Prince and the Copyright Revolution (part three)

If the DMCA is not upgraded, copyrights will become increasingly vulnerable to infringement

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Copyright law must be brought up to speed with rapidly advancing technology if it is to remain effective. The Digital Millennium Copyright Act (DMCA) has remained unchanged since it became law in 1998, and its protective mechanisms are now beginning to lag. The technological advancements made over the last decade and a half have been staggering; consider how poorly a computer would perform that had not been updated in over 15 years! If the DMCA is not upgraded, copyrights will become increasingly vulnerable to infringement.

Updating the takedown notice system

The DMCA immunizes online service providers (OSPs) from infringement litigation as long as they promptly remove unauthorized material upon receipt of a "takedown notice." The purpose of this safe harbor provision is to balance the interests of copyright holders with the right of society to have access to information. But the takedown notice system was crafted for the much simpler world of 1998, when we were still in the midst of transitioning from analog to digital technology.

In 1998, Steve Jobs first unveiled the "iMac" at the Flint Center in Cupertino, Calif.; the first commercially available MP3 player, "MPMan," debuted in Korea; and a couple of PhD students had just formed an Internet business in California called "Google." Back then, cell phones were still used to make calls, a "social networking site" was a burger restaurant, and the coolest electronic gadget was a rather creepy talking toy called a Furby. In 1998, downloading a simple video game like Duke Nukem 3D might take all night because 56K modems were so slow and prone to disconnections.

Today, we live in a world of Oculus Rift virtual reality visors, Google Glass headsets and Cube 3D printers. Online connectivity is virtually ubiquitous and almost everyone has a smartphone loaded with multifunctional apps. Broadband technology allows for even the largest of files to be downloaded in seconds, and even the cheapest of PCs boasts a lightning fast processor and a terabyte or more of storage capacity. In fact, downloading and saving files on a home computer is largely unnecessary at all these days, as data can be instantly transferred and stored without limit in the cloud.

These advancements have had the unintended consequence of facilitating copyright infringement on a grand scale, and the DMCA may be inadequate to cope with this change. The safe harbor provision, for example, only requires that a website remove an

infringing work after an OSP receives a specific, individualized takedown notice. It does not require OSPs to proactively monitor their sites for infringing posts. This system can be very burdensome for copyright holders, especially when they may need to file hundreds, or even thousands, of notices.

Further, once a file or URL is removed in response to a takedown notice, it may immediately pop right back up in multiple new locations — not unlike a Lernaean Hydra that grows back two heads for every one that is cut off. The OSP is not obligated to remove these subsequent postings until it receives separate notices for each new instance of infringement. The entertainment industry and software companies are responding to this situation by increasingly relying on automated programs to scour the internet for infringements. The problem is that these "bots" generally lack the discernment that would be exercised by a human being. They tend to send out blizzards of takedown notices that may include requests to remove fair use items — such as reviews, parodies or critiques — that simply mention the copyrighted material. Nevertheless, OSPs that become inundated with notices will often acquiesce and remove even legitimate postings rather than risk losing the safe harbor protection of the DMCA. And since there are no established sanctions for sending bad faith requests for removal, rivals can use takedown notices as a weapon to stifle competition.

But wait, there's more!

The problem of websites being overwhelmed by the sheer number of takedown requests may be getting worse in the wake of the *Garcia v. Google* ruling. In February of this year, the 9th Circuit Court of Appeals held that actress Cindy Lee Garcia held an independent copyright interest for her performance in the infamous "Innocence of Muslims" video, despite the fact that Garcia was only on screen for five seconds, her lines were dubbed in a foreign language, and she played no part in the creative process. This controversial ruling effectively creates a new species of copyright that has the potential of giving veto power over a film to an actor.

Now, any performer that is unhappy with their performance — or their pay — may have the right to file a takedown notice under the DMCA. And while Chief Judge Alex Kozinski notes that most on-screen performances are covered by standard releases or implied licenses, there is no longer a clear, bright line that marks an acting role as a "work for hire." The courts may now have to look at each movie, documentary, music video, commercial, etc. on a case-by-case basis. Robert De Niro will almost certainly seek to have all copies of "The Adventures of Rocky and Bullwinkle" permanently deleted.

Netflix, the International Documentary Association, Adobe Systems, the Electronic Frontier Foundation, the Association of California Broadcasters, Internet law professors and intellectual property law professors have all filed amicus briefs asking the 9th Circuit to reconsider this ruling.

Conclusion

Upgrading the current takedown system under the DMCA will require that OSPs, tech companies and the entertainment industry work together to formulate a workable plan. Unfortunately, such cooperation among these rivals has been historically difficult, if not impossible, to achieve. There is one thing, however, upon which all these interested parties clearly agree: All copies of "The Adventures of Rocky and Bullwinkle" should be destroyed.

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