Copyright trolls pose growing challenge to TMT risk management

By:
Tina Veale, Willis Towers Watson &
James Sammataro, Pryor Cashman

Early last year, web developer Daniel Quinn received a call from a law firm claiming that he was infringing on a photographer's copyright. Quinn, scrupulous about copyright requirements, pulled the photo immediately and then inquired about the license fee, thinking it might be prudent to pay a few hundred dollars if indeed he had unintentionally used the photo.

The law firm's representative said the license fee was $20,000.

Quinn's tale of his subsequent struggle with the law firm was posted in a Techdirt blog that examined the questionable practices of a possible copyright troll. It turns out that the $20,000 demand was just the beginning. The law firm raised the ante with the threat to seek statutory damages of up to $150,0000 for intentional infringement or $30,000 for unintentional infringement, plus attorneys' fees.

With no reasoned resolution in sight, Quinn retained a lawyer who characterized the matter bluntly: "This is copyright trolling." Meantime, the case is pending, with mounting legal costs, while a cloud of uncertainty hovers over Quinn.

This case involves a small business, but imagine the same thing happening on a much greater scale to any business, with technology, media and telecom (TMT) operations among the most vulnerable. Then again, why imagine? It has been happening for years.

What is "copyright trolling" and who is vulnerable?

The landscape of copyright litigation has been overrun by "copyright trolls." In an oft-cited, early study of this disreputable subspecies of entrepreneurs, an Iowa law review article defined a copyright troll as "more focused on the business of litigation than on selling a product or service or licensing their [copyrights] to third parties to sell a product or service." Senior U.S. District Judge Denise Cote aptly described the business model: "A copyright troll plays a numbers game in which it targets hundreds or thousands of defendants seeking quick settlements priced just low enough that it is less expensive for the defendant to pay the troll rather than defend the claim."[1] [i]

Adult film companies pioneered and mastered the art of copyright trolling. First, they file John Doe complaints to break the veil of anonymity between an internet protocol (IP) address and the actual human accessing the copyrighted material through that IP address. Then, they blast thousands of demand letters and strike quick settlements on a mass scale by shaming adult film viewers and the occasional misidentified defendant into paying what amounts to hush money. The hallmark of the hustle is a nuisance-value calculus: Settle for an amount that is low relative to the potential statutory damages and defense costs but high relative to the market value of the copyrighted work (which could have been rented for a pittance). A copyright troll's success derives "not from the Copyright Act, but from the law of large numbers."[ii] Over 40% of the 3,813 copyright infringement lawsuits filed in 2013 were John Doe complaints, with over three-quarters of those related to adult films.[iii] Driven by adult film-trolling kings such as Strike 3 Holdings and Malibu Media, 5,032 copyright infringement lawsuits were filed in 2019.[2]

[1] *It is important to distinguish aggressive, legitimate protection of copyrighted material from what may appear to be an unethical trolling operation. Although the term "troll" has earned a negative connotation, copyright infringement is a real and massive problem. The livelihood of writers, photographers and artists depends on the protection of copyright law as much as the profitability of major studios, publications and web platforms.*

[2] Lex Machina litigation database.

The adult film industry was able to perfect this litigation model by leveraging a potent dynamic peculiar to its defendants: shame. Nevertheless, this litigation model proved to be transferrable to other industries even without the threat of humiliation. Standard trolling runs the same plays: file a deluge of slap-dash complaints, leverage the high cost of discovery (effectively weaponizing the courts) and force quick-strike settlements. And, when a quick resolution is not possible, avoid merit-based litigation either by cutting and running or by employing unorthodox, vexatious, abusive tactics to extract settlement.

Copyright trolling surfaces wherever copyrights might be claimed, including music deceptively offered as "free music," blog articles, home design plans, online photographs and clothing fabrics. Adept trolls lay traps to ensnare unwitting defendants. Consider, for example, Larry Philpot, who "places his photos on the internet, protected only with a 'Creative Commons' license. This means that anyone may use the images for free, so long as they provide proper attribution to Philpot, along with proper identification of the image. When users re-publish one of Philpot's images without attribution, he sues them for damages."[iv] Freeplay Music allegedly sets a similar trap. Its website touts: "Over 50,000 songs for free for YouTube™ or more."[v] Yet, the company stands accused of running a bait-and-switch extortion plot that lures unsuspecting users blinded by "free" ads only to be sued for using the very music they were encouraged to use.

Paparazzi photographs supply today's most alluring and most profitable trolling bait. The current troll kings are photo agencies, such as BWP Media, Splash News, and Richard Liebowitz. (Liebowitz is a New York attorney who has filed more than 1,100 copyright infringement cases in the last three years, and been branded by judges as a "troll," a "legal lamprey," "an example of the worst kind of lawyering" and a "clear and present danger to the justice system."). A-list celebrities — including Gigi Hadid (twice), Jennifer Lopez, Katy Perry, Khloe Kardashian, Ariana Grande, Nicki Minaj and Lebron James — have all been sued for posting photos of themselves on Instagram. Nearly every major media company — ABC, CBS, Forbes, NBC Universal, Prometheus Global Media, Turner Broadcasting, Variety and Viacom — have been trolled. No one is safe.

Most settle. The trolls have perfected the cost-benefit balance of bitter-pill pragmatism of settlement on one side and determined litigation over the troll's damages (because liability is already a foregone conclusion) on the other side. The average strike point is approximately $20,000 — the amount of the demand sent to Quinn, our web developer. That's $20,000 to settle for a photo that could have been licensed for roughly $100.

Collectively, TMT companies have paid trolls hundreds of thousands of dollars. Even with the institution of best practices, TMT companies, their business partners and users are particularly vulnerable to copyright trolls. Under the pressure of a publishing deadline, a content provider may utilize a photo mistakenly believing it to be within the company's Getty license. Likewise, TMT companies display third-party content and, consequently, face the ever-increasing burden of combatting false Digital Millennium Copyright Act (DMCA) take-down notices, a particularly gnarly strain of trolling that forced YouTube, for example, to sue a user submitting such false notices.

Litigation frequency, severity and resolution

The *National Law Review* in June 2019 reported that more than 2,700 additional copyright infringement lawsuits were filed in U.S. federal courts in 2018 as compared to 2017. Much of the excess was attributed to actions filed by two studios against "John Doe" defendants accused of using file-sharing services to download copyrighted videos.

The content of the videos — adult films, it turns out — gave the two studios an unusual amount of leverage over the defendants. Their techniques in identifying the defendants offer a window into trolling. In both cases, the studios used third-party forensic investigators to establish connections with a defendant's IP address. Subpoenas were used to force Internet service providers, such as Comcast, to furnish subscriber lists (the "John Does") for the IP addresses, according to *The National Law Review*.

Technical innovations such as content recognition software make it increasingly easy to find evidence of copyright infringement. Software can now comb the Internet to identify copyrighted photographs, audio and video clips. While these technological developments can be invaluable for copyright holders, they may also provide useful tools for copyright trolls.

A complicated legal and regulatory landscape adds to the challenge of protecting a copyright, avoiding copyright infringement and deflecting trolls. Recent U.S. court rulings have dealt setbacks to copyright trolls. For example, U.S. district courts are finding an IP address does not in itself constitute adequate basis for litigation. But rulings on what constitutes copyright infringement have not always been consistent or clear, often blurring the line between infringement and inspiration.

On the regulatory front, the European Union's 2019 Directive on Copyright in the Digital Single Market ensures that content creators — writers, composers, musicians, filmmakers and others — are attributed and compensated. The directive has been criticized by major technology companies, including Google, which opposes certain limits to its use of content developed by newspapers and other third parties.

It may be years before content developers and Internet platforms reach an accommodation, and the impact will be felt in the United States and other countries outside of the European Union. Until the directive is tested and precedents are set, there could be heightened risk management issues for TMT companies.

Risk mitigation — Legal advice, editorial controls, education

Proper risk mitigation involves a combination of education, editorial control, legal muscle and proper insurance.

Education is key. A number of copyright myths persist, even among savvy employees. The top nine prevailing copyright misunderstandings are: (1) if it lacks the ©, then it isn't copyrighted; (2) if I do not make money from the content, I can use it; (3) public access is synonymous with the public domain; (4) Google images are free for the taking; (5) uses limited to educational purposes are always a fair use; (6) paraphrasing is permitted; (7) attribution and disclaimers insulate the use; (8) a creative commons license provides a free pass; and (9) fair use protects the use.

A keen understanding of what constitutes the public domain is critical: specifically, that whether a work is in the public domain depends not on ***where*** the work can be found, but *when* the term of copyright protection expired — or if it existed in the first place. A post on Facebook or social media does place the work in the public domain.

A firm grasp of the fair use doctrine is essential. There is no bright-line test, and the "7 seconds rule/500 copies/10%/200 words" limitation is an urban legend. Instead, whether a use is fair is contextual and involves balancing a complex list of variables, including (i) the purpose and character of the use; (ii) the nature of the copyrighted work; (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (iv) the effect of the use upon the potential market for or the value of the copyrighted work. Critically, fair use will ***not*** prevent you from getting sued; instead, fair use is a defense *in case* you get sued. Only the court can determine if the use was, in fact, fair.

Editorial control — Vet your content. Editorial controls are equally critical. A pre-broadcast quality check is critical. Mechanisms need to be implemented to trace the origin of all published content. An individual should be responsible for determining which licenses your company possesses; whether your company possesses the right licenses (Getty Images, Shutterstock, iStock and Fotolia), the terms and conditions of those licenses, and whether the utilized images either fall within the scope of these licenses or are truly royalty-free images. The same analysis must be done for audio and video clips, and the manner in which these clips are used is critical. Additionally, to the extent that you permit the posting of third-party content, you must properly establish and adhere to a DMCA policy.

Legal muscle. Don't settle. Trolls depend upon settlements to feed their operation. A quick settlement begets another litigation. Hearst Media sent a message when it refused to settle, went to trial, and made the plaintiff litigate in order to end up with a verdict of $750.00 (the minimum statutory damages award). The case caused Hearst far more in legal fees than a practical settlement; however, it also announced that Hearst is not an easy mark and is not in the business of easy paydays for trolls. The single-photograph cases call for a coordinated defense where media companies form a consortium and contribute to a collective kitty in order to create sufficient precedent cementing a

"single digit multiplier" concept in which a photograph that could be licensed for $100.00 is capped at statutory damages of under $1,000.00. Enough $1,000.00 verdicts will dissuade copyright trolls.

In addition to demonstrating litigation prowess, legal vigilance must be applied on the front end. Properly ascribe risk in your contracts with third-party content providers and vendors, such as web designers, with customary representations and warranties and, more importantly, smartly crafted indemnification (which allows for selection of legal counsel of your choice) and dispute resolution provisions.

Even with education, sufficient editorial controls and legal know-how, mistakes may still occur. Consequently, any holistic approach must include insurance, including the proper media liability, insurance and/or advertising policies.

Media liability/stand-alone intellectual property insurance

There is insurance available should you find yourself facing a copyright infringement claim.

While a commercial general liability policy often provides "advertising liability" coverage that protects the insured against claims arising from perils such as invasion of privacy, libel, slander and copyright infringement, the cover is related to advertising activities and is often sub-limited.

For companies producing content for purposes other than just advertising, a media liability (E&O) policy can provide an effective risk transfer solution. Media liability coverage is a special type of errors and omissions policy designed for content creators, providers and distributors. Policies provide coverage for the legal costs and damages arising from claims made against the insured for copyright infringement, trademark infringement, unfair competition, plagiarism, breach of confidentiality, invasion of privacy and breach of the scope of a license.

Common media liability coverage exclusions include patent infringement and trade-secret misappropriation. Stand-alone intellectual property insurance coverage should be considered for these exposures. Media liability limits range from $100,000 to $100 million, and deductibles can be as low as $500.

Conclusion

TMT companies must stay at the top of their game to protect their copyrights and to avoid infringing on the copyrights of the content sources. At times, this will pit the interests of newspapers, artists, production studios and other content providers against popular Internet platforms, including such industry titans as Google and Facebook.

A complicated and evolving legal and regulatory environment is further roiled by copyright trolls with business models that derive significant revenue from the threat of litigation involving copyright infringement. But effective risk mitigation can set up a formidable barrier against copyright trolls while defending the legitimate ownership of creative content on which the Internet depends. TMT companies need to embed a deep enterprise-wide understanding of copyright requirements, supported by rigorous legal and content-management procedures and risk transfer arrangements that can include media liability insurance.

[i] *McDermott v. Monday Monday, LLC*, 17-cv-17cv9230 (DLC), 2018, 2018 WL 5312903 (S.D.N.Y. Oct. 26, 2018).
[ii] *Strike Three Holdings, LLC v. Doe*, 351 F.3d 160, 161 (D. D.C. 2018).
[iii] *Malibu Media, LLC v. Doe*, 15 Civ. 4369 (AKH), 2015 WL 4092417, at *2 (S.D.N.Y. 2015).
[iv] *Philpot v. Emmis Operating Co.*, 1:18-CV-00816-RP, 2019 WL2928774, at *2-3 (W.D. Tex. July 8, 2019).
[v] www. https://freeplaymusic.com/#/