

## Cloud Content Is Copyright Protected; But Its Providers Are Not

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Millions of Internet users use the cloud to transmit and store cloud content, such as email, contacts, documents, calendars, photos and more. Cloud transactions are dependent upon entities which allow their computers to facilitate cloud content storage or communication entities which allow access to cloud-stored content. These entities are known as cloud content providers. While copyright law protects cloud content, it does not necessarily protect cloud-content providers.

The Internet network cloud is a telecommunications system, composed of public or semipublic space on transmission lines (such as T1 or T3) and related servers that facilitate the transmission and storage of data accessible from multiple distributed and connected resources. As cloud content providers increasingly employ recourses to facilitate the use of the cloud, understanding critical for protecting and preserving their rights.

The term "cloud-content provider" for Internet purposes is widely used, but rarely used with precision. Some use the term to mean entities that create cloud content, rather than the more accurate definition as the source of content for the cloud, whether they created the content or simply facilitated access to content via the cloud. The outcome of Internet law cases regularly turns on terms that are regularly misunderstood, as well as technical concepts that form the factual basis for certain legal rights.

For example, the Internet term JavaScript is not the same as Java, and some people tend to think it is. JavaScript is an interpreted programming language from Netscape and is similar in capability to Microsoft's Visual Basic. Java, however, is a programming language expressly designed for use in the distributed environment of the Internet with the "look and feel." of C++. Many Internet transaction contract breach matters have turned on the imprecise use of Java as evidence that a contracted agreement was intended to control a single computer rather than a network. Similarly, many imprecise applications of copyright law to cloud content provider transactions have resulted in copyright law protecting cloud content but not cloud-content providers.

As a direct consequence of copy-right law, the rights of cloud-content providers must be differentiated from the rights associated with cloud-content creators. Since a provider facilitates the storage and access of content but rarely creates independent content, most cloud-content rights do not belong to cloud-content providers. Rather, cloud-content rights belong to the creator of cloud content.

The protocols and software that facilitate the storage and access of content does generate some protectable rights for the cloud-content providers. In particular, some protocols and software are

independently created when cloud content is stored or transmitted. This content is normally not subject to copyright rights because it usually fails to satisfy the basic copyright threshold requirement for originality. Rather, this content is normally protected by contract rights, particularly the right to mine metadata (i.e., data about data, such as who accesses what data and when).

The Internet is a set of computers acting as servers and sharing a common protocol. Cloud content is Internet content (some of which is protected by copyright law) which is broken down, stored and passed over the Internet in packets, with the original content being finally reassembled at the end user's server. Thus, cloud content by definition is pre-existing content which is loaded and stored on the cloud and, as a direct consequence of this process; copyright law does not apply to cloud content.

While some content that is replicated and subsequently found in cloud content is subject to copyright protection, such as a chapter from a book, such content's copyright rights arise from memorializing content by its author and subsequent registration by the book publisher, not from becoming cloud content.

The goals of American copyright law are reflected in Article I, Section 8, clause 8 of the U.S. Constitution, also known as the constitutional source of the framework for patents and copyright laws. The Copyright Act includes a two-prong test that grants to authors the ownership of their (1) original works of authorship that are (2) fixed in any tangible medium of expression (17 U.S.C. §102(a) (2012)).

In the two-prong test of copyright eligibility, cloud content can meet the fixation requirement as a digital file if stored in a computer readable format, such as random access memory (RAM), flash memory, a compact disk (CD) or a digital video device (DVD). Having thus satisfied the fixation requirement, the only question that remains is simply whether cloud content meets the "original work of authorship" requirement.

In *Feist Publications v. Rural Telephone Service* (499 U.S. 340 (1991)), the Supreme Court clarified the doctrine of originality, which implicitly applies copyright protection to cloud content. In particular, the court found that Rural Telephone Service provided white-page phone number listings of residences in alphabetical order and that Feist Publications, a competing company used said listings to create its own phone listing for sale. Upon Rural Telephone Service's refusing to license said listings to Feist Publications, Feist conducted its own listing survey and requested a declaratory judgment of non-infringement of the Rural phonebook.

The Feist court ruled that an essential condition of copyright is originality, and that to qualify for copyright protection, a work must be original to the author. Thus, the court found that to qualify as "original" for copyright purposes, the work must enjoy some minimal degree of creativity and rejected the theory that some amount of work would render it subject to copyright protection. In this case, the court found that a compilation of listings is not original under the Copyright Act or the Constitution.

Meshwerks v. Toyota Motor Sales U.S.A., 528 F.3d 1258 (10th Cir. 2008), presents a potential hurdle for copyright protection of cloud content due to the lack of originality. In that case, a party created digital images from an image generator whose sole input was a car owned by the third party. The input exclusively involves collecting measurements of a Toyota vehicle. The dispute arose from a secondary use of said images. The court found that the images were not entitled to copyright protection, and the registrations were invalid due to lack of originality.

The findings of the Meshwerks court, in conjunction with the teachings of the Supreme Court's Feist Publications, seem to be applicable to cloud content. In particular, works are not, copyrightable to the extent they do not involve any expression apart from the raw facts. The Meshwerks court, on the whole, applied this finding to digital content. Thus, any cloud content that is simply a copy of the original content, rather than newly created content, is not protected by copyright law. As a consequence, cloud content copyright rights accrue to the content creator but not to the cloud-content provider, which was the entity that allowed the content to be found by a cloud user.

Note that the intent of the creator is critical in the analysis of copyrightable subject matter. As the Meshwerks court found, "If an artist affirmatively sets out to be unoriginal to make a copy of someone else's creation, rather than to create an original work it is far more likely that the resultant product will, in fact, be unoriginal." Since cloud-content providers generally set out to make existing content available to cloud users, rather than to create original content, cloud-content providers are generally not protected by copyright law.

The Meshwerks court specifically identified a theory for challenging copyright protection for cloud content. If the decision is narrowly interpreted to apply to situations where third parties copy works of others, then cloud content may be protected by copyright law. However, the reasoning expressed by the Meshwerks court most likely results in cloud content not being protectable under copyright law as an independent creation.