

[Filed by SIM]

While it is important to protect the spread of copyrighted works, balance is necessary to protect the system from abuse, either intentionally or unintentionally. DMCA takedown requests can be more effectively used in order to maintain their true power without them becoming overbearing for either party. Current examples exist of using DMCA notices for questionable purposes, for example attempting to create a 'chilling' effect by ordering takedown of negative product reviews via DMCA request (1) or inadvertent mass purges of legally held information, especially when such takedown notices are mass-generated by a computer; for example Microsoft's much-maligned takedown of itself, (2) and other instances where automated scripts are generating infringement notices and takedown requests. What was originally supposed to be an affidavit filed under penalty of perjury, which is held with much weight by receiving ISPs, are increasingly automated and sent out in great numbers, which can cause a great deal of damage when misdirected at an innocent caught in their wake. Further, noted copyright 'trolls' have attempted lawsuits described as "extortionary " by attempting to goad or embarrass the defendants into settling quickly by simply accusing them, in the public record, of allegedly downloading pornography, even if no infringement occurred. (3)

The discussion should therefore be brought into play that any attempt to use enforcement on an individual level should be carefully weighed against proper process and procedure to ensure that any one actor cannot unfairly take away too much power from the situation --by simply crying wolf or spamming infringement notices hoping for a 'bite'. There needs to be meaningful penalties for the filing of a fraudulent enforcement actions, comparative to the harm such actions can cause, and disincentivize the filing of a million copyright claims to catch a one pirate, simply because this is more convenient for the filer. Similarly, allowing a form of neutral due process for egregious copyright violations allow the penalties for such violation to be made full-strength, discouraging spam infringers.

Finally, this also represents further imbalance between someone with more lawyers and/or time than another party. Preventing point-by-point enforcement helps both individual users of fair use, and also even large corporations as well; for example, the lawsuit over signal retransmit boxes for television broadcasts (4). It is going increasingly difficult for all parties involved the transaction to determine what is legal within a given framework, leading to careening between having a given process be seen as legal or illegal. Having every new internet business idea, from twitter to netflix, to begin with a massive legal hurdle, helps no one. There needs to be clear cut and dry assumptions built-in to copyright law so that one can casually determine from first glance what processes are legal and what are not, without requiring every transaction to go through a formal courthouse trial, allowing the new transactor an opportunity to compensate the other parties involved in the new practice, in a fair manner for both parties, in a more efficient marketplace than a courthouse.

Copyright law clarity is also improved when copyright law is not used as an end run around contract law, where terms of a contract, previously presumed to be understood, are suddenly changed mid-contract because the article being purchased this under copyright. End-user license agreements that rent an article should make clear what is being rented instead of purchased, distinctly point out the rights transferred or surrendered, be obvious and unhidden, should certainly presented BEFORE an exchange of money has taken place, and generally be of the form of every other contract in existence. Unusual contracts that are substantially incomplete place too much burden on copyright law to interpret their terms in what should have been explicitly set forth in the original contract. Far too frequently, misunderstandings arise because an article is held out for, assumingly, purchase, in an extremely standard manner, yet because the article is under copyright, portions of the transaction are

retroactively voided, and the article is effectively un-purchased later, without recompense to the purchaser. This creates a general sense of unfairness when money is surrendered without value in return, and leads to a lack of respect of the rule of law in both copyright and contract laws as a whole, which leads to further problems enforcing future contracts and copyright terms in future, as their enforcants see little reason to respect or trust a system that found in their disfavor in previous such disagreements. Copyright law should be an aid to contract law and not a method of lawyering out of contracts after the fact.

Generally, problems can arise when the copyright standards are not fully completed and put into place before things relying on those standards are using them as a prerequisite. A deal should set forth the boundaries of the deal; also, copyright law itself should define what is and is not allowed, in general terms, before such rules are needed in the marketplace, to foster innovation, and to prevent any of the parties, or even unrelated 3rd parties, from abusing those rules in a manner other than intended. Care should thus be taken to ensure that enforcement powers, however nobly granted, are not made too powerful, allowing for fair refereeing of terms without unfairly victimizing any one party, and eliminating constant scrambling by all parties to stay within the law. Referees are not players in the game, and so should maintain such impartiality to avoid unbalancing the game towards any one player's strengths over the other players, and properly maintain the sense of 'fair play'.

To such end, I applaud such a panel such as this in setting forth policy, but caution continued vigilance. The internet economy is ever-changing and new questions, and loopholes, can constantly arise with new challenges. Creativity and innovation should not be regarded as a final destination, but a necessarily part of a world constantly in flux, and continuously requiring new updates as new ideas become available, new technologies improve, and new questions emerge to meet those challenges.

Citations: (Which themselves point out some of the more egregious problems with current set-ups).

(1)

<http://arstechnica.com/tech-policy/2013/03/gopro-can-fall-from-planes-with-no-parachute-cant-get-copyright-law/>

(2)

<http://www.pcworld.com/article/2045486/microsoft-accuses-microsoft-of-copyright-infringement-asks-google-to-scrub-search-links.html>

(3)

http://www.theregister.co.uk/2013/06/06/forensics_reveal_more_on_prenda_laws_trolling_techniques/

(4)

http://www.nytimes.com/2013/10/12/business/media/tv-broadcasters-appeal-to-supreme-court-in-effort-to-stop-aereo.html?_r=0

