



THE INTERSECTION OF DIGITAL RIGHTS, COPYRIGHT LAW AND TRADEMARK LAW

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DIGITAL RIGHTS

- A. With certain exceptions, the digital world enjoys no greater freedoms than the non-digital (tactile) world.
- B. One glaring exception – The Digital Millennium Copyright Act

DIGITAL RIGHTS

- Why Have The Digital Millennium Copyright Act?
 - In the tactile world, where various actions exist that impose absolute liability, intent is immaterial.
 - (But can affect a damage award.)

“Absolute Liability” Torts

- No requirement of intent; can be innocent infringer, but still guilty.
- 1. Copyright Infringement
 - Elements - access to and copying of protected material,
 - Whether or not copier knew material was protected.

“Absolute Liability” Torts

- 2. Defamation –
 - Elements – Communication of an injurious falsehood to a third party,
 - Whether or not there is knowledge of falsehood.

“Absolute Liability” Torts

- 3. Invasion of Privacy
 - Elements – Intrusion on solitude, false light, public disclosure of private facts, appropriation for commercial advantage.
 - Possible to commit any of these acts without intent.

DIGITAL V. TACTILE

- So in the tactile world, liability for some torts is absolute.
- Internet Service Providers (ISPs) lobbied Congress to escape absolute liability because of lack of control over content (chose to not control uploads)

DMCA

- Basic Provisions of Act
 1. No automatic liability for ISPs.
 2. But strict provisions regarding eligibility of ISP for safe harbor.
 - No knowledge material is infringing
 - No involvement in creation of material
 - No modification of content
 - If caching, no control

DMCA

3. But ISPs must appoint representative to receive notices demanding takedown.
4. Notice provisions are spelled out and must be followed.
5. Content uploader must be notified of takedown, has an opportunity to demand put-back

DMCA

- Where encryption code is used by copyright owner, it is an offense to break the code to look at the content.
- (But without breaking the code, a user cannot tell whether a work is still protected or is useable because in the public domain.)

DMCA

- All Interactive websites must appoint Copyright Designated Agent for reception of Takedown Notices.
- Safe harbor also available for linking by ISPs, with same limitations on knowledge, etc.

VIACOM V. YOUTUBE

U.S.D.C.S.D.N.Y. 1:2007cv02103

- Viacom as principal owner of CBS owns much of CBS show content
- Members of public upload portions of many TV shows to YouTube without permission
- Viacom sends takedown notices to YouTube.

VIACOM V. YOUTUBE

- Viacom has filed \$2B lawsuit vs. YouTube, claiming copyright infringement for featuring CBS content.
- YouTube (now owned by Google) defends by stating that they send proper takedown notices each time they are aware of illegal uploading, as prescribed by DMCA.

VIACOM V. YOUTUBE

Viacom's response – Uploads are on such a grand scale that Viacom should know, should take down without notice rather than waiting for receipt of notice

What About Uploading?

- Individuals upload television, film content to networking websites such as YouTube.
- Is that copyright infringement?

What About Downloading?

- Individuals find songs on the Internet, download for personal use, make songs available for peer-to-peer transfer by others.
- Who is guilty of copyright infringement?

Downloading Music

- Two recent cases find liability:
 - 1. Capitol Records et al. v. Thomas-Rasset, 06-cv-01497 D. Minn. 24 songs downloaded and “made available” for peer-to-peer transfer.
 - Original judgment of \$1,920,000 reduced to \$54,000, or \$2,250 per song.

Downloading Music

– 2. Sony BMG Music v. Tenenbaum,
07-cv-11446, U.S.D.C.D. Mass.

30 songs downloaded, award of \$675,000 - \$22,500
per song.

Google Trademark Lawsuits

- Google has keyword terms available for sale.
- Permits competitors to appear on Google Search results when another's keyword is entered by searcher.
- Lawsuits by American Blinds, Rescuecom, others.

Google Trademark Lawsuits

- Claim is that by offering companies an opportunity to appear on a results page when a browser begins search for competitor, Google is committing trademark infringement.

Google Trademark Cases

- Rescuecom lower court decision --Three tests to determine unlawful trademark use
 - - a. There is a trademark use,
 - b. In commerce,
 - c. With a likelihood of confusion.

Google Trademark Cases

- Rescuecom Case – Judgement for defendant – (temporarily)
 - Applying 3 tests, no infringement of Rescuecom trademarks by Google
 - Reversed on appeal.

Google Trademark Cases

- Rescuecom case reversed on appeal – 562 F.3d 123.
- Sent back to determine whether Google’s use of the mark constitutes a “use in commerce” within the meaning of the prior cases.

WHAT ABOUT SECOND LIFE?

- Offshoot of “World of Warcraft”
- Virtual world, involving creation and travel of “avatars” in special electronic environment.
- Avatars can roam virtual world, but no tangible products or services.

SECOND LIFE

- Question of whether infringement where:
 - trademark is featured on electronic goods only used to dress an avatar;
 - copyrighted song used as atmosphere in virtual world bar.
 - is use in virtual world a “use in commerce?”

SECOND LIFE

- Situation complicated by use of “Linden Dollars” to purchase material
- Linden Dollars” have a real world value, albeit very small
- But collection of them can be redeemed through Linden Life for real money

VIRTUAL WORLD

- Cases –
 - Taser v. Linden Research – 2:09-cv-00811
U.S.D.C.Dist. Ariz.
 - avatars using guns that look like Taser guns –
harms Taser image.

Virtual World

Cases --

- Stern v. Sony – 2:2009cv07710, U.S.D.C.D. Cal.
- man with “visual disabilities” suing under ADA for failure to provide aids
 - » But ADA deals with “places of public accommodation” – virtual world may not qualify.

VIRTUAL WORLD

- Cases (Cont'd)
 - Bragg v. Linden Research – 487 F.Supp.2d 513 (E.Dist. Pa. 2007)
 - player bought real property in virtual world
 - But Linden confiscated it, claimed error in allowing it to be sold.

Virtual World

- Cases (Cont'd)
 - Eros LLC v. Linden Labs –
claim of copyright infringement
because of uploading by player of Eros
copyrighted material.

CYBERSQUATTING

- Use of trademark by non-owner as a domain name
 - Domain names usually serve as internet addresses
 - But increasingly thought of as trademark use

CYBERSQUATTING

- Can handle complaints without necessity of lawsuit (solving international jurisdiction problems)
 - ACPA, Anticybersquatting Consumer Protection Act
 - ICANN, Internet Corporation for Assigned Names and Numbers
 - UDRP (Uniform Dispute Resolution Policies)



QUESTIONS??