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With Great Internet Bandwidth Comes Great Responsibility...Maybe

Posted on February 16, 2013

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We live in tumultuous times. Or so [Professor David Nimmer](#), a prolific copyright law scholar, proposed during the Annual Burns Senior Lecture in Intellectual Property on January 17th 2013, at the Benjamin N. Cardozo School of Law. Armed with a highly animated PowerPoint presentation, Professor Nimmer guided over 100 students and practitioners through critical cases and legislative developments that address online copyright infringement.

Ultimately, who is really responsible for online copyright infringement? Professor Nimmer began by discussing [§ 512\(c\) of the Digital Millenium Copyright Act's \(DMCA\)](#) "Safe Harbor" provision and recent related cases. Online Service Providers (OSP), such as YouTube.com, can receive protection from copyright infringement liability if they are in compliance with the technical and policy requirements as setout in the DMCA's "Safe Harbor" provisions. Essentially, the Safe Harbor provisions place the responsibility of mitigating copyright infringing material onto service providers such as YouTube because they are in the best position to manage their networks.

This "Safe Harbor," however, is not guaranteed. One of the ways to be outside the Safe Harbor's protections, among others, is if the service provider has actual knowledge of infringement [§ 512(c)(A)(1)(i)] or is aware of facts or circumstances from which the **infringing activity is apparent** [§512(c)(A)(1)(ii)]. It is the latter knowledge—facts or circumstance from which the infringing activity is apparent—that is dubbed the "Red Flag" test. Professor Nimmer suggests that recent cases such as [Perfect 10 v. CCBill](#) and [UMG v. Veoh Networks](#) apply this test narrowly, thus allowing service providers to exercise near willful blindness in response to facts that suggest infringing activity. The upshot of such a narrow application of the Red Flag test is that it shifts the responsibility of policing copyright infringement back onto the copyright owners.

Professor Nimmer marshals compelling evidence from each case (e.g. emails between business operators and users about the infringing nature of the sites content), to suggest that the recent application of the Red Flag test is sending the wrong signal to service providers: "Don't worry service provider, you likely won't be held responsible for infringing content on your website, and if so, your liability will be very limited."

As a reaction to this imbalance of mitigation responsibilities, the entertainment industry sought to propose its own heavy-handed solution: The "Stop Online Piracy Act" (SOPA) and

the "Protect Intellectual Property Act" (PIPA). Professor Nimmer did not address in detail his personal views on these measures. He did note, however, that Congress supported the bills for quite sometime; the shift against SOPA/PIPA occurred in the "eleventh hour" as [worldwide boycotts and media pressure](#) increased against the legislation.

Professor Nimmer concluded his presentation by examining how online piracy (e.g. cyberlockers such as MegaUpload) was eroding the market for smaller, independent films. He noted that the Oscar-winning movie "The Hurt Locker" should have recouped its financial nut through international film and DVD sales, but was unable to do so due to online piracy. He also suggested that [online piracy prevented](#) the standard "bump" in sales after a film secures an Oscar for Best Picture. So where do these legal battles and online skirmishes leave copyright law in the age of the Internet? In a dangerous place, according to Professor Nimmer.

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