S. Code, Sec. 107

For most people, including a large number of practicing professional writers and professional writing teachers, the issue of intellectual property isn't something they usually consider particularly problematic. Most writers today, particularly those of us

who spent a lot of our academic careers in and around English departments, tend to subscribe to the view that authors "own" their texts. We tend to believe (as is implied by the excerpt from the Constitution, above) that we have the right to expect remuneration for "our" writing and, furthermore, that we ought to be able to have some control over how our texts will be used.

However, recent trends toward more collaborative writing projects in the workplace, along with the use of online computer conferences, electronic discussion groups, hypertexts, multimedia presentations, groupware, and other computer technologies aimed at enhancing and promoting collaboration, are all seriously challenging the popular, romantic view that an author owns his or her text. More and more frequently, professional writers are finding themselves confronted with intellectual property and copyright issues which result from the increased reliance on computers in the workplace, and, in many cases, writers are finding themselves unprepared to deal with these issues. Consider, for example, the following scenarios:

Scenario 1

You work in the document design department of a large corporation, and, traditionally, your department has made it a point of pride to produce dramatic covers for the company's annual report. One of your co-workers finds a reproduction of a famous photograph in a popular magazine, and the image would be perfect for the theme of this year's annual report with some cutting, pasting, and a few other modifications.

Since the photograph is famous, since you're going to use only part of the image, and since you're going to modify the image in order to produce something which is essentially a new image, should you go ahead and scan it? Or do you first have to have permission from the magazine which first reproduced it, the publishing house which sells reproductions of it, or the photographer who originally took the photograph?

Scenario 2

You've just been hired to do some desktop-publishing work for a large consulting firm. The office manager bought you a new computer system to use, but the system came with a new software package that is incompatible with the old version of the software used by the rest of the office. As a result,

you can't share files with co-workers and do your job effectively. Fortunately, however, the office still has the installation disks for the old version of the software, and the office manager tells you that, since these disks were purchased by the company, you can install the old software on your system.

Should you go ahead and copy the software since the office has already paid for it?

Scenario 3

You're doing research on an article about usability testing for *Technical Communication*, and, as part of your research, you join an electronic discussion group on the Internet, where people doing human-factors research exchange e-mail messages about their works-in-progress. As you're writing your article, someone posts an e-mail message to the group describing the results of her unpublished research project. These results are central to your article's thesis and force you to completely revise your thinking about the subject. Since these results haven't been published elsewhere, you wish to quote from the e-mail message in your article.

Can you legally and ethically quote from an e-mail message? Indeed, are you obligated to cite the message since it has had such a profound impact on your own thinking? If so, does anyone own the copyright on the message? Do you need to seek the author's permission? Or, since the message was electronically "published" by an electronic discussion group, do you need to have the permission of the person(s) who created and operate the discussion group or the university or company which owns the computer that hosts the group?

Scenario 4

You work for a large corporation in which e-mail is the primary means of communication. Instead of using informal notes, memos, short reports, or phone conversations to contact each other, people in your company use e-mail. In keeping with this "paperless office" milieu, you have maintained an electronic correspondence with a co-worker in another department for some time. You and your co-worker (who happens to be of the opposite sex) are careful to keep your electronic interaction limited to your breaks and lunch periods so that it does not interfere with your work. Your supervisor knows what you're doing and has said that she actually prefers that you correspond via e-mail on your breaks since that way, you're not tying up the office telephone. How-

ever, one afternoon, you discover that your electronic exchanges are being monitored and even shared as jokes among people in the computer operations department. You're furious at this violation of your right to control how your texts will be used, but your supervisor tells you that the company owns the computer and, therefore, has the right to monitor its use.

Can you stop this monitoring of your e-mail? Who actually "owns" the messages you've been sending? Do you, as the author, own the messages? Does the addressee who received them? Or does the owner of the system on which the messages were produced? Furthermore, what rights does ownership of the messages entail?

Scenario 5

You're a faculty member in a professional writing program at a large university, and one of your responsibilities is to serve as the placement director for the program. In order to help your graduates find information about companies which routinely hire writers, you decide to create a Hypercard stack which will allow students to click on a map of the United States. Then, depending on the state students select, students would receive information about specific companies located in that state. You construct your stacks on the university's computers, and from a book which provides an alphabetical list of national corporations, you select data on companies which you think might routinely hire technical writers. The resulting hypertext is so popular among your students that several publishers learn of it and are interested in publishing it.

Can you publish your hypertext? Have you infringed on any copyrights by providing your students with your hypertext in the first place? If you can publish your text, are you legally obligated to pay any royalties to your university or to the publisher or author of the book from which you selected your data?

As these scenarios illustrate, the new electronic environment in which professional writers must now function makes intellectual property and copyright issues more and more a part of their everyday experience in the workplace. Indeed, these sorts of issues are becoming so commonplace that we may well wish to make an understanding of intellectual property in an electronic environment a criterion of "electronic" or "computer literacy." As

I will show when we return to these scenarios at the end of this essay, even a relatively clear understanding of the principles of copyright law may not allow writers to answer the questions posed in these scenarios.

However, not only do professional writers need to have a better understanding of copyright issues because they are more likely to encounter them than ever before, but they also need to better understand questions about intellectual property in an electronic environment because new information technologies are forcing us to reshape traditional notions about authorship and ownership. In a world where, for example, a software package can reorganize and rewrite the information in databases (thereby "virtually" creating or authoring texts without human intervention), colloquial ideas about authorship and ownership may no longer be enough. In fact, these sorts of technological challenges to traditional ideas of ownership are particularly troublesome to writers in the workplace because (a) they may diminish writers' claims to remuneration for their work, and (b) they may strip writers of the right to control how their texts will be used.

In order to better understand the problems of ownership in the electronic workplace, I will offer a brief historical examination of the origins of U.S. copyright law since it is through copyright laws that the rights of individual authors and corporations have come to be defined. Furthermore, by examining the evolution of current copyright law, I will explore why electronic publishing, electronic discussion groups, computer conferences, and other new information technologies represent such a challenge to current copyright law. A historical examination of another new publishing technology, i.e., the printing press, will show that then, as now, the introduction of new technologies challenged existing systems for owning and controlling texts. Furthermore, this examination will show that, although many people are not aware of it, current copyright law reflects an interesting struggle among at least three historically distinct and competing theories of textual ownership. First, there is, of course, the romantic and commonplace notion that authors have a "natural right" to the fruits of their intellectual labors. Second, there is the assertion that the public has a right to all knowledge since "Laws of Nature" and absolute truths cannot be the property of any one individual. And third, there is

the view that all knowledge is socially constructed, that a text is a product of the community the writer inhabits, and that the text must therefore be communal, rather than individual, property. These three theories have tended to compete when the question has been whether a copyright is a natural right of private property or whether a copyright is a privilege granted to individuals by the public's representatives.

A Historical Overview

When I've taught my professional writing students about the history of copyright laws, and even when I've discussed the subject among some of my faculty colleagues, one of the things that always seems to surprise them is the fact that the original impetus to develop copyright laws did not come about through a desire to protect the "natural property rights" of authors. Indeed, most people I've encountered tend to have the same misimpressions about copyright issues that they have about driving their cars. Most people tend to think that it's their "right" to operate any motor vehicle they care to purchase. Similarly, they tend to believe that, since they also own the texts they write, they ought to be able to control how those texts will be used and ought to be able to profit from that use. And, of course, in actual practice, there are few things in our day-to-day experiences to challenge these notions. Today, the use of an automobile is so pervasive in our society that we just expect everyone to have access to them.

And yet, those unfortunates who either fail to receive or somehow lose their driver's license serve to remind us that operating an automobile is not a right we can expect; rather, it is a privilege we are granted by the government under certain specific circumstances. Similarly, as legal historians such as Joseph Beard are quick to point out, a copyright or (literally speaking) the right to reproduce copies of a particular text was not and, indeed, is not a "natural unlimited property right." Instead, it was and is a "limited privilege granted by the state" (Beard, 1974, p. 382). As with a driver's license, the government gives writers license to "oper-

ate" texts in the public domain. What's more, it makes the license so easy to obtain that we seem to forget that we're dealing with an issue of privilege rather than of natural right. Yet, if we consider the origins of English and American copyright laws in the sixteenth century, we can quickly see that protecting an author's natural right was never really an issue then either.

During the fifteenth and sixteenth centuries, the great new technological development was the printing press, and, just as today's "computer revolution" is stimulating the growth of new industries in information technology and electronic publishing, the printing press was producing tremendous growth in the book-publishing industry. Prior to the introduction of printing-press technology, the book trade depended on an excruciatingly slow and tremendously expensive publishing technology. Scribes, illustrators (then called limners), and book binders worked laboriously to produce each single copy of every book. Because of the enormous expense involved in this technology, most book-publishing efforts required the funding of either the Church or the Crown, a situation which made it easy for those in power to control the kinds of texts which would be produced and consumed.

Of course, the printing press changed all this. The radical reduction in production costs meant that texts could be produced and marketed cheaply and easily; yet, with a limited number of popular and lucrative texts available for publication, there was a dramatic increase in competition among book publishers. Two significant developments resulted from this increased competition. First, people involved in various aspects of the book-publishing industry (i.e., limners, book binders, printers, etc.) banded together into a cooperative organization which came to be known as the Stationers' Company. As Patterson and Lindberg (1991) point out, the Stationers were essentially a "group of businessmen who agreed to allow one of the[ir members] the exclusive right to publish a specific work in perpetuity" (p. 22). Thus, the Stationers created a voluntarily enforced form of copyright, which (though it did not carry the force of law and said nothing about the "natural rights" of authors) still offered book publishers limited protection against competition. In other words, the increased competition which brought about the development of the Statio-

ners' Company clearly established the need to protect a publisher's (though not an author's) copyright. Indeed, as Martha Woodmansee (1984) points out, it wasn't until the eighteenth century that writers were able to realize any real profits from the competitive book trade in the form of royalties. In fact, even in the eighteenth century, copyrights were valuable properties:

> . . . a flat sum remained customary, upon receipt of which the writer forfeited his [*sic*] rights to any profits his work might bring. His work became the property of the publisher, who would realize as much profit from it as he could. (pp. 435–436)

The second result of this increased competition was that the Church and the Crown lost what had been their de facto control over the production and consumption of texts. Because of its new, more economical printing technology, the book-publishing industry no longer needed to depend on Church or State subsidies, and, consequently, publishers were free to produce texts which would not have received the economic sanction of the Church or Crown. Indeed, given that the public is always fascinated with controversial texts and is therefore going to purchase more of them, it seems likely that sixteenth-century publishers found new economic incentives to publish texts which, ironically, challenged the same religious and governmental authority which had been their chief means of support before the introduction of the printing press.

As a result of these two developments (i.e., the Stationers' desire to protect themselves from competition and the Crown's inability to control the publication of subversive books), in 1556 Mary Tudor and Philip of Spain granted the Stationers a royal charter, which stated in its preamble that it had been issued in order "To satisfy the desire of the Crown for an effective remedy against the publishing of seditious and heretical books" (Beard, 1974, p. 384). Furthermore, the Stationers' royal charter "limited most printing to members of that company and empowered the stationers to search out and destroy unlawful books" (Patterson & Lindberg, 1991, p. 23). As a result, modern copyright law finds its origins not in the recognition and protection of an author's natural property rights, but, rather, in the "ignoble desire for censorship" and

in the greedy lust to "protect profit by prohibiting unlicensed competition" (Beard, 1974, p. 383). And yet, despite the disturbing motives behind this early form of copyright law, the Stationers' royal charter is significant because it firmly established the principle that a copyright is not the natural, absolute, or unlimited property of any individual or company. Instead, to the degree that a copyright can be considered a form of property at all, the Stationers' charter made it clear that to own a.copyright is essentially to own a limited license or a privilege which the state grants in order to promote intellectual activities that are deemed to be in the best interests of the state and its citizens.

Although Mary Tudor, Parliament, and the U.S. Congress probably had very different views of the desirability of censorship and book burning, the same principle of privilege that Mary established in the Stationers' charter can be found in Parliament's 1709 passage of the Statute of Anne, the statute which in turn provided the basis for Article I, Section 8 of the Constitution. Unlike the Stationers' charter, both the Statute of Anne and the Constitution recognize the rights of authors. In fact, Article I, Section 8 of the Constitution provides that authors shall have the "exclusive Right to their respective Writings and Discoveries," thereby offering writers the kind of protection which the Stationers' charter gave only to publishers. However, this provision does not assert that texts are the exclusive property of their authors; instead, what the Constitution does is to give Congress the legal authority to grant authors limited copyrights in order "To promote the Progress of Science and the useful Arts." In other words, as was the case with the Stationers' charter, copyright is still a privilege or license granted by the government for a limited period of time in order to promote not only the right of authors to profit from their labors, but also the enhancement of the public's collective welfare. Hence, just as the State of South Carolina makes laws which give me the right to profit from certain uses of my car for four years and under specific circumstances which are intended to protect and benefit my fellow citizens, the Constitution empowers Congress to make laws which give me the right to profit from certain uses of my texts for seventy-five years from their publication or for a hundred years from their creation (whichever is shorter) and

under specific circumstances which are intended to promote the economic and intellectual well-being of the American public.

Major Principles of U.S. Copyright Law

Now the upshot of all this law-making, privilege-granting, condition-making legal-speak is that the Constitution has come to represent a delicate balance between the rights of an individual and the good of the public. It represents a sometimes uncomfortable compromise, "balancing an author's interest against the public interest in the dissemination of information affecting areas of universal concern, such as art, science, history, and business" (Van Bergen, 1992, p. 31). Copyright law in the United States recognizes that in order to encourage authors to produce the texts which will lead to the artistic, scientific, and technological discoveries that drive business and industry, it is essential that authors be allowed to realize a profit from their texts. Obviously, without the hope of profit, there is little incentive for a software developer to invest in the research required for the production of new computer applications, nor is there sufficient cause for a publishing house to pay large sums of money to photographers and writers in order to produce books which they cannot sell because the articles and photographs can be obtained more cheaply through some other means. In short then, U.S. copyright law is based on the simple principle that one has to spend money in the short term in order to make money in the long term; we have to pay for intellectual and economic progress by first investing in the mechanisms of research and development.

On the other hand, copyright law doesn't give authors and publishers the legal right to prevent the public from the "fair use" of texts. Indeed, I have already shown that individual authors are granted copyrights not because authors have a natural property right, but because such protection is in the public's best interests. Thus, as Pierre Leval (1990) notes, "Fair use is not a grudgingly tolerated exception to the copyright owner's rights of private property, but a fundamental policy of copyright law" (p. 1107).

The public's right to the fair use of texts is provided for in Statute 17, Section 107 of the U.S. Code, and essentially what it does is to place limitations on the "exclusive Right to their Writings and Discoveries" that authors and inventors received in the Constitution. Section 107 grants the public the right to copy a work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." Thus, the doctrine of fair use allows the use of texts for noncommercial purposes which are in the public's best interests. However, this does not mean that, for example, teachers can freely make photocopies of entire textbooks for their classes or that a textbook publisher developing a multimedia presentation on the Vietnam War for high school history classes could freely use sequences from Apocalypse Now and *The Deer Hunter* in its stacks. Beyond granting the right to copy a work for educational purposes, the law further states that in determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include the following:

- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work. (17 U.S. Code, Sec. 107)

Thus, even though the two parties mentioned here (teacher and publisher) are using copyrighted texts for teaching purposes, they would both be considered guilty of copyright infringement because, in the first case, the teacher is copying the whole text and is interfering with the "potential market for" the textbook; and in the second case, the publisher of the multimedia presentation would be profiting from the commercial sale of its product to schools. Hence, in the doctrine of fair use, the balance between individual rights and public needs can once again be seen.

In addition to the "fair use" of texts, the copyright statute imposes other limitations on the exclusive rights of copyright holders, and one of the most important of these restrictions is on those features of texts which are copyrightable. According to the copyright statute in the U.S. Code, only the tangible expression of ideas belongs to the copyright holder. Ideas are not copy protected. This limitation is of particular interest because it gives perhaps the clearest articulation of the ways in which authors can be said to own their texts, and clearly this limitation undermines the commonplace and romantic notion that a "person's ideas are no less his property than his hogs and horses" (Woodmansee, 1984, p. 434). Instead, there are two principles of ownership being advanced here: first, that ideas are like universal laws of nature which, because they obtain for everyone, cannot be owned by any single person; and second, that a new discovery, even though it may be the product of one individual's intellectual labor, owes its origins to the realm of public knowledge and should therefore be considered communal property.

In terms of actual practice, current copyright law does grant authors the right to demand remuneration for their intellectual labors, and it does this by protecting the ways authors express ideas. However, it does not allow them to claim ownership of the ideas they express; authors cannot expect to have and maintain a monopoly on truth. According to copyright law, since truths are either universal absolutes or social constructions, they cannot be owned. Hence, if I write a piece of software that uses the mathematical equation $2 + 2 = 4$ as part of its code, I don't have to pay anyone for its use, nor can I expect to receive an honorarium every time someone in the United States calculates the sum of $2 + 2$, because mathematical principles and algorithms are thought to be universal truths. On the other hand, if people copy the way I used an algorithm in my software, if they borrow my code's structure or organization, then they are using my expression, and that expression is copyrighted. Consequently, while authors can't expect to profit from ideas and truths, they can expect to receive remuneration for the labor required to un/cover and to form/ulate those ideas and truths. Although it's important to remember, as the doctrine of fair use makes clear, there are still certain

public uses even of an author's form of expression for which the copyright holder cannot expect to be compensated.

Copyrights in the Electronic Environment

This examination of the historical origins and principles which inform modern U.S. copyright law reveals that the commonly held belief that authors own the texts they produce does not accurately reflect the actual legal status of textual ownership. Although it is correct to say that authors do indeed own a copyright as soon as a text is produced and that they therefore enjoy the rights of copy protection, it is important that both the producers and consumers of texts understand that those rights exist in the form of a limited privilege granted by the State and that those rights obtain only under certain conditions specified by the State.

And yet, while professional communicators need to understand the general principles upon which current copyright law is based in order to function effectively in the electronic workplace, it's also important to understand that those same principles don't always yield clear answers when we have to deal with electronic texts. A professional writer may know that copyright is only a privilege, that the public has the right to certain "fair uses" of texts, and that only the form of expression is protected in a work; yet, this knowledge may still leave the writer unsure as to the exact copyright status of a particular electronic text in a particular situation. As Marilyn Van Bergen (1992) has noted, "there is good reason why the law is often symbolized by scales used as weighing instruments" (p. 31), and this is particularly true for copyright law since, as I have shown, it seeks to balance the rights of the individual against the needs of the public, since it represents a compromise among three competing theories of intellectual property, and since technological changes have, historically, represented challenges for existing forms of copy protection.

Still, in spite of the fact that the nature of copyright law makes it difficult to say for certain that a particular situation does or does not represent a copyright infringement, an understanding of copyright principles can still serve as a useful guide for professional

communicators. To show how this is the case, I wish now to return to the scenarios with which I began this essay in order to illustrate how these principles can at least help writers either avoid litigation or recover the remuneration they are due.

Scenario 1

In this scenario, a member of a document-design team is planning to scan a famous photograph from a popular magazine in order to manipulate a portion of it for the cover of the company's annual report. The central questions here are (1) does such a reproduction fall under the doctrine of fair use and (2) who owns the copyright on the image?

As far as the question of fair use is concerned, it seems highly probable that this would not be considered a fair use of the original work. Since the reproduction is not being made for educational, news reporting, or critical purposes, its use is still copy protected. Furthermore, as Brad Bunnin (1990) points out in his extremely informative article "Copyrights and Wrongs," even though an image has been manipulated, it may still be "legally considered a derivation of an original work" (p. 77), and therefore its reproduction will require the permission of the copyright holder. In his article, Bunnin also reproduces an electronically manipulated version of Munch's famous painting *The Scream;* yet, in spite of the fact that *The Scream* is a famous painting in the public domain, and in spite of the fact that Bunnin's derivative reproduction is a new image, Bunnin received permission from the museum which owned the painting "and paid a $250 fee to manipulate it" (p. 77). Similarly, the member of the document-design team should receive permission before reproducing and manipulating the photograph.

As to the question of who should be contacted in order to receive permission to reproduce the image, the issue is a bit more complicated. Probably the safest course for the document designer is to purchase and receive permission to reproduce a copy of the photograph from the publishing house which owns the copyright on the original photograph rather than using the magazine's reproduction. The reason for this is that derivative works are also

copy protected. As Nicholas Miller and Carol Blumenthal (1986) observe, "Copyright laws protect an author's rights in his own expression even when that expression makes use of nonoriginal information" (p. 229). For example, were I to copy Bunnin's manipulated version of *The Scream*, I would be responsible to Bunnin's publisher. Thus, in order to avoid infringing on what may be considered a derivative work in the magazine's reproduction of the photograph, the document designer should obtain a copy of the original photo from the original copyright holder.

Scenario 2

In this comparatively straightforward scenario, a writer is instructed by the office manager to copy desktop-publishing software which the company had previously purchased for use on another employee's computer. Here, the central question is whether purchasing a copyrighted work gives one the right to copy it.

There is an unfortunate, though common, misconception that, when individuals or companies own a copy of a book or a piece of software, they can use their property as they see fit. However, as the privilege principle makes clear, "owning" a text or even a copy of a text is not the same as having the right to copy a work. Typically, when I purchase a text, the only "property" that I "own" is the actual physical copy of the book, computer disks, photograph, painting, compact disk, etc. However, ownership of this physical property doesn't give me the right to copy the text. In order to copy the work, I also have to have purchased a license to copy it.

Today, most software publishers do, in fact, sell consumers limited licenses to copy their software. Usually, diskettes are sold in shrink-wrapped or sealed packages so that opening the package constitutes an acceptance of the conditions of the limited license to copy the software. Exactly which copyrights are granted in these licenses varies from software package to software package; however, the most common form of licensing agreement allows consumers only to make backup copies for protection and to install (i.e., copy) the software on one system for use by one individual.

In terms of the scenario, if this is the sort of license which was purchased by the company, then it would be a violation of copyright law to install the desktop-publishing software on a second system.

However, before the writer in this scenario refuses the office manager's instructions to copy the software, it would be a very good idea to check the exact terms of the license agreement. It may well be that the company purchased a "site license" for the software, in which case the software might legally be copied onto the second system. Companies often purchase site licenses which allow them to copy software on several machines or to install software on their local-area networks so that the software can then be copied into the memories of a number of individual computers at the site, the exact number of copies possible being specified by the terms of the site's licensing agreement.

Scenario 3

In this scenario, a writer is preparing an article for the journal *Technical Communication* and wishes to quote a passage from an e-mail message that had been posted to an electronic discussion group. The central questions here are (1) whether such a use is protected by the fair use clause and (2) whether the author of the message, the owner of the discussion group, or the university which owns the host computer for the group is the copyright holder for the message.

Currently, it would probably be considered legal for the writer to quote a short passage from such an e-mail message. The doctrine of fair use allows the reproduction of short passages for the kinds of news reporting and critical purposes typical of articles found in *Technical Communication.* However, the situation here is clouded by the technology involved and the lack of specificity in the fair use clause. The fair use clause requires that, in addition to considering the purposes for and the amount of the work being copied, "the effect of the use upon the potential market for or value of the copyrighted work" should also be taken into consideration (17 U.S. Code, Sec. 107). Thus, the author of the e-mail message may feel that her copyright has been violated since she

has not been given the opportunity to publish the work through more traditional means, where the potential for remuneration is greater. In other words, the author of the e-mail message may be able to argue that her right to report on the research has been "upstaged," and therefore its potential value has been diminished.

However, although there is some validity to this argument, it seems more likely that sending an e-mail message to a discussion group would be considered a form of publication, so the author of the e-mail message can't really argue that the work has been upstaged. Indeed, while the exact copyright status of texts sent to and distributed by electronic discussion groups is still unclear and can vary widely from group to group, more and more groups are operating as electronic publications. In fact, groups like PACS-L, PMC, and E-Journal have received ISSN numbers, giving them the same copyright status granted to more traditional print publications. In other groups where discussions are open and unmoderated, the groups' owners may explicitly state that the copyrights belong solely to the authors of the messages sent to the groups. And in yet another type of group, members of the group may have a more or less tacit agreement not to quote or cite each other's messages at all, making it unethical (though not necessarily illegal) to quote their messages. Thus, even though quoting from the e-mail message sent to the electronic discussion group would probably be considered fair use regardless of the type of group, the writer of the article in this scenario should first contact the discussion group's owner for more information since the owner operates as an agent for the university and would be able to describe the quoting practices of the group. If the group has an ISSN number, then quoting from the message is acceptable under the conditions specified by the doctrine of fair use. If the group does not have an ISSN number, then the safest and most ethical course is to attempt to secure the permission of the e-mail message's author before quoting from the message.

Scenario 4

In this scenario, an employee discovers that his personal e-mail messages to a fellow employee are being monitored and redis-

tributed by managers in the company. The central question here is whether copyright laws offer the employee any protection against this use of his messages.

Although the employee may have some legal means of preventing the management from monitoring and redistributing his messages in this case, it is unlikely that this problem can be best solved through an appeal to copyright laws because the privilege principle upon which copyright law is based does not give authors a "natural unlimited property right" to their texts (Beard, 1974, p. 382). Because a company pays for an employee's time and provides the resources the employee uses to produce texts, the company has certain rights to the use of the texts created. Usually, in fact, the company is the sole copyright holder of the texts its employees produce while in the company's employ. However, in some cases (particularly in university settings), an institution may receive only a percentage of the remuneration due to the copyright holder since part of the work was accomplished with the institution's resources and part of the work was done on the writer's own time. In this scenario, since the company's resources were used to produce and distribute the e-mail messages, this does give the company some limited rights in the use of those messages. Consequently, the issue here is probably not one of copyright infringement; rather, it is one of privacy.

In a similar case at Epson America, an employee was allegedly fired because she questioned her supervisor's right to read employees' e-mail messages. The employee is currently suing Epson not for copyright infringement, but because monitoring and redistributing employees' private e-mail messages "violated a California law that makes it a crime for a person or company to eavesdrop or record confidential communication without the consent of both the sender and receiver" (Branscum, 1991, p. 63). Similarly, in this particular scenario, the employee should probably seek appeal to either state or federal privacy laws rather than claiming copyright infringement.

Scenario 5

In this scenario, a university employee is attempting to publish a Hypercard stack which was produced on the university's

computers and which reorganizes the job information compiled from a copyrighted source. The central questions here are (1) whether the university is entitled to some portion of the royalties received for the stack's publication and (2) whether using the data but not the organization or expression from another work constitutes a copyright infringement.

As was discussed in the previous scenario, since the university's resources were used to develop the stack, the university has the right to expect some remuneration for the use of its facilities. Thus, the faculty member should make arrangements to share a percentage of the profits with the university.

The question of whether the reorganization of data compiled in another source constitutes a copyright infringement is much more difficult, however. As was previously discussed, copyright law protects only an author's expression. Yet, in the case of reference materials and databases such as business lists, telephone directories, bibliographies, or indexes, virtually the only form of tangible expression is the way the data are organized. Furthermore, as Miller and Blumenthal (1986) have pointed out, with the recent developments in information technologies, "computer databases contain randomly stored information which can be retrieved by a computer program in a wide variety of ways. There is no 'organization' to protect" (p. 229). Consequently, two fundamental principles of copyright law come into conflict in this scenario. On the one hand, there is the principle dating all the way back to the Stationers' charter, which recognizes that publishers and authors must be able to expect a profit from their labors if they are going to continue to have the incentives required to produce valuable new texts. On the other hand, there is the principle that ideas and knowledge cannot be the property of any one individual and that only the expression of the ideas belongs to the author or copyright holder.

As is the case with most electronic texts today, it is not yet clear how Congress or the courts will decide to deal with these kinds of challenges to the fundamental principles of current copyright law. It may well be that, because hypertexts and electronic databases allow users rather than authors to determine the ultimate organization and shape of these electronic texts, future copyright laws will need to find radical new foundations. In fact, in a 1976

act, Congress did make a number of changes to the copyright statute in the U.S. Code precisely because of technological developments in the television, music, and computer industries. One of these changes was to Section 103, which now "provides that copyright may be had for compilations, but protection extends only to the material contributed by the author, not to preexisting material that is used in the compilation" (Patterson & Lindberg, 1991, p. 93; see also 17 U.S. Code, Sec. 103). In terms of the scenario here, then, this suggests that the faculty member's use of the information would not be a copyright infringement because the original compiler's expression has been avoided and also because Section 103 seems to reaffirm the notion that data are part of the public domain.

However, law courts are conservative institutions, and it seems likely that a scenario like this one will also be resolved according to precedents such as *Leon v. Pacific Telephone and Telegraph Co.* In this 1937 court case, the defendant essentially changed the alphabetical organization of a telephone directory to a numerical order based on telephone numbers, thereby using the data but not the plaintiff's mode of expression. Yet, in spite of the fact that the defendant did not encroach upon the plaintiff's expression, the court ruled that this was, nevertheless, a copyright infringement. As Miller and Blumenthal (1986) point out, the effect of this decision has been that "some of the recent cases which follow Leon have explicitly stated that the compiler's labor is what should be protected" (p. 229). In other words, when the courts have been required to choose between protecting a publisher's incentives to produce texts and consumers' rights to use a work's content but not its mode of expression, the courts appear to believe that protecting a producer's incentives is in the best long-term interests of the public. Thus, in this scenario, the safest and most conservative course would be to negotiate some kind of financial arrangement with the persons holding the copyright on the reference materials used in the stack.

Conclusion

As these scenarios have illustrated, the new electronic environment in which professional writers must now function makes intellectual property and copyright issues more and more a part of their everyday experience in the workplace. Today's professional communicators need to have a more thorough understanding of the principles upon which modern copyright laws are based than ever before. As the discussion of the scenarios has shown, an understanding of these principles may not allow a writer to predict with any degree of certainty how a court of law will rule in a particular case; however, I would argue that such an understanding can at least offer professional communicators some sense of how to avoid copyright infringements. And given the enormous cost of litigation, both in terms of actual dollars and potential damage to a career, I would argue that knowing how to navigate through the intellectual property minefield is a tremendously valuable skill.

References

Beard, J. (1974). The copyright issue. *Annual Review of Information Science and Technology, 9*, 381–411.

Branscum, D. (1991, March). Ethics, e-mail, and the law: When legal ain't necessarily right. *Macworld*, 63, 66–67, 70, 72, 83.

Bunnin, B. (1990, April). Copyrights and wrongs: How to keep your work on the right side of copyright law. *Publish*, 76–82.

Leval, P. (1990, March). Toward a fair use standard. *Harvard Law Review*, 1105–1136.

Miller, N., & Blumenthal, C. (1986). Intellectual property issues. In A.W. Branscomb (Ed.), *Toward a law of global communication networks* (pp. 227–237). New York: Longman.

Patterson, L.R., & Lindberg, S.W. (1991). *The nature of copyright: A law of users' rights.* Athens: University of Georgia Press.

Van Bergen, M. (1992, July/August). Copyright law, fair use, and multimedia. *EDUCOM Review, 27,* 31–34.

Woodmansee, M. (1984). The genius and the copyright: Economic and legal conditions of the emergence of the 'author.' *Eighteenth-Century Studies, 17*(4), 425–448.