

General Counsel



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Copyright and email

To say that electronic mail has become a ubiquitous form of communication is something of an understatement. What was once used only for the corporate world and the technologically savvy elite is now the primary form of communication for millions of computer users. Academicians and scientists were among the earliest users of wide area computer networks, enjoying the instantaneous and borderless transfer of knowledge and ideas. The planetarium community certainly hasn't avoided this phenomenon, having had its own thriving Internet-based discussion group, Dome-L, dedicated to all things planetarium, for over 10 years.

Recently, the widespread use of email and other Internet-based communication tools, like email discussion lists ("listserves"—see note at end), discussion groups, and social networking sites like MySpace.com® and Facebook, has begun to raise questions about the ownership and proper usage of information posted on the Internet. While basic copyright prin-

ciples do apply in cyberspace, the issues are complicated by the terms of use agreements that govern various online services. Moreover, electronic communications can be subject to other legal provisions based on whether government servers or email accounts are involved. In this installment of General Counsel, I offer a brief sketch of some issues related to Internet-based discussion forums.

Copyright Considerations

It is axiomatic in modern copyright law that the author of a particular work is the owner of the copyright. Applying that principle to Internet postings (for simplicity, I use "postings" to refer to any public Internet communication, whether by way of email discussion list, message board, discussion forum, chat room, etc.) dictates that the copyright in such a posting vests in the person who wrote and posted it. The matter is complicated, however, by the terms of use agreements that govern the web sites which host various Internet discussion tools. Few users actually read them, but the lengthy documents serve as the contract between the user and the service provider.

Although somewhat uncommon, there have been cases of certain commercial services including a copyright assignment clause in their terms of use, meaning that anything a user posts on the web site would be owned outright by the service provider. Of course, the vast majority of postings are commercially valueless, making the copyright issue, as a practical matter, largely unimportant (one wonders what a service provider would do with the copyrights it owns in millions of pages of chat room transcripts). But, I have occasionally seen, for example, authors posting large excerpts of forthcoming works. In these cases, the copyright provisions could have far reaching consequences.

Becoming increasingly common are terms of use agreements which stop short of providing for an outright copyright transfer, and instead require the user to grant the service pro-

vider a nonexclusive, royalty free license to use their postings. Again, these terms may be inconsequential to the majority of users and in the majority of circumstances, but they are worth keeping in mind before posting information that may have commercial value down the road, or, simply information over which you wish to exercise control.

Despite the few services that raise copyright issues in their terms of service, the fact remains that the majority of services take no rights in their user's postings, and, those that do, generally don't enforce such rights or limit the poster's ability to otherwise use his or her postings. For all practical purposes, then, you are the owner of the copyright in the content that you post on the Internet.

On the flipside, it's important to remember that other participants' postings are copyright-



ed as well, and the mere fact they take place in a public forum does not grant you the right to use the material as you wish. Of course, taking small portions or brief quotations may well fall within the realm of fair use, but just because something is online does not grant you the right to use it without permission.

Privacy Considerations

Aside from copyright concerns, because of the global and omnipresent nature of the Internet, privacy has become a key issue surrounding Internet communication. Aside from private, person-to-person email, and sites with disclosed security procedures (e.g., banks) it is generally advisable to assume that anything posted on the Internet may be publicly accessible.

Even "private" email discussion lists and web-based discussion forums can be susceptible to public disclosure. Some participants on a list of which I am a member recently discovered that, although the list was heavily moderated and its membership was subject to an approval process, the list's archives were available on a publicly accessible web site and easily located through any major search engine. Although the incident upset many members

General Counsel is intended to serve as a source of general information on legal issues of interest to the planetarium community. Planetarians seeking information on how the principles discussed in a General Counsel column apply to their own circumstances should seek the advice of their own attorneys.

of the list, it served as a valuable reminder that very often, the Internet is very much a public forum, whether it is intended to be or not.

But, it bears repeating again, that just because something is publicly available does not necessarily imply that it is acceptable to copy or otherwise use it. Particularly in the case of a private email list, one would be well advised to check with the author of a particular post before quoting or attributing the text, even if there appears to be no direct legal issues surrounding its use.

Public Records Laws

The U.S. federal government, each of the states, and many foreign countries have “sunshine laws” on the books. These laws provide for public access to government meetings and certain government records. Although the precise contours of each law vary substantially by jurisdiction, many of them provide that email sent to and from government accounts is considered a “public record” and thus subject to disclosure. Underlying these laws is the notion that the inner workings of a government must be open and freely available to the public in order for a democratic government to function properly.

Planetarians working for government-owned institutions may find it revealing to investigate the state of the law in their juris-

diction and, more importantly, the public records policy of the institution in which they work, which governs how the institution responds to request for records from the public. While the likelihood of your email making it out into the public sphere may be quite low, it pays to be aware of the possibility. Many government employees maintain separate personal email accounts with one of the many web-based email services through which to send messages that are perhaps best left out of public view.

Best Practices

To summarize, I offer the following best practices to keep in mind when participating in Internet-based discussions, and using email as a form of communication.

Always assume that everything you write in a chat room, message board, email discussion list may be publicly accessible.

With few exceptions, you own the copyright in anything you create and post on the Internet. Some services require that, as a term of using the service, you transfer the copyright or, more commonly, provide a license to use the copyrighted work. Check the terms of use to be sure.

With few exceptions, the other participants in an Internet discussion own what they create and post. Just because something is avail-

able publicly does not mean you are free to use it elsewhere. As always, regardless of your legal position, it’s a nice idea to ask for permission first.

For government employees, be aware that public records laws may subject your email to public scrutiny. Using a private email account for personal matters will help avoid any unfortunate disclosures.

As always, these suggestions should be considered only as general tips, and should not be taken as (nor are they intended to be) legal advice. For advice specific to your circumstances, consult with a licensed attorney in your jurisdiction.

Note

It is worth noting that the term “listserve” is a popular and generic term derived from the federally-registered trademark Listserv® which identifies a particular software program for maintaining email based discussion groups. While many list services do use Listserv, there are now numerous other mailing list programs in use. Using the term “listserve” wanders a bit close to using a trademark to define a generic class for my taste (see my past column on trademarks to see why that’s a bad thing), so, observing the “practice what you preach” principle, I use the generic descriptor “email discussion list” in this column. ☆

The advertisement features a central image of a globe with the text "calgary science centre productions" overlaid. Surrounding the globe are several Polaroid-style images of show trailers: "Weather WHYS", "The SPACE SHOW", "Great Space Trees & Plants", "In My Backyard", "The Incredible Critter Show", and "The Halloween Show".

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