



Content Owners, Fair Use Advocates Debate UGC Principles

A new study released April 10 by American University's Center for Social Media shows, in the words of its principal investigators, an astonishing amount of confusion about what copyright law requires of content uploaders, and an equally surprising desire on the part of content generators to comply with the law. But a panel discussion accompanying the report's release reflected widening divergence of views as to what should happen next.

The study, entitled "The Good, The Bad, and The Confusing: User-Generated Video Creators on Copyright," was supervised by Patricia Aufderheide, a professor in the university's School of Communication and the Center's director, and Peter Jaszi, a professor at AU's Washington College of Law and director of the law school's Program on Information Justice and Intellectual Property.

Simultaneously, a panel of experts, including representatives from Microsoft, NBC Universal, Verizon, the Electronic Freedom Foundation, the Center, and the law firm of Drinker Biddle, shared the dais at the university's panel discussion "User-Generated Content: The Copyright Conundrum," which focused on the fluid boundaries of the "fair use" doctrine, upon which "participatory media" uploaders rely when they employ existing copyrighted content in their work. Panelists noted with some concern the increasingly aggressive enforcement activities of content owners, exemplified by the recent issuance of more than 100,000 removal notices by media giant Viacom.

Fair Use, Fair Compensation. The discussion developed quickly into a polarized debate over posting rights between NBC Universal's Government Relations VP Alec French and EFF's Fred von Lohmann.

"My company is constantly accused of being a dinosaur, and a Luddite," French began. But in fact, he insisted, "it gets it." NBC Universal has rolled out new businesses, streaming shows, downloads from iTunes, old news programming, podcasts, movie rentals, CinemaNow, art downloads, download and burn, and backup copy privileges, he noted, adding, "We recognize that new business models may outlive the old ones." The company supports participatory media and the ability of consumers to use its content in new ways, French insisted.

"But we feel that it's our right to be the one to profit from licensing out the content. If someone wants to make our copyrighted works available, they should get a license from us, or should ensure that the use is fair and non-infringing."

French advocated filtering as the solution of choice, but he was not opposed to stronger measures, including mass DMCA notices and banishment of identifiable repeat offenders. The problem is acute, he claimed; an NBC survey indicated adverse economic impact totaling no less than \$500 million attributable to content sharing and re-use by university students alone.

Von Lohmann emphatically disagreed. "The American public has never seen all the fair use it is entitled to, because of all the checks required by counsel," he said.

"If the movie industry wants 500 million dollars that would otherwise go into higher education, well, hell no," he rejoined. He noted that French's claims arose in the midst of the movie business's most profitable years ever, profits largely attributable to the incremental effect of DVD sales. Moreover, the current enforcement scheme constitutes overkill, producing unfair and unproductive results: actions are often brought against individuals and their parents and are paid off because it is cheaper than defending, and a storm of 100,000 notices inevitably results in the removal of non-infringing works along with the infringers. When you fish with a drift net, you're going to get some dolphins," he observed. Worse still, the whole system fails as a deterrent.

Practically speaking, von Lohmann advocated for best practices that result in the "right stuff, not just more stuff" getting taken down. A university could be required to pay a blanket licensing fee, on a per-student basis, to avoid the distraction and waste of the current system, he proposed, noting further that the content owner communities have expressed a genuine willingness to move in this direction. "But send the lawyers home and stop picking on students and their parents," von Lohmann concluded.

A copy of the report, "The Good, The Bad, and The Confusing: User-Generated Video Creators on Copyright," is available at http://www.ilrweb.com/pfdocuments/ilrpdfs/CSM_report_Good_Bad.pdf.

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