Copyright Protection in the Digital Age

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• Focuses in areas of particular interest to entertainment and sports clients:
  – Social Media, New Media, and Digital Content
  – Copyright and Trademark
  – Electronic Media Monetization
  – Social Media, New Media, and Digital Content Advisory Services

• Author of *Shear on Social Media Law* blog that is syndicated by the publisher of The American Lawyer through its Law.com Blog Network
Digital Millennium Copyright Act (DMCA)

- Provides a mechanism for copyright holders to protect their digital content
- Once a content owner becomes aware that his work is being infringed upon it is up to the copyright holder to notify the Internet Service Provider (ISP)/Online Service Provider (OSP)
- If the ISP/OSP follows its DMCA take down process, then the ISP/OSP most likely will qualify for the safe harbor provisions of the DMCA
- Section 512 (c) states that the ISP/OSP must act “expeditiously” to remove infringing content
DMCA Take Down Procedure

• An ISP/OSP is not liable under 17 USC § 512 (c) if it acts expeditiously to remove, or disable access to the infringing content when it:
  – Has actual knowledge
  – Is aware of the facts or circumstances from which infringing activity is apparent; or
  – Has received notification of claimed infringement that meets the requirements set forth in 512(c)(3)
How is “Expeditiously” Defined in the DMCA?

• No case law or statute defines “expeditiously”
• According to the Senate Report (S. Report 105-90, 44) on the DMCA:
  • Subsection (c)(1)(A)(iii) provides that once a service provider obtains actual knowledge or awareness of facts or circumstances from which infringing material or activity on the service provider’s system or network is apparent, the service provider does not lose the limitation of liability set forth in subsection (c) if it acts expeditiously to remove or disable access to the infringing material. “Because the factual circumstances and technical parameters may vary from case to case, it is not possible to identify a uniform time limit for expeditious action.”
Viacom Int’l, Inc. v. YouTube, Inc. (S.D.N.Y 6/23/10)

- Viacom sued YouTube because YouTube’s web site contained more than 100,000 clips of Viacom’s copyrighted content w/o Viacom’s permission.
- Viacom had sent a DMCA takedown notice to YouTube in 2007 and within 1 business day virtually all of the infringing content was removed.
- YouTube was granted summary judgment that it qualified for safe harbor protection under 17 USC §512 (c).
Viacom Int’l, Inc. v. YouTube, Inc. (continued)

• Page 16 of the decision:
  – “the present case shows that the DMCA notification regime works efficiently: when Viacom over a period of months accumulated some 100,000 videos and then one mass take-down notice on February 2, 2007, by the next business day YouTube had removed virtually all of them.”

• Therefore, commercial entities may have only 1 business day to remove infringing content.
YouTube’s Copyright Infringement Notification
Facebook’s DMCA Notice
MySpace Notification of Copyright Infringement
Twitter’s Copyright Policy
Protecting Frequently Updated Digital Content

• No bright-line rule
• Copyright Office’s Circular 66
  – Do websites, blogs, or other original content updated frequently and uploaded to electronic media constitute an automated database as defined by the Copyright Office?
  – If the above is included in the definition of automated databases, it may be required to register frequently updated digital content every 3 months.
• Circular 65 which discusses automated databases has been in the process of being updated for at least several months and is currently unavailable online.
Can You Protect Your Microblog/Tweet?

- **Title 37 Part 202 § 202.1 Material not subject to copyright.** The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained: (a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents…

- May a Tweet/Microblog be copyrighted?
  - Do Microblogs/Tweets fall under Title 37 Part 202 § 202.1?
  - If a Haiku poem may be copyrighted why can’t a Tweet be copyrighted?
Can You Protect Your Microblog/Tweet (continued)?

• Twitter’s Terms of Service may not create legal rights
  – “You retain your rights to any Content you submit, post or display on or through the Services. By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).”
  – “Tip: This license is you authorizing us to make your Tweets available to the rest of the world and to let others do the same. But what’s yours is yours – you own your content.”
• Retweets, links to Twitpics, etc…
• Fair Use Issues
Canadian Copyright Law

• Canadian Copyright Act
• Signed but not ratified the World Intellectual Property Organization (WIPO) Copyright Treaty of 1996
• The Copyright Modernization Act Bill C-32 was tabled in June 2010
• Canada is in the process of determining how to update its copyright law for the Digital Age
UK Digital Economy Act (DEA) of 2010

- Provides the government broad powers to limit, suspend, or terminate Internet service to copyright infringers.
- Appears to require ISPs/OSPs to notify/assist copyright owners of potential infringement in some matters.
- On 11/10/10, the Culture, Media, and Sport Committee of Parliament announced an inquiry into the DEA to consider the implementation, practicality and likely effectiveness of the relevant measures contained in the Digital Economy Act.
  - The comment submission period ends January 5, 2011
User Generated Content

• Who owns User Generated Content (UGC)?
• The Terms of Service should clearly state who owns UGC and how a web site may utilize the content.
• Legal liability of repurposing UGC
U.S. Fair Use v. European/Canadian Fair Dealing

- **In the U.S., four factors that determine if infringement has occurred:**
  - (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
  - (2) the nature of the copyrighted work;
  - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
  - (4) the effect of the use upon the potential market for or value of the copyrighted work.

- **Europe and Canada Recognize Fair Dealing:**
  - Doctrine of legal defenses that may be valid against copyright infringement actions
  - Each country that recognizes Fair Dealing has a slightly different interpretation
Future Copyright Policy/Law Changes

- **The USPTO’s Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy is in process**
  - The Department of Commerce’s Internet Policy Task Force is conducting a comprehensive review of the relationship between the availability and protection of online copyrighted works and innovation in the Internet economy.
  - Comments are due November 19, 2010

- **Anti-Counterfeiting Trade Agreement**
  - Proposed trade agreement that will establish/enforce a new international copyright protection framework
  - Currently being negotiated

- **Combating Online Infringement and Counterfeits Act (COICA)**
  - Proposed bill that would allow the government to require ISPs/OSPS and registrars to block access to websites deemed to be "dedicated to infringing activities"
  - Appears to be shelved for now
Recent Copyright Issues

• Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies
  – 6 new classes added in July 2010
  – These exemptions may require a reassessment of how you spend your intellectual property protection budget

• Author’s Guild v. Google (book scanning case)
  • This settlement has far reaching consequences
  • May change how content protection is viewed

• Section 108 Study Group
  – How will the definition of a library or archive change in the future?
  – This group appears to be dormant since its initial report was issued in March of 2008
Subscribe to the Latest Updates From The Copyright Office

• Latest Updates From the Copyright Office’s Newsnet
  – December 20, 2010: Due date for comments on pre-1972 sound recordings
  – January 19, 2011: Due date for reply comments on pre-1972 sound recordings
Conclusion

- Social Media, Electronic Media, and New Media present new legal challenges to the entertainment and sports industries
- Content users need to be reprogrammed that just because content is in a digital format does not mean it is in the public domain
- Creative lawyering and new strategies are needed to combat intellectual property infringement in the Digital Age