Copyright Protection in the Digital Age

Overview

Copyright protection across the world has become more difficult in recent years due to technological advances that make content sharing extremely easy and inexpensive, and due to a drastic increase in the utilization of Internet-related platforms such as social media. Since the dawn of the Internet Age in the late 1990's, legislators around the globe have been trying to determine how to balance the need to protect an author's intellectual property from unauthorized use without hampering innovation. This QuickCounsel summarizes some of the laws and regulations that in-house counsel should be aware of in order to protect their companies' content on the Internet.

U.S. Copyright Law

The U.S. Constitution provides the federal government the authority to protect an author's original work. Article 1, Section 8, Clause 8 of the U.S. Constitution, states that "[t]he Congress shall have Power… To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Federal law defines what type of content may be protected under U.S. copyright law. According to 17 U.S.C. Section 102(a), "[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." Federal law enables content creators to monetize their original work and protects copyright holders against the unauthorized commercialization of their material.

The Digital Millennium Copyright Act (DMCA) provides a mechanism for copyright holders to protect their online content. Once an author becomes aware that his work is being infringed upon it is up to the copyright holder to notify the Internet Service Provider (ISP)/Online Service Provider (OSP) that contains the material about the alleged infringement. If the ISP/OSP has created a mechanism that enables copyright holders to request that infringing work be removed and the process is followed by the ISP/OSP, the DMCA generally provides the ISP/OSP with a safe harbor from liability. Under Section 512(c) of the DMCA, a service provider must act "expeditiously" to remove copyrighted work after it has been notified. However, the DMCA does not define "expeditiously" and no controlling case law provides a definitive time frame that an ISP/OSP must abide by.

In the Viacom Int'l Inc. v. YouTube, Inc. case (S.D.N.Y. June 23, 2010), Viacom sued YouTube because YouTube's website housed, without Viacom's authorization, more than 100,000 of Viacom's copyrighted video clips. Viacom sent YouTube one mass DMCA take down notice to remove the infringing material and YouTube complied with Viacom's request and removed virtually all of the videos within one business day of being notified. Although the Viacom court did not define "expeditiously" in its ruling, due to the viral nature of online activity it is recommended that commercial entities take no longer than one business day after they are notified to remove infringing material.

In addition to the Copyright Office, the Librarian of Congress is also involved in copyright rulemaking. Every three years the Librarian of Congress is required under Section 1201(a)(1) of the copyright law to determine if there are any classes of works that will be
subject to exemptions from the statute's prohibition against circumvention of technology that effectively controls access to a copyrighted work. The Librarian of Congress makes its determination based on the recommendation of the Register of Copyrights. Six new classes of work were recently added to the exemption against circumvention of technology and these works will not be subject to the prohibition against circumventing access controls (17 U.S.C. § 1201(a)(1)) until the conclusion of the next rulemaking.

**Canadian Copyright Law**

The Canadian Copyright Act governs copyright law in Canada. Canada is a party to the Berne Convention for the Protection of Literary and Artistic Works and has signed, but not yet ratified, the World Intellectual Property Organization (WIPO) Copyright Treaty of 1996 that both the U.S. and the European Union have ratified. There is no Canadian equivalent to the U.S. DMCA because Canada is in the process of updating its copyright laws.

Current Canadian intellectual property law does not adequately address the unique challenges of the Internet and the Social Media Age. The latest attempt to update Canadian copyright law was The Copyright Modernization Act, Bill C-32. This legislation was tabled on June 2, 2010, and it was the second major failed initiative in the past several years that tried to modernize Canadian law to specifically address the legal issues that confront Canadian electronic content providers and users.

**European Copyright Law**

Intellectual property law in Europe varies by country. European countries first tried to coordinate intellectual property protection via the Berne Convention for the Protection of Literary and Artistic Works. The Berne Convention requires its signatories to recognize the works of authors from other signatory states in the same manner that it protects the copyrights of its own citizens.

In addition to the Berne Convention, European Copyright law is promulgated via directives, which are legislative acts of the European Union that require member states to achieve certain results without instructing its members on exactly how to achieve the desired goals. Since some European Union member states have legal systems based on common law and others on civil law, a one-size-fits-all approach will not work for all its members. Intellectual property directives provide member states guidance on how to regulate Internet and electronic media copyright issues.

**The UK Digital Economy Act 2010 (UK DEA)**

The UK DEA regulates digital content in the United Kingdom. The UK DEA provides the government broad power to limit, suspend, or terminate Internet service to copyright infringers. The UK DEA also requires ISPs/OSP to notify copyright owners of potential infringement. In comparison, in the U.S., the onus is on the copyright holder to notify the ISP/OSP of alleged infringement.

Companies doing business in the UK need to understand how the UK DEA may affect their social media implementation plans and internet content compliance.

**Anti-Counterfeiting Trade Agreement (ACTA)**

The Anti-Counterfeiting Trade Agreement is a proposed trade agreement being negotiated by a group of countries to increase intellectual property protection. The United States, Canada, and the European Union are part of the group of countries that are in the process of negotiating ACTA. According to the U.S. Trade Representative's summary of ACTA the proposed treaty aims to establish international standards for enforcing intellectual property rights in order to fight more efficiently the growing problem of counterfeiting and piracy. Since ACTA is still being negotiated, it is too early to determine how it may affect Internet content compliance. If ACTA becomes a reality, it may create a governing body outside of the World Trade Organization (WTO) and WIPO with the authority to create and implement intellectual property law that may trump current court precedents and be binding on those countries that ratify ACTA.

**User Generated Content Ownership (UGC)**

The Terms of Service/Use of a website should clearly state who owns UGC and how a website may utilize UGC. For example, by utilizing Facebook, "you [a user] specifically give[s] us [Facebook] the following permission, …a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook ("IP License")." In-house counsel should ensure that their companies' websites have unambiguous Terms of Service/Use to help protect against claims of unauthorized intellectual property utilization.
Fair Use

In the United States, Fair Use allows for the limited use of copyrighted material without the copyright holder's permission. The difference between infringement and fair use is not always clear. Four factors are utilized to determine if infringement has occurred. The four factors include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Canada and the UK do not recognize Fair Use. Instead, both of these countries recognize Fair Dealing, which is a doctrine of legal defenses that may be valid against copyright infringement actions. Each country that recognizes Fair Dealing has a slightly different interpretation. Therefore, it is imperative to ensure that a company's online content is adequately protected in the country that may have jurisdiction over the work.

Conclusion

The international reach of the Internet and the increased utilization of Social Media have created the need for new solutions to intellectual property protection. Country-specific copyright laws no longer fully protect an author's work. New electronic technologies that have no national borders have heightened the need for international law and treaties that protect original material. Due to rapidly changing technology and the expansion of international intellectual property law, in-house counsel must stay abreast of each new development to ensure that their company's online content is protected.

Government Resources

- Complete Version of the U.S. Copyright Law, October 2009
- U.S. Copyright Office Federal Register Notices
- U.S. Copyright Legislative Developments 111th Congress
- U.S. Copyright Office Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works
- U.S. No Electronic Theft Act
- Canada Copyright Act
- United Kingdom Intellectual Property Office
- The World Intellectual Property Organization's Gold Global Collections of Searchable IP Reference Resources

http://www.acc.com/legalresources/quickcounsel/icpituscaeu.cfm