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Why Google shouldn't be the copyright court of last resort

By David Post

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When I was in law school in the early '80s, our Law Review editorial board made the decision to stop sending in copies of the Law Review to schools and universities in South Africa, as a way of protesting against apartheid. It struck me, at the time, as a foolish move for any number of reasons, but mostly because it would suddenly make all of our decisions about who to sell our journal to subject to question; it gave a kind of "meaning" to *all* of our subscription-fulfillment decisions, meaning that they didn't have to have and shouldn't have. [If we shipped journals to universities in China, or Pinochet's Chile, or Syria, that must mean that we didn't think those governments were acting as reprehensibly as South Africa was acting].

I thought of this in connection with the recent 9th Circuit decision in the "Innocence of Muslims" case (Garcia v. Google), about which Eugene and I have both blogged. This case has received an enormous amount of attention (and the 9th Circuit recently indicated that it might be hearing it en banc), but there's one question that puzzles me still. To review the basics: Cindy Garcia was hired to work on a film ("Desert Warrior"), but, without her consent, the filmmakers took her footage and used it in a different, virulently anti-Islamic film ("Innocence of Muslims"), overdubbing part of her words so that she is seen asking:"Is your Mohammed a child molester?" Garcia sent Google a "take-down notice," asserting that her copyright had been infringed, but Google refused to take down or disable access to the film. After negotiations between Garcia and Google failed, she sued Google for copyright infringement (and prevailed).

The question that puzzles me is: why did Google decide to oppose her request? Of the thousands and thousands of copyright infringement takedown notices it receives every day, why did it single this one out for special treatment? And was that a good idea, for Google, or for the rest of us? I understand the free expression values at stake here, and that Google — most commendably — takes the position that they're defending the film producers' right to speak, however offensive that speech might be. Fighting the good fight, as it were. I'm one of those people who thinks that Google is a substantial net plus for freedom of expression in the world, and I support them when they fight the good fight (as they often do) on behalf of users.

But I do wonder whether this was indeed the good fight.

Here's why. Copyright law, in section 512′s "notice-and-takedown" procedures, has worked out a pretty sensible mechanism for dealing with disputes like this one, and it is one that is designed

to remove the intermediary (Google, in this case) entirely from the dispute and relieve it of the burden of having to decide whether something is, or is not, an infringement. Google gets many tens of thousands – possibly hundreds of thousands — of takedown notices every day;if it had followed the procedures it follows in 99.9% of them, here's how this would have played out:

1. Garcia submits the takedown notice.

2. Google automatically disables access to the challenged material, and simultaneously informs the person who posted the material — here, the film's producers — that it has done so.

3. In its notice to the producers, Google informs them that they can can send Google a counter-notice, if they have a good faith belief that the material is not infringing. If they do so, Google – still following the dots of the process set forth in sec. 512 — replaces the material back online within 10 days, UNLESS, during that period, Garcia institutes a copyright infringement action in federal court against the producers; in that case, the material stays offline, and Google waits for the resolution of that action to decide whether the material remains offline or goes back up.

It is, as I've said many times before, a pretty sensible and straightforward procedure. Not flawless, to be sure – but pretty reasonable as a means of resolving, or at least dealing with, copyright complaints at massive scale. It protects the intermediary against the possibly astronomical copyright liability that could arise from user infringements; if Google follows these procedures, it receives an immunity from any claim of infringement arising from posting the allegedly infringing material. It is also protective of user rights of free expression; if you think your video is not infringing and has been been the subject of an erroneous takedown notice, send in your counter-notification and it'll go back up, unless the complainant thinks it's worth going to court over.

The whole process can, and usually does, operate in an entirely automated fashion, and the intermediary doesn't have to make any decisions about who's right and who's wrong; it just has to follow the dots. It is a very sensible process because, among other things, it takes the intermediary — Google — out of the dispute entirely. If there is, ultimately, a lawsuit, it will be a suit in which the actual parties to the dispute – Garcia and the producers – are on opposite sides, with the intermediary out of the case altogether.

This is as it should be – and this case shows why. Because Google short-circuited this process and refused to honor Garcia's takedown notice, it, and not the producers, was the defendant in the suit. But that means that critical facts about what actually happened – facts that are absolutely indispensable for determining whether there was or was not infringement – are not before the court when it renders its decision, because Google doesn't have those facts. What did the producers actually tell Garcia about her part in the film? Or about what the film was going to be about? What did she actually agree to? What kind of "license" did she give them?

In the lawsuit as it actually played out, we only have Garcia's side of the story; the producers, though named in her complaint as primary infringers, did not make an appearance (and they are, I assume, beyond the reach of federal court jurisdiction). And without them, we can't possibly know what actually happened, and we can't possibly know whether this is, in fact, an infringement of copyright.

That's another good thing about letting the 512 process play itself out. If, upon receiving word from Google that the film has been taken down, the producers want to file a counter-notice to get the material put back up, they have to consent to federal court jurisdiction to adjudicate the underlying claim. (This is in sec 512(g)(3)(D) of the Act, for those of you following at home).

That, too, seems pretty reasonable. The film goes offline, unless the producers say that they have a good faith belief that they're not infringing AND agree that they're prepared to assert that defense in federal court should Garcia sue them, in which case it goes back up, unless Garcia calls their bluff and does sue them, in which case it comes back down and we have a case that will develop a full record of who did what to whom.

That sounds like a very sensible process to me. Google exercises no decision-making discretion – because it is not in possession of critical facts, and it is in no position to obtain the critical facts, necessary to make a decision. Though I applaud Google's motives here, I do think they acted in a very misguided fashion. Google should not be taking on the mantle of copyright judge and jury – not only because it forfeits its copyright immunity when it does so (Google's problem, not mine), but because the public is not well-served when it does so.

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