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Internet Law Update

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I.
The Emergence of The Copyright Troll

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The Emergence of the Copyright Troll

- Righthaven
  - Righthaven LLC, a Nevada entity that has the right to enforce for the *Las Vegas Review-Journal*
  - Has filed over 130 lawsuits in Nevada federal court claiming copyright infringement
  - Targets the operators of web sites, blogs, and message boards where Review-Journal articles have been displayed
  - Demand up to $150,000 (based on statutory damage scheme) and appears to settle out relatively cheap

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The Emergence of the Copyright Troll

- US Copyright Group
  - Signs up movie companies and has brought over 10,000 lawsuits agains BitTorrent users who have shared movies (including "the Hurt Locker"); offers an immediate $1500 settlement, with the demand increasing as time goes on
- Lucas Entertainment
  - Sued 53 anonymous BitTorrent Users for downloading a pornographic movie for which Lucas owns the copyright
  - Appears to be seeking the identity of the IP addresses they are targeting and may leverage the defendants fear of being publicly named to garner quick settlements

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The Emergence of the Copyright Troll

- No question that plaintiffs are legitimate copyright owners
- May be issues of actual liability
  - Righthaven claims, for instance, may fail because of fair use by defendants
  - BitTorrent claims may have faulty or spoofed IP addresses (wi-fi hijacking, etc.)
- Cost of defense is out of proportion with settlement demand, almost assuring settlement regardless of actual liability

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II.
DMCA Notice and Takedown Update

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DMCA Safe Harbor Overview

- The DMCA shields service providers from infringement liability arising from:
  - providing information location tools, 17 U.S.C. §512(d);
  - caching, 17 U.S.C. §512(b); and
  - storage of material at the direction of users, 17 U.S.C. §512(c).

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DMCA Safe Harbor Overview

- Service Providers Only Receive Immunity if they:
  - Reasonably implement and inform users of copyright enforcement policy (including identifying a designated DMCA agent)
  - Register with LOC
  - Respond to take-down notices that are compliant with 17 U.S.C. §512(c)(3)(A)

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Recent Decision: Generalized Awareness of Infringement Doesn't Create Duty to Find It

- *Viacom International Inc. v. YouTube Inc.,* S.D.N.Y., No. 07 Civ. 2103 (LLS), 6/23/10
- Viacom claimed that massive infringement on YouTube justified liability without notice
- Court granted summary judgment to YouTube:
  - Section 512(m)(1) specifically frees a service provider from the duty of "monitoring its service or affirmatively seeking facts indicating infringing activity."

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Recent Decision: Complicated Notices Don't Suffice

- *Perfect 10 Inc. v. Google Inc.,* C.D. Cal., No. 04-9484, 7/26/10
  - Perfect 10 served Google with e-mails, spreadsheets, hard drives and DVDs with copies of copyrighted material
  - Material included over 70,000 distinct files
  - Court held that ‘Inexplicably Complicated' DMCA Notices Did Not Impart Actual Knowledge of Infringement and thus, no liability

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III.
To Scrape or Not to Scrape?

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To Scrape or Not to Scrape?

Scraping is the practice of removing content from a website via automated means

Used to collect large amounts of data from a site

In one sense, it resembles standard browsing, but employs scripts or "bots" in place of actual users

Increasingly relied upon for collecting large amounts of data when site operator does not provide an API or other mechanism

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To Scrape or Not to Scrape?

- Possible Claims arising from scraping activities
  - Copyright
  - Breach of Contract (Terms of Service)
  - Trespass to Chattels
  - Computer Crime Violations
    - Federal – Computer Fraud and Abuse Act (see *EF Cultural Travel BV v. Explorica, Inc*., 274 F.3d 577 (1st Cir. 2001)
    - State – various state statutes (Texas statute is Tex. Penal Code §§33.01 to 33.03)
  - Lanham Act (but see *Dastar Corp. v. Twentieth Century Fox Film Corp*., 539 U.S. 23 (2003))

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To Scrape or Not to Scrape?

- Recent Scraping Case of Interest
  - *Cvent, Inc. v. Eventbrite*, Inc., 2010 U.S. Dist. LEXIS 96354 (E.D. Va. Sept. 14, 2010)
    - Cvent maintained database of event venues
    - Eventbrite scraped so as to include in its invitation service
    - Cvent sued (on all types of scraping claims)
    - Eventbrite moved to dismiss and prevailed on most (however, case shows how defendant needs good facts to survive otherwise valid claims related to scraping)

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IV.
Dilution Online -
Use in Commerce v. Noncommercial Use

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Online Dilution: Use in Commerce v. Noncommercial Use

Background:

- 43(a) of Lanham Act, the Federal Dilution Statute, proscribes "use of a mark or trade name in commerce" when such use is likely to blur or tarnish a famous mark
- The statute say "noncommercial use of a mark" is excluded from liability
- This often comes into play on the Internet in the context of gripe sites which use a famous mark to voice complaints

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Online Dilution: Use in Commerce v. Noncommercial Use

Do Gripe Sites qualify as non-commercial speech?

A use in commerce may be noncommercial:

- when the use of the a mark intertwines commercial and noncommercial speech elements
- when the use in not an integral part of a commercial transaction

For full analysis see: Lee Ann W. Lockridge, *When Is a Use In Commerce a Noncommercial Use*?, 37 Florida State University Law Review 337 (2010)

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V.
Trademark Nominative Fair Use in Domain Names

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Nominative Fair Use of Trademarks

Nominative Fair Use:

affirmative defense to trademark infringement under which a third party may use the trademark of another as a reference to describe the other product, or to compare it to their own.

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Nominative Fair Use of Trademarks in Domain Names

- *Toyota Motor Sales U.S.A. Inc. v. Tabari*, No. 07-55344 (9th Cir. July 8, 2010)
  - Case involved domain names that contained Toyota marks – buy-a-lexus.com and bouyorleaselexus.com
  - Toyota claimed trademarks infringement and got an injunction in lower court
  - 9th Circuit remanded to lower court with instructions to modify the injunction to allow at least some use of Toyota marks

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Nominative Fair Use of Trademarks in Domain Names

- *Toyota Motor Sales U.S.A. Inc. v. Tabari :* Notable Points about Decision
  - Judge Kozinski criticized the way many other courts have applied initial interest confusion doctrine in internet cases (consumers don't form impression of site until they have visited)
  - Places burden on plaintiff to show source confusion
  - Acknowledged free speech chilling by over extending trademark liability
  - Extended reasoning (in dicta) to met tag use of trademarks

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VI.
CDA §230 Safe Harbor Update

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CDA Safe Harbor: Alive and Well

- 47 USC §230 of the Communications Decency Act immunizes providers of interactive computer services against liability arising from content created by third parties
- The defendant must be a "provider or user" of an "interactive computer service."
- The cause of action asserted by the plaintiff must "treat" the defendant "as the publisher or speaker" of the harmful information at issue.
- The information must be "provided by another information content provider," i.e., the defendant must not be the "information content provider" of the harmful information at issue.

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CDA Safe Harbor: Alive and Well

CDA Has Been Relied Upon in Numerous Contexts:

- Defamation

  Zeran v. AOL, 129 F.3d 327 (4th Cir. 1997)

- False / Misleading Information

  Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 830 (2002)

- Sexually Explicit Content

  Doe v. MySpace, 528 F.3d 413 (5th Cir. 2008

CDA Safe Harbor: Alive and Well

CDA Has Been Relied Upon in Numerous Contexts:

- Discriminatory Housing Ads

  Chicago Lawyers' Committee For Civil Rights Under Law, Inc. v. Craigslist, Inc. 519 F.3d 666 (7th Cir. 2008).

- Threats

  Delfino v. Agilent Technologies, 145 Cal. App. 4th 790 (2006), cert denied,128 S. Ct. 98 (2007)

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CDA Safe Harbor: Alive and Well

Recent CDA Litigation

- Craigslist seeking to use it preemptively against South Carolina law enforcement prosecution related to on-line adult services ads ((craigslist Inc. v. McMaster, D. S.C., No. 2:09-cv-13089/8/10)
- Website operators relied on CDA to defeat claims that they were responsible for fraudulent advertisements placed by third party *(Milgram v. Orbitz Worldwide* LLC, N.J. Super. Ct., No. 09-142, 8/26/10).
- Google survived a claim that its programming and the "service" it provided in conjunction with defamatory content disqualified it from CDA safe harbor (*Black v. Google Inc.,* N.D. Cal., No. 10-2381, 8/13/10).

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