

NEWSLETTER

An Entertainment Industry Organization



The DMCA is not an Alibi: We're All A Part of the Google Nation

By Chris Castle

The President's Corner

Ed Arrow

Over the past few years I have read many articles proclaiming that major record labels are no longer relevant. These doomsayers are now pointing to alleged success Radiohead's self-released download as a watershed moment in the demise of major labels.

These cynics believe that major labels are nothing more than banks and distribution machines, and that such services are no longer required by recording artists. While this might be worth arguing, it ignores the main function of major labels: Promotion.

Radiohead is a legendary band with a large following. Anything they do attracts media attention. But what of the many unknown bands who have self-released albums and made them available on i-Tunes, MySpace, or other popular on-line music destinations? How will they attract customers? They may generate some interest through live performances. But, if it is their goal to sell hundreds of thousands of tracks, as the most successful recording artists do, they will be disappointed.

Major record labels have the financial resources, channels, and expertise to break new acts. Like them or not, major labels still play a vital role in launching the careers of new recording artists.

Thank You

YouTube have now established the new model for "getting away with it" in the Google Nation:

Step 1: You create the art;

Step 2: Google Google's users steal it from you;

Step 3: Google makes you chase them to take it down;

Step 4: If you can afford to chase Google to try to make Google take it down and Google does take it down, the work Google stole will suddenly reappear, because Google has every incentive NOT to filter effectively as they have no business if they do;

Step 5: See Step 3; Step 6: See

Step4; Step 7: See Step 3; Step
8: See Step4; Step 9: See Step 3;
Step 10: See Step 4; Step 11: See
Step 3; Step 12: See Step 4;

Step 13: *Tired of this yet?*

Step 14: See Step 3; Step 15: See
Step 4;

Step 16: *Tired of this yet? Got
any money left?*

Step 17: See Step 3; Step 18: See
Step 4;

Step 19: *Now if you're tired
of this, or you don't have any
money left (and since we are bil-
lionaires) what we could do little
artist is give you a share of the ad-
vertising revenue we are/could be
selling on the pages with your ar-
tistic works. Approval over adver-
tisers? Oh, no, we don't do that.
And of course we will do whatever
we want to try to commercialize
your name, likeness, song titles,
genres, and the clothes that you
wear. And that revenue share?
We'll decide what's fair because
we are Google and we do no evil.*

*Now there's no need for
name calling, we certainly don't*

*think we're philistine cretins with
as much appreciation for art as a
stuck pig. We're Google and we
do no evil.*

We call this a shakedown
where I come from, but then I'm
just a country lawyer and I'm not
as smart as these city fellers.

And that, my friends, is
the new boss, The Man 2.0. If
you hated the record compa-
nies, they were Mother
Theresa compared to this
crowd.

The Congress passed some-
thing called the Digital Millennium
Copyright Act in 1998. The DMCA
has in it something called "notice and
takedown" (The U.S. Copyright Of-
fice has a helpful link on the subject at
<http://www.copyright.gov/onlinesp/>)
The notice and takedown provisions
essentially say that if you are an on-
line service provider and are not oth-
erwise aware of infringing activity
going on in your house, if a copy-
right owner finds an infringement
on your site they can send you a
notice and make you disable ac-
cess to the infringing material.

Let's assume that YouTube
even qualifies as an online service
provider, which many do not be-
lieve. The way that Google wants
to interpret the DMCA skips the
first step—the keep your house in
order step. They want to interpret
the DMCA as requiring copyright
owners to notify them for each in-

stance of infringing material on
YouTube— but make no mistake,
this is about Google more than it is
about YouTube. YouTube is just
the test case.

JASRAC forced YouTube to
take down 30,000 infringing works
over a weekend. Viacom had to send
over 100,000 DMCA notices to
YouTube. Think about that for a
minute. You won't need much
more than a minute's thought to
see that that is a ludicrous situation.
Even if you could keep the enforce-
ment costs to \$10 per notice (which
is very low), that is over \$1,300,000
in costs to just to notify Google that
they are massively infringing your
works.

Because that thought is so
incredibly stupid, I can't believe
that the Japanese company didn't
get something in the way of dam-
ages for those 30,000 works, and
of course the Viacom case is
ongoing as of this writing.

Needless to say, independent
artists cannot afford to go after
Google, and often can't afford the
notice and takedown. Many artists
will want to participate in YouTube,
which is fine—for them--but there
is an assumption there that the art-
ist will control everything that gets
posted. Not the case. But we should-
n't be surprised—Google CEO Eric
Schmidt was recently quoted in the
Wall Street Journal as telling the
creative

community to “prove it” when he was told in negotiations with Viacom that content has “intrinsic value”. (Currently available at

<http://online.wsj.com/article/print/SB117319537794228320.html>.)

But we shouldn't be too surprised that Schmidt got it wrong, he was the one who agreed a \$200 million liability escrow fund was good enough to cover potential copyright infringement claims against YouTube. That's billion with a “B”. And oopsie with an “O”.

I differ from Dr. Schmidt. I believe that art does have intrinsic value. Music is not a commodity. It's not an “input”, it's not the anonymous “content”, it's something that someone labored over to create, and it's something that people labored over to promote. Successful artists are not brought by the stork. There is a lot of hard work and investment by the artist and record company to make a recording famous enough to steal.

If we decide to live in the “catch me if you can” world of YouTube under the mob rule of the Google Nation, then that is a very different country than what's left of the one I thought I lived in. I'm not so sure where that ends up, and I can remember mob rule going lots of places that I thought we were protected against by the Constitution.

I believe in a very simple idea and there is nothing that Google or anyone else is going to do to dissuade me from this belief: Artists should control their work. This is an absolute that is the foundation of having

a self-supporting creative community. If artists do not want to be associated with advertising, they shouldn't have to be. If they don't want to be on YouTube, they shouldn't have to be, and they shouldn't have to spend a lot of money to keep someone from taking their work. And PROFITING from it. That, too, is billion with a “B”.

Artists should not have to take on the corporation with the biggest market cap in the world in order to enforce their rights. It's not a fair fight, and that's just how Google likes it.

Distribution of a creative work should be the artist's choice. And by artist, I mean everyone involved in the creative process, songwriters, producers, musicians and vocalists as well as featured artists, record companies, film and TV creators, actors—the entire creative community.

When you understand that Google is an advertising agency, all will be revealed (or I think so, anyway). If artists wanted to work in an advertising agency, they would have done it. All I suggest is that Google should respect that choice and not steal from them to drag them into the philistine abyss that is a world where everything is for sale— aka the Google Nation. And Google should not be allowed to hide behind the DMCA to pull off this massive theft.

None of this should be too surprising—I recall listening to one of Professor Lessig's recorded lectures a few years ago in which he ended with a call to arms to his students to oppose

strong copyright and encouraged them to believe that they would prevail against “Hollywood”. And in closing he had a remark that produced audible snickers from his audience: “Besides, we're bigger than them.”

It's a very tough row to hoe for an independent artist to take on Google. *Mr. Smith Goes to Washington* notwithstanding, the little guy simply does not have the resources to take on Google's money and influence. Even Viacom has felt these effects: Immediately following its lawsuit against Google and YouTube, Viacom was sued by plaintiffs represented by Stanford Law School's Fair Use Project largely funded by... Google. This message is not lost on the creative community.

If Google were to fund a pro-artist litigation group, that would be true philanthropy, doing something against your interest because it is the right thing to do. But you can't even get Google to contribute the rounding error in Google's yoga budget for doing something like that. Nope. There's no intrinsic value to what we do--Dr. Schmidt tells us to “[Spend the money to] prove it.”

There's another way to look at all of this—try respecting creators. As Microsoft's Tom Rubin poignantly said in his recent speech to the Association of American Publishers (*The Wrong Path* currently available at <http://online.wsj.com/article/SB117314844325627857.html?mod=US-Business-News>):

I cannot imagine a world without great writers, and without

the publishers who nurture them and help bring their works to the reading public... I think we [at Microsoft] have much in common [with the creative community].

I recognize, of course, that the works that you help create and publish, and the works we create at Microsoft, seem very different. Still, we share a common understanding of the creative process. We both understand the time and commitment it takes to develop the first germ of an idea into a finished work.

More importantly, we both understand the risk it involves – that despite all of our best efforts, a book or software product can still fall flat in the market. For these reasons, I suspect we also share many of the same values when it comes to preserving incentives for creativity, so that people will continue to invest in creating works of the very highest quality, not just today, but into the future.

.... In essence, Google is saying to you and to other copyright owners: “Trust us - you’re protected. We’ll keep the digital copies secure, we’ll only show snippets, we won’t harm you, we’ll pro-

mote you.” But Google’s track record of protecting copyrights in other parts of its business is weak at best. Anyone who visits YouTube, which Google purchased last year, will immediately recognize that it follows a similar cavalier approach to copyright.

Contrast Tom Rubin’s thoughtful approach with Schmidt’s “prove it” speech. One is the product of appreciation of culture and mutual respect of copyright owners for each other. The other is the brittle confrontational style of the biggest corporation in the world intent on imposing its will on American—indeed the world’s—culture.

This contrast also highlights a division in the technology community between those who respect copyright and culture and those who do not. As these industries become increasingly interdependent on each other, it will no longer be in anyone’s interest to help create the tools that cause the demise of the creative culture of the world in favor of “hobbyists”. This is a rift that is worth watching, as it will play itself out in important ways. (Andrew Keene’s *The Cult of the Amateur* is an excellent study of the issue.)

The DMCA was designed for reasonable people behaving reasonably—it is not an alibi. If you get hundreds of thousands, if not millions, of notices, maybe—just maybe—you’re doing something really wrong. If a company like Microsoft or Amazon goes way out of their way to respect copyrights, to help to build a digital future that embraces creativity, and even become in their

own ways cornerstones of that new digital future for creators, then if there’s an “oops” here and there, so be it. We trust them.

On the other hand—if people stay up late night with whatever passes for whiskey and cigars in Mountain View dreaming up ways to create “gotchas” in the Copyright Act, resulting in a crystal clear pattern of infringement, don’t be surprised if we don’t trust them. At all.

What we should have learned from observation is that there is a certain element of the Web 2.0 crowd who has no intention of behaving reasonably, fully intends to steal

from us to profit themselves, and they are going to hide behind the DMCA notice and takedown provisions to do it.

If you don’t believe me, see step 19.

And get ready to keep working for The Man 2.0 unless it stops.

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Aspen Summit, as well as conferences including SXSW, Digital Hollywood, Musexp0, Beverly Hills Bar Association, California Lawyers for the Arts and the State bars of California, Minnesota and Texas. He writes an “Insider Blog” for Digital Music News, and is a contributing editor to *Entertainment Law & Finance*. Before law school, he was the drummer for Jesse Winchester, Long John Baldry and Yvonne Elliman, among others.

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