IP Problems, YouTube, and the Future: Crash Course Intellectual Property #7

Crash Course: Intellectual Property
https://youtube.com/watch?v=MCodRWoavoc
https://nerdfighteria.info/v/MCodRWoavoc

Stan: Hi, I'm Stan Muller, and this is the final episode of Crash Course Intellectual Property. Tackling such a huge subject in only seven episodes has meant that we can't go into quite as much detail as we'd like, but hopefully we've given you a pretty good overview of the basics of Intellectual Property. We spent the last six episodes talking about copyright, patent, and trademark laws as they currently exist, but we keep running into a roadblock. Intellectual Property law is slow to change, and we're living in a world that's changing pretty rapidly.

As we've noted again and again, our new digital world has raised challenges for both consumers and producers of IP. So today, we're going to look at some of the problems that have developed in recent years with Intellectual Property. We're also going to talk about IP as it applies to everyone's favorite internet media hub, YouTube, and we're even going to look into the future. I mean, we've got this liquid-filled dye agitator containing a dye with raised indicia on the facets thereof. This thing tells the future, right? It is certain!

(Intro)

So YouTube's kind of a big deal. It has over a billion users watching hundreds of millions of hours of video and generates billions and billions of views. At the time we made this, over 300 hours of video are uploaded to YouTube's servers every minute, and in its ten year history, YouTube has become the audiovisual wing in Google's attempt to build its archive of everything.

YouTube is truly vast, and it'll continue to grow. It's arguably the most important tool for speech and entertainment on the internet, and we think it's probably the world's greatest and most transformative teaching and learning tool, but as great as YouTube is, in a lot of ways, it's kind of a mess.

When over 300 hours of video are uploaded every minute, 24 hours a day, some of it's not going to be that great. While it's kind of amazing and radically democratic that individual vloggers and makers of cat videos and those videos where they just open the toys and look at them get to publish their videos side by side with huge media companies, some creators are concerned that their creative work is cheapened and becomes just another piece of content that gets lost amidst the junk, and people aren't just uploading their own content. Very often, people use this service to share material they didn't create, so for pretty much the entirety of YouTube's 10 year existence, it's been getting sued.

In early 2007, Viacom opened the floodgates, served over 100,000 take down notices, and sued YouTube for $1 billion. Sports leagues, music publishers, and other copyright owners all filed class action suits based on the same theory: YouTube and Google should be held liable for the copyright infringements committed by YouTube users. The issue here was whether YouTube complied with Section 512 of The Copyright Act, which was added in 1998 as part of the Digital Millennium Copyright Act, or DMCA. The DMCA sets out safe harbors to protect Internet Service Providers or ISPs from unreasonable liability. Basically, certain ISPs have to block or remove infringing content that it's aware of, or for which it receives a valid notice.

DMCA safe harbors protect Internet Service Providers that comply with certain conditions when they're engaged in one of four covered activities. The first activity is when they're acting as 'mere conduits', like the pipes of the internet, for example, Comcast, Verizon Fios, or Google Fiber. The second activity is caching content, like Google does. The third activity is hosting user-generated content, like YouTube, and the fourth is acting as an information location tool or search engine, like Google or Bing.

The problem is, Congress came up with these categories in 1998, which is like 80 years ago in internet years. The DMCA doesn't fit neatly with new categories of online services including peer-to-peer sharing, torrents, and cloud storage. The DMCA is due for an upgrade. Let's take a closer look at the notice and takedown provision of the DMCA in the Thought Bubble.

So ISPs don't have to actively monitor for infringement, but they do have to act if they know about infringing content. ISPs know there's infringing content on their system when they receive a takedown notice or when they're independently aware of it through either actual knowledge or where it's obvious infringing activity is going on. This is called 'red flag knowledge.'

Copyright owners and ISPs complain that the notice and takedown system isn't working. Rights holders complain that the system only works for large corporate entities. Individuals and small businesses can't afford to constantly monitor for infringement and send thousands of notices. Also the DMCA requires that content be taken down only from the specific location or URL identified in the notice. Once infringing content, like Interstellar posted on YouTube, is taken down, it just gets reposted in a different location. Copyright owners call it the whack-a-mole problem. ISPs complain that the volume of takedown notices is overwhelming.

Google started keeping track of the take down notices over the past several years. The number has increased from about a 130,000 URLs per week in 2011 to nearly 10 million per week in 2015. Lots of these notices are sent using automated systems, which sometimes leads to erroneously removed content that doesn't and can't take into account the fact that the use might be fair. Also, there is some evidence that the take down system is being abused as a censorship tool, as in the case where some candidates' political advertisements have been targeted for removal during the days leading up to a campaign, or as in the case of video game companies flagging unfavorable reviews as infringing content. Thanks Thought Bubble.

Now to get back to the Viacom v YouTube case, the issue really centered around whether YouTube had knowledge that infringing content was being posted to the site, and whether it induced users to post such content.

In 2012, the second circuit court of appeals held that in order for YouTube to lose its safe harbor protections, it must have knowledge or awareness of specific infringing activity. So although YouTube was probably generally aware that infringing content was being uploaded because of the sheer volume of video being posted and the fact they were being sued by a lot of people who were loudly pointing out that a lot of this content was infringing, Viacom couldn't show that YouTube knew about specific infringing content and ignored it.

After yet another appeal, Viacom and YouTube settled the case in March of 2014. One big reason for that settlement may have been YouTube's 2012 development of the content I.D. system. With content I.D., YouTube allows certain copyright owners to upload their content into a database of protected material. YouTube scans the uploaded content looking for a match in the database. When there is a match, rights holders can elect to either block or remove the offending material, or monetize the video by running ads against it.

Though content I.D. seems to have slowed all the litigation, it's kind of really upset the YouTube user community. Critics point out that the automated system can censor fair uses of protected content and sometimes unfairly flag certain videos. Others claim that the system doesn't go far enough, arguing that YouTube gamed the DMCA in rapidly evolving markets to turn a billion dollar lawsuit into a lucrative business deal, and that YouTube should be more

proactive in ferreting out infringing content.

In any case, it appears that content I.D. is here to stay into the foreseeable future, and there are probably several settlement agreements that require its existence anyway. For the time being, content I.D. will continue to chip away at some YouTubers incomes, which leads us to the issue of monetizing YouTube videos. It's not an incredibly easy thing to do. The difficulties inherent in generating income on YouTube become more complex when you talk about freebooting, which is the unauthorized copying of online content and rehosting it on another website.

Unlike linking, sharing, or embedding the file where the original creator is credited and paid for any views that take place, the freebooted file is actually downloaded and reposted on another site where it generates revenue. Our friend Destin at Smarter Every Day made an excellent video about it that you should watch.

Freebooting is kind of interesting; the companies that are hosting these infringing videos have something of a perverse incentive to slow down the DMCA takedown process. The longer the video is up of their site, the more views and revenues it generates. While they're observing the letter of the law and eventually taking the stuff down, it seems a little fishy to me.

In any case, the compensation structure of YouTube is often at odds with the incentive structure of copyright law. Authors are granted exclusive rights for a limited time so they may financially benefit from their creation either through sale of copies or licensing access to the work. But this limited grant of exclusive rights becomes less limited all the time as copyright term is extended and extended further into the future. Speaking of the future, let's wrap things up with a little futurism.

We're gonna look at a few problems with current intellectual property law, and we're gonna talk a bit about what the future might look like. We painted a pretty rosy picture of trademark law, and at its core it is a consumer protection measure that really does function pretty well. We all have to buy things, but trademark law makes sure we can more easily locate and buy the things we actually want and need, but owners sometimes overreach and abuse the system.

Trademarks are everywhere, and for better or worse, they've taken on such a level of importance to our day-to-day lives that it's impossible to Photoshop out every soda bottle or shirt logo in our videos. And by the way, Photoshop is a registered trademark of Adobe Systems Incorporated, not a generic term for digital photo editing.

And even if our old friend T-Swizzie registers phrases like "this sick beat" and other lines from her songs, it's not that worrisome. Trademark registrations don't give owners the right to dictate how a phrase or mark is used. Trademarks become problematic when owners try to use them to restrain speech, like where a restaurant threatens the author of a bad Yelp review with trademark infringement.

So, patents are a little more of a mess. A lot of recently issued patents are for inventions that are unoriginal, vague, over-broad, or so unclear that bad actors can easily use them to threaten innovation. For example, patents have been issued to basic technologies like sending and receiving of streaming audio and video over the internet, voice over IP systems, and real-time multiplayer games. To me, all of these seem like basic building blocks for other products. These bad patents seem to serve no function besides generating license fees and curbing innovation. This is really the case with software patents, where inventions can be as abstract as a single click to purchase a book or the idea of sorting your Facebook friends into groups.

Patent trolls are non-practicing entities that take advantage of these vague patents by filing vague legal complaints. Even if you've closely read the patent and you know your stuff, it's kind of hard to figure out how you've infringed the thing. There is patent troll legislation currently pending in the House that would require companies bringing lawsuits to use greater detail in their documents, and there's actually a good chance that this patent troll legislation is going to pass next year.

Okay, so we spend a lot of time on copyright in this series because we encounter it so often in our day-to-day lives. It's simply inescapable, and judging from the comments you posted, a lot of you really hate it. Law professor Jane Ginsburg has an idea of how copyright lost it, and got a bad name. She attributes it to "Greed. Corporate greed and consumer greed." Corporate owners trying to increase earnings have lobbied for and gotten more protective legislation that extends the term of copyright and interferes with the development of consumer-friendly copying technologies. Consumers want to share content and get stuff for free, and they feel that any law or enforcement mechanism that gets in the way of what they can do with their own equipment in their own homes is illegitimate, and it's a threat to the public interest. Copyright owners argue that there are now so many creators that strong exclusive rights are the best way to promote the public interest.

So one thing I've noticed in the comments is that you guys think copyright term is way too long. Well, there's evidence to back this belief up. Fewer than 11% of copyrights registered between 1883 and 1964 were renewed at the end of their 28-year term. Even though renewing didn't cost very much. So back when stuff could move to the public domain, copyright owners let 89% of their works lapse, because the works no longer had any economic value, or the authors just didn't care anymore. In our current system, the copyright term is automatically life plus 70 years with no renewal requirement. But a similar percentage of today's copyright-protected works will likely be neglected and forgotten about within a few decades, or even a few years of their creation. The only difference is that they're still protected by copyright. This creates a huge body of work that's under protection, but where the author or owner often can't be found to grant permission for use. There are called "orphan works." Good-faith users that want to make use of these works can't find the owner, can't get permission, and therefore face the risk that they'll be sued if the owner does eventually step forward. The copyright office is advocating for legislation that will limit liability for good-faith users of orphan works who've at least made some attempt to find the owner. This legislation also might create a framework for the private sector to develop rights clearance mechanisms that will make it easier for creators to use copyrighted work. It's possible that Congress may consider introducing legislation along these lines in the coming years, but you know how Congress is.

There are also some really interesting private initiatives that have tried to address the super-long copyright term. Organizations like Creative Commons and copyleft have attempted to let creators choose how their work can be used by others, and these movements have gained some traction. It's hard not to just argue that the term should be shorter, but that's really hard to do. Changing US law requires the revision and maybe renegotiation of all these international treaties that further entrench the life-plus-70 term, and the US is signing more of these treaties all the time, so unfortunately, the life-plus-70 term is here to stay.

So I may have given the impression here that intellectual property law is a stinking cesspool of greed and confusion, but I'm going to argue that there is some value here. The basic notions--that individual authors should be rewarded for their creative efforts, that

inventors should profit from their inventions, and that manufacturers of goods should be able to market their products without fear that knockoffs will appear on supermarket shelves--these are all good ideas. Maybe you think they're not, but I believe that we as a society can't neglect our creators and innovators. We also can't allow outdated laws to prevent technological innovation and progress. The trick, as always, is striking a balance, a combination of strong exclusive rights for authors and inventors, and equally strong exceptions and limitations that allow for creators to build on work that came before. Is this possible? "Reply hazy. Ask again later."

Well, there you have it. As usual on Crash Course, there are no answers, only more questions. Next week, we're going to start looking at questions around the world economy with Crash Course: Economics. Thanks for watching.

(Outro)

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