Sacked by Copyright

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Shortly after the Super Bowl this winter, I posted my first clip to YouTube. The "Super Bowl Highlights" I extracted from my MythTV were moments only a copyright lawyer could love: The copyright warning intoned during the third quarter, "This telecast is copyrighted by the NFL for the private use of our audience. Any other use of this telecast or of any pictures, descriptions, or accounts of the game without the NFL's consent is prohibited," followed by several seconds of uneventful football.

I posted the clip to my blog as an example of copyright overreach: Copyright in the telecast can't prevent sharing of pictures and descriptions or quoting the announcers' accounts, no matter what the NFL says. Before I could even raise the issue in class, however, the NFL showed it took its words literally. NFL sent YouTube a takedown notice alleging that 162 different YouTube videos infringed "NFL Copyrighted Content." Pursuant to the Digital Millennium Copyright Act, YouTube removed the clip.

Since I was confident that the 30-second clip was fair use, not an infringement of copyright, I took the next step in the DMCA dance. I filed a counter-notification and waited 10-14 business days for YouTube to replace the clip. The video went back online 14 business days later, but shortly thereafter, was downed again, by a second NFL complaint. I sent back the same counter-notification, and, as of this writing at least, the clip is back online after another two-week delay. Catch it while you can, since I can't predict whether it will stay this time either.

As founder of the Chilling Effects Clearinghouse, where we've been chronicling the chill from of legal threats for five years now, I knew that copyright holders frequently overstated their rights. Even so, I wasn't prepared for this twist. The DMCA describes one round of notice, takedown, counter-notification, and putback, not several. After one exchange, YouTube and other Internet hosts should be able to step to the sidelines, leaving the dispute between the poster and copyright claimant. Instead, NFL didn't contact me directly until after the second takedown and putback, when they wanted to correct the portrayal of their claims. The NFL said they did not object to my posting of the copyright notice, only to the game footage which followed.

I stand by my fair use analysis of the entire clip. My use is for nonprofit educational purposes; the copyright in the telecast is thin; the portion of football that follows the copyright warning is a minute portion of the whole game, with no significant action or commentary, useful to show people what it was the NFL claimed its copyright covered; and the effect on the market for or value of the work is non-existent. As I replied to NFL, the material following the copyright warning gives it context, identifying it as the Super Bowl and letting viewers see to what kind of copyrighted material the claim is applied. All these are key to the discussion purpose for which I posted the video clip.

As of April 12, my video clip has been offline more days than on. But while it couldn't be used to talk about the copyright warning, it illustrated a larger problem. The DMCA empowers copyright claimants

to demand expeditious removal of alleged infringements, but gives the poster far less recourse to assert the use was lawful. Since we all depend on intermediaries to speak online, the laws of intermediary liability, and the incentives those laws create, seriously impact the speech we're able to make and receive. Overreaction to the problems of copyright infringement has left us with laws that limit our opportunities for fair use, while many copyright holders feel even those laws fall short.

The DMCA encourages service providers to respond to takedown notices with a "safe harbor," promising them immunity from liability if they expeditiously remove or disable access to claimed infringing materials. When a copyright claimant sends a compliant notice, the Internet service provider can avoid litigation risk by removing complained-of material without investigating its infringing character. Then, if the poster counter-notifies, the ISP can retain its immunity while re-posting the material 10 to 14 business days later. As a practical matter, the ISP is permitted but not required to replace content because its terms of service will generally protect it against any liability for removal. Moreover, the counter-notifier must be willing to swear to "good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled." The original notifier, by contrast, needs swear only to authorization to notify; its allegation of infringement is unsworn. Finally, section 512(f) permits those harmed by takedown to recover costs and fees from those who "knowingly materially misrepresent[]" infringement.

Through Chilling Effects, I see many DMCA notifications, but virtually no counter-notifications, though the Chilling Effects site provides a form by which users can generate the necessary boilerplate elements. The required statement under penalty of perjury is a daunting one to most non-lawyers, even when they strongly believe their postings to be lawful. Some of the notices raise valid claims of infringement, but a substantial number target materials with a strong defense of non-infringement or fair use. These include disputes between competitors over coincidental textual similarities; complaints against critics who have quoted text from the sites they criticize; political disputes. In each of the cases of mis-notification, the public loses access to potentially valuable commentary. A better balanced, less demanding counter-notification provision, and stronger remedies against abusive notifications could reduce this chill.

Reform is warranted because in many ways, the DMCA is a boon to developers of online services. Within the safe harbor, YouTube can offer a platform for video hosting without pre-screening the materials users post – a near-impossible task for a popular, rapid-exchange host – and so makes room for a wealth of independent comedy, journalism, and cultural commentary. Significantly, Viacom's recent complaint against YouTube does not allege any failure to comply with safe-harbor obligations. Rather, it takes issue with the premise of the DMCA, arguing that YouTube should bear the burden of monitoring for and filtering out prospective infringement. Unsatisfied with "expeditious" takedown, Viacom wants to outsource its copyright enforcement further. Even if GooTube were now in a financial position to take on that burden, recall that YouTube started on its own and independently outpaced Google Video. Harbored by the DMCA, other competitors may emerge offering still more compelling platforms, ultimately to the benefit of creators of new copyrighted material.

We can protect both innovation and free expression with copyright law that hews to the constitutional purpose, "to promote the progress of science and useful arts." That progress depends on a balance of protections for authors, developers and ISPs, and the public. The Internet gives the all of us tremendous opportunities to be both author and audience. Copyright law should protect us in both roles.