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THE ANTI-PIRACY LANDSCAPE IN THE MOTION PICTURE INDUSTRY

A MANY-PRONGED ATTACK

By **Karen Thorland**
Loeb and Loeb

While what some in the industry call “viral video” sites (YouTube, DailyMotion, Veoh, etc.) have garnered significant press and attention in recent months, even content owners find themselves on different sides of the debate as to how unauthorized copyrighted content on such sites should be handled, and addressing the piracy of motion pictures on these video hosting websites is just one challenge in the motion picture industry’s ongoing fight against piracy. On the one hand, the popularity of video hosting sites exemplifies the industry’s biggest challenge – keeping up with technology and the ever changing face of film piracy. On the other hand, advances in the technology don’t just favor pirates they also offer content owners new tools for catching and identifying pirates. Several major types of piracy are faced by the motion picture industry and warrant separate attention in the fight to protect the industry’s most valuable asset – its content.

INTERNET PIRACY

While all piracy raises concerns for the industry, the nature of Internet makes it arguably the greatest threat to the motion picture industry. When users share or post unauthorized digital motion picture files on-line they make those motion pictures available to tens of thousands if not millions of other users. Moreover, this viral infringement occurs with little or no degradation of the digital file – the hundredth copy is as good as the first. According to a study by LEK

Consulting, Internet piracy cost the members of the Motion Picture Association of America (“MPAA”) in excess of \$2.3 billion in 2005. So what is the industry doing to address this?

Education: Education regarding the consequences of piracy has remained an important component of the motion picture industry’s fight against Internet piracy. With pressure from the industry, college campuses are taking action to educate students regarding Internet piracy. For example, this year thousands of students at the University of California, Berkeley will attend orientation workshops at residence halls where they will be required to view a video discussing the consequences of illegal file sharing and to register for Internet service in their dorm rooms, students will have to read warnings about copyright infringement and acknowledge that they understand its legal consequences. Additionally, the MPAA has backed legislation – called the Curb Illegal Downloading on College Campuses Act of 2007 – aimed at curbing campus piracy by giving colleges and universities greater incentive to implement anti-piracy tools on campus networks. The attention on college campuses is well placed, according to MPAA Chairman & CEO Dan Glickman, campus piracy “represents 44 percent – over \$500 million annually – of total domestic losses to major U.S. motion picture studios.”¹

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¹ Press Release, MPAA Welcomes Keller Legislation Aimed at Curbing Campus Piracy, Motion Picture Association of America (March 29, 2007).

THE ANTI-PIRACY LANDSCAPE

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Identifying & Removing Content: In the past year pirates have found new ways to try to avoid detection and the removal of their content. According to BayTSP, a California anti-piracy consulting firm that battles illegal Internet content sharing, when sites like YouTube became a target for copyright enforcement, pirates migrated to foreign sites, such as French site DailyMotion, or used random character files names (rather than naming files with film titles) “and then created websites or blogs touting the unauthorized content by its real name and directing viewers to the code-named files.”²

Fingerprinting and watermarking technologies provide companies with new methods for monitoring and preventing the illegal sharing of their copyrighted content on the Internet. For example, a fingerprint for a video file can be created and compared to unknown content on the Internet to see if their fingerprints match. Fingerprinting technology can be used to filter copyrighted materials (i.e., remove it from a site), to identify it for purposes of asking site operators to remove the material after it has been posted or to identify it for purposes of monetization. In one example of the use of fingerprinting today, DailyMotion recently launched a version of its service in the United States which implements copyright filtering by Audible Magic. However, since fingerprinting technology identifies content based on matches to the fingerprint, its use is not limited to the context of peer-to-peer sites and it can be employed in connection with searches of the Internet at large for infringing content. Searching beyond the peer-to-peer environment, one fingerprinting company, Attributor Corp., will begin monitoring text on line for the Associated Press.

Once infringing content is found, content owners have a number of options available including issuing take down notices, pursuant to the Digital Millennium Copyright Act (“DMCA”) or otherwise. The “takedown notice” is a commonly used tool because the notice calls on the company hosting the content in question to remove the digital files immediately. Take down notices often result in the prompt removal of offending content but the issue remains whether the motion picture studios should be solely responsible for policing sites for their content when those sites attract more users, and therefore increase their revenues, because of the availability of that very content.

Another way to make the infringing content unavailable is to shut down the sites that host the content or links to content. The MPAA, through its member companies, has brought actions against torrent site administrators seeking to shut these sites down and obtain damage recoveries. In Columbia Pictures, Inc. v. Bunnell, pending in the Central District of California, motion picture studios filed a copyright infringement suit against operators of a web site called TorrentSpy that allows users to locate and download dot-torrent files including files containing motion pictures. In this ongoing case, the motion picture studios received a notable ruling in their favor when the District Court upheld the magistrate judge’s ruling ordering the defendants to produce activity logs from their computer servers that would show the identity of the dot-torrent files requested, the dates and times of such requests and the IP addresses of the users in an encrypted form. According to a statement issued by the TorrentSpy, following this ruling the company has blocked access to the site by U.S. users. The prior iteration of Napster, Grokster, Aimster, LokiTorrent, and SuperNova.org, are among the companies who once profited from illegal file-sharing that have ceased operating following litigation by the entertainment industry. However, the legal landscape remains less predictable overseas. In August 2007, a Moscow court decided to free the former owner of one of Europe’s largest pirate sites – allofMP3.com – finding prosecutors guilty of “extreme negligence” in collecting and presenting evidence against him.³

Notifying or Suing Individual Infringers: After identifying and/or removing infringing copies of motion pictures from the Internet, the question remains whether or not to pursue the individual infringers. The Internet protocol (“IP”) address of on-line infringers can be obtained with relatively straightforward

technology. With the IP address in hand, motion picture companies can call on Internet service providers (“ISPs”) to notify their customers of the infringement and/or they can serve ISPs with subpoenas seeking the identity of these customers. While ISPs do not always pass on infringement notices, when they do infringing behavior is curtailed according to Aaron Markham, Director of Anti-Piracy Technical Operations for NBC Universal.

In addition to sending notices, motion picture companies have filed lawsuits and sought to identify and prosecute Internet infringers. Since November of 2004, individuals who have infringed copyrighted motion pictures via the Internet have been sued in lawsuits across the country, many being ordered to pay upwards of \$6,000 for sharing a single motion picture on a peer-to-peer site. While suits against individuals who infringe the films by downloading and uploading motion pictures through Peer-to-Peer sites have continued, there have also been cases brought in the last few years against “early propagators”—i.e., those who first make a pirated file available on a major peer-to-peer site. Last summer, Paramount obtained a judgment of \$50,000 in statutory damages against an individual who was the first propagator of the motion picture “Lemony Snicket’s: A Series of Unfortunate Events” on the file-sharing network eDonkey, making the file available for download just one week after the picture’s theatrical release.⁴ These suits serve the goal of making infringers realize that there are possible severe consequences for infringing copyrighted material. However, new technologies may make suits against at least some infringers more difficult in the future. For example, “onion routers” can mask the true location of an infringer by re-routing messages and the content they contain in an unpredictable path through a series of proxies.

Involvement of Law Enforcement: There are a number of factors for copyright owners to consider in seeking out the assistance of law enforcement in connection with the piracy of their films on the Internet and through other means. First, as Assistant United States Attorney Matthew A. Lamberti points out, while civil remedies may be available for innocent infringements, criminal prosecution under intellectual property statutes requires *mens rea* – e.g., for copyright, willful infringement. Additionally, criminal statutes may include threshold dollar amounts that make them inapplicable to infringement of a limited magnitude. Moreover, content owners obviously give up control of the pacing and strategy of the prosecution when they hand a matter over to law enforcement. However, when criminal prosecution is available and law enforcement is interested in pursuing the claims, the benefits to the content owner both financially and on the public relations front can be substantial.

Law enforcement has been active in the area of Internet piracy in recent years. In an international effort beginning in 2005, the FBI and law enforcement agents targeted “warez” servers in Operation Site Down, focusing on “so-called ‘release’ groups that operated as the original sources for a majority of the pirated works distributed and downloaded via the Internet. Once a warez release group prepares a stolen work for distribution, the material is distributed in minutes to secure, top-level warez servers throughout the world.”⁵ To give an idea of the scale of infringement involved, over 27 terabytes of pirated movies, games and software were contained on just four of the warez servers targeted by the investigation according to Lamberti. As of 2006, according to US Department of Justice statements, Operation Site Down’s San Jose efforts (known as Operation Copycat) had resulted in charges against 32 individuals and 20 convicted. Overseas efforts by law enforcement have included a raid by government officials on the co-location facilities for the infamous Pirate Bay, confiscating tracking servers operated by the site and temporarily taking it offline. However, tracking sites are often able to get back on-line quickly simply by changing ISPs. Law enforcement efforts have not been limited to warez groups and tracking sites, they also have targeted individuals, including Jorge

² Fighting Piracy 2006 (BayTSP Los Gatos, California), 2007, at 2.

³ Nick Holdsworth, Russian Rights Holders Decry Decision, *Hollywoodreporter.com*, August 17, 2007.

⁴ Paramount Pictures Corp. v. Davis, No. 05-0316, 2006 WL 2092581 (E.D.Pa. July 26, 2006).

⁵ Press Release, Justice Department Announces International Internet Piracy Sweep, ‘Operation Site Down’ Attacks Organized Piracy Networks In 10 Countries (June 30, 2005).

Romero, who now faces three years in prison for uploading pirated episodes of the Fox television series "24" to the video sharing site Livedigital.com almost a week before the episodes premiered.

Making Content Available Through Legal Sites: In the last year the motion picture industry has opened the way for their films and other filmed content to be available to the public through legitimate, legal means. CinemaNow, Vongo, Movielink, Movieflick, iTunes, Wal-Mart and others now offer motion picture downloads and Amazon's digital download store is set to launch in the near future. With more and more content readily available through these legal sites, the hope is the draw of Internet piracy will wane.

OPTICAL DISC PIRACY

The illegal manufacture and distribution of hard copies of motion pictures in digital disc formats, including DVD and CD, continues to plague the motion picture industry. These discs, which are often poor quality, can be found on street corners from New York to Los Angeles to Hong Kong and around the globe. But illegal discs are not just sold in alleys and on corners; they can be found on websites, on online auction sites, at flea markets and sometimes in small shops. A recent study by LEK Consulting estimates that members of the MPAA lost approximately \$3.8 billion worldwide due to physical piracy in 2005.

The MPAA reports that it worked with law enforcement around the world to seize over 81 million pirated optical disc products in 2005 alone. This effort has continued. In August of 2007, 3,000 counterfeit DVDs were seized in a raid in London on a pirate DVD distribution center. The recovered DVDs included the first known counterfeit copies of "The Bourne Ultimatum," which had just been released in the UK. China has cracked down on pirate DVD vendors in Hong Kong in past months, arresting sixteen DVD vendors and seizing 8,800 optical discs in Shenzhen on a single day.

CAMCORDER PIRACY

The camcording of a movie can result in illegal copies appearing online within days or even hours of the motion picture's premiere. Similarly, bootlegged copies of films that have just been theatrically released in the U.S. can make their way to the streets of cities across the world within days and well in advance of any international premiere.

Legislation: Much of the focus of the attack against camcording has been on obtaining legislative changes that criminalize the use of recording devices in theaters. According to the MPAA, 40 states, Washington D.C. and Puerto Rico have laws against camcording. In 2005, the Family Entertainment and Copyright Act made it a Federal crime – a felony – to camcord a movie. Efforts to obtain legislation against camcording in other countries have resulted in some recent success. For example, in May of this year, Japan enacted a law criminalizing the act of bringing a camcorder into a movie theater to pirate films. Violators of this new law could face up to 10 years in prison and stiff fines.

Technical Efforts: Obviously, camcorders must be found if they are to be prosecuted. Technical measures such as "watermarking" can help investigators track down the source of a camcorded copy by allowing them to determine the time, date and exact location of the screening where the copy was made. Watermarking is an invisible code unique to each screening of a motion picture. Although the code is buried in the film and not visible to someone viewing the film, it is recorded on the camcorded copy, allowing investigators to determine where and when the copy was made.

THE BIG PICTURE

There are numerous types of piracy and anti-piracy efforts that have not been discussed here. But at least two things are clear from even a cursory look at the piracy landscape. First, technology is both a friend and an enemy in the fight against motion picture piracy of every kind. Second, the costs of both piracy itself and of development of the technology needed to protect content from theft are enormous. ■

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Karen R. Thorland is a partner at Loeb & Loeb LLP in Los Angeles. Her practice focuses on IP and Entertainment Litigation.