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Copyright Laws and the Digital World: In Sync or Badly Dubbed?

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In light of the recent claim against YouTube performer Michelle Phan, Paul Harris, an intellectual property litigation partner at Pillsbury, reviews how copyright laws are functioning in the modern world.

"The latest YouTube sensation" has become common parlance for videos and increasingly, people are becoming an instant worldwide hit. The likes of Justin Bieber, Gangnam Style and Fenton the dog have emerged on social media as global sensations, with some enjoying more longevity than others.

Michelle Phan, an American make-up demonstrator, is another name to have built up a major following via the video sharing network. Her YouTube channel, which launched in 2007 and focuses on make-up demonstrations, has amassed almost seven million followers who tune in to see her tutorials.

However, it was not the quality of Ms. Phan's beauty advice that was of concern to some of her audience. It was announced in July that she was being sued for alleged copyright infringement over the songs she used in her make-up videos. Ultra Records said it was seeking $150,000 in damages for infringement of more than 45 music sources. The action against Ms. Phan has sparked a debate over the use of copyright material and the aggressive pursuit of infringement.

Indeed, the case poses some key questions surrounding copyright in the modern world. The advent of technology has always caused problems, whether it is the recording of the pop charts from the radio (there was much furore when Sir Alan Sugar's Amstrad launched its twin-tape recording machines in the 1980s), the plague of piracy in early computer games (particularly the 'work around' patches to avoid the games' input codes that could only be found in a game's official instruction manual before being allowed to play), or dodgy VHS videos filmed in a cinema with a clandestine camcorder being sold out of the back of a pub or in a car boot sale, every generation has the same idea about what can, or should, be allowed to be copied freely.

Currently, we have the 'Internet Generation', for whom the OpenSource software sharing approach pervades much of the thinking behind those who enable the streaming of films and music. These individuals seem to fail to understand the amount of investment of time and money required to make blockbuster films and produce music. So while they may not go into a shop and steal

a physical CD or DVD, the concept of sharing “digital” music or video for free does not resonate as strongly.

As with the pharmaceutical industry (which also uses the term ‘blockbuster’ for its top selling drugs), there is a need to make money out of their good drugs in order to support lots of clinical trials and ‘flops’, so too the film and music industry – there are box office hits and total disasters. The Internet Generation seems to ignore this aspect, and instead organisations like the Pirate Bay are formed (they started a few years ago in Sweden), which provide the means for people to stream copyrighted material into their homes for free. Couple this with the law of copyright, seemingly out of step with the technological advances, and you have a recipe for disaster (or a lawyer’s paradise – which amounts to the same thing!).

Share and share alike

YouTube is perhaps the most well-known and popular platform for sharing videos and music. The case of Ms. Phan is the latest in a string of litigation brought against YouTube, with copyright infringement being a tricky subject for the courts. Cases around the world have shown the tension between the traditional interpretation of the law and how it sits with cutting edge technology.

One of the most high-profile examples was Viacom’s $1 billion case against Google (YouTube’s owner) for uploading tens of thousands of its shows without permission (the case settled). The US National Music Publishers Association also settled a case against the website over illegal use of music videos, which included the formation of a licensing agreements where YouTube pays royalties, while the UK Premier League ended up dropping its case against YouTube last year over copyright infringement of football matches. There was also the case in the US of Lenz v. Universal Music Corp, where the judge ruled that “fair use” must be considered before issuing a takedown notice. Other similar cases have been heard in Spain and Germany.

YouTube has been targeted (and then embraced) by the major media moguls for unauthorised uploading of TV and film clips. Many blogs or websites also simply cut and paste copyrighted images without much of a concern.

Ms. Phan though, unlike the hardcode pirates or illegal music downloaders, was using the music as a background. Think nail beauty parlour, or hair salon, and you’ve got some idea of the thought process behind what she did. It may not be as blatant as the dodgier practices but the key is that she was still using the record company’s music without its permission. The case is, of course, pending but history in the UK shows some very interesting inter-pretations of copyright infringement with emerging technologies.

Judges have to apply the existing law to solve problems which have been created by new technological processes. So in *CBS Songs Ltd and others v Amstrad Consumer Electronics plc and another [1988] RPC 567* (the case concerning copying using the twin-deck tape recorders), the House of Lords was applying the Copyright Act 1956, which was not designed for this technology. While the law being applied now is only 11 years old (and the Internet has now been around a while), the technology is still moving on rapidly.

I suspect Ms. Phan, who is referred to in this story, knew exactly what she was doing. Frankly, if she’s ever worked in a salon, she’d know a licence is required. However, (and somewhat ironically) one of those whose music Ms. Phan has used, Ryan of Kaskade, has come out in support of Michelle, remarking that copyright law is a dinosaur. Yet his website still has a copyright notice for his material, with the usual ‘All rights reserved’ warning. Nice one Ryan!

Changing times

How has the pursuit of copyright infringement changed in the past decade? The disputes and degree of knowledge required to handle them have become more complex and methods of infringement have become much more diverse. At the same time, as mentioned earlier, the law is struggling to keep abreast with changes in technology. The case of *SAS Institute Inc v World Programming Ltd [2013] EWCA Civ 1482, [2014] IP & T 312* is a good example below.

The action started in the High Court in 2010, went to the Court of Appeal, and then there was also a referral to the Court of Justice of the European Union. The issue was whether SAS’s copyright in its software had been infringed in circumstances where World Programming Ltd had not copied the actual source code, but had simply observed its functionality and created a new programme which mimicked the output.

The High Court had to consider the Software Directive 2009/24/EC relating to computer programmes,

and also the Information Society Directive 2001/29/EC (the latter relating to infringement of the user manual). It was found that SAS's copyright had not been infringed – except in relation to aspects of the user manual. While understanding how various forms of technology work is a continuing challenge for copyright lawyers, it's just as much of a challenge for legislators. More so is the given the pressure in finding parliamentary time to debate the matter, and then for an appropriate Bill to go through. However, lobbying from the film and music industries has resulted in some changes to the Copyright, Designs and Patents Act 1988, specifically (in 2003) to include Internet Service Providers, so that the means by which infringement occurs could be cut off if the court was persuaded to grant an injunction. Again, highlighting the time lag, it has taken until 2014 for two cases to consider key aspects of those changes – including a trip to the UK Supreme Court.

Michelle is something of an amateur when it comes to using copyright material and this seems to have appeared relatively quickly on the radar of copyright owners. Film studios and other large owners of copyright material are quite sophisticated in their approach to detecting infringement in the way that they have people who do nothing but search for people using streaming and other forms of unauthorised use. What does take time, however, is the legal process once an infringement has been identified. Enforcement is a long and often arduous process; before clients embark on an enforcement action they must weigh up the investment in time and costs involved and determine if it will be worth it.

Financial benefits

Just because copyright is infringed does not necessarily mean that the person using the copyright material financially benefits from their actions, other than perhaps saving themselves a few pounds or dollars at the till. Many people who have been sued used copyright material for their own use and enjoyment, but they did so on a large scale – for example, downloading whole albums of an artist. Of course, there are always those who will benefit from pirating the copyright material and selling it in those same pubs or car boot sales, or some local market where the dodgy VHS or CDs have been making their ubiquitous appearances for years.

For those who want to make their films or music available for free, and to waive any rights they may have in it, there is nothing to stop people from making their own music and putting it on YouTube or other social media sites. But generally, people will always want to make money out of their copyright material. Those who do so will probably appreciate that they want to protect their own material, in which case their attitude to copyright infringement is likely to change. As more people are educated about piracy, and come to appreciate the need to protect copyright, so the demand for the likes of Pirate Bay will diminish. But I doubt it will ever truly go away – there are always those who do not want to pay for something that they know they should. The fights will continue; it's just that there will be fewer of them.

But there are always the Michelles of this world in every jurisdiction, and the likes of the Phonographic Performance Limited (who chase those without a licence) regularly appear before the Chancery Division judges in the English High Court. It's the legal equivalent of Michelle's background music: ever present, even if few pay attention to it. Perhaps it's time we should.

Will copyright law ever truly catch up with technology? Probably not, but they may at least get close enough to be able to apply them without unduly torturing the wording of the statute.

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