

# **Viral Videos Challenging the Enforcement of Copyrights**

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In an effort to move United States copyright law into the digital age, Congress passed the Digital Millennium Copyright Act (DMCA) in 1998. The DMCA is the beginning of an ongoing effort to modernize the nation’s copyright law.<sup>1</sup> In an ever-changing digital world, copyright law must continue to evolve with technology.

Social media and viral videos have altered the landscape of copyright enforcement. Pirated videos receive millions of views and thousands of “shares” every day. Opportunities to infringe original video content are many and varied, sharing is easy, and tracking down every instance of copyright infringement is difficult. Owners of videos that go “viral” face an uphill battle to safeguard their intellectual property. The DMCA places the burden to find and respond to acts of infringement on the copyright owner, not the social media platform. Given the expanse of the world-wide web, the uncountable number of possible infringers and potential infringing acts, and the lack of effort required to download and repost a stolen video, this burden is daunting.

A viral video spreads quickly through online sharing, receives millions of views, and usually generates “buzz,” such as news coverage. Copyright owners struggle to protect their intellectual property on social media, especially on Facebook, where “freebooting” is rampant. Historically, freebooting was synonymous with piracy, echoing the old battle over whether a violation of copyright is equivalent to theft. The current definition has evolved to characterize the unauthorized duplication and presentation of infringing content as original work, perhaps seeking

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<sup>1</sup> Executive Summary, Digital Millennium Copyright Act, Section 104, Report. Web accessed 09 Aug. 2017: [https://www.copyright.gov/reports/studies/dmca/dmca\\_executive.html](https://www.copyright.gov/reports/studies/dmca/dmca_executive.html).

a more colorful and emotive term to replace “copyright infringement.” Video owners post their copyrighted content only to find stolen versions garner more views. Infringers of copyrighted videos stand to gain advertising revenue from views, endorsement and sponsorship deals, and attention in the form of likes, shares, or new followers.

According to an article in *Business Insider*, social media platforms seriously complicate copyright infringement cases; copyright owners claim social media companies do little to stop or discourage infringement. Facebook has more than four billion daily video views and while it may be impossible to quantify just how much copyrighted material is shared on Facebook, illegally uploaded videos routinely clock tens of millions of views, and hundreds of thousands of shares. *Business Insider* observed that, on the issue of copyright, social media is stumbling.<sup>2</sup>

The Copyright Act affords protections to copyright owners, as outlined in U.S. Code Title 17 Section 102:

Copyright 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. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.

The United States Copyright Office defines a work as protected the moment it is created and fixed in a tangible form that is perceptible either directly or with the aid of a machine or device.

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<sup>2</sup> Price, Rob. “Facebook's new video business is awash with copyright infringement and celebrities are some of the biggest offenders.” *Business Insider*, 06 May 2015. Web accessed 08 Aug. 2017: <http://www.businessinsider.com/facebook-copyright-infringement-facebook-content-id-celebrities-2015-5>.

Registration of a work is voluntary; however, it may be required in order to bring a lawsuit and stand eligible for economic remedies. Generally, registration of a work, created on or after January 1, 1978, endures for a term consisting of the life of the author plus 70 years.<sup>3</sup>

Remedies for copyright infringement include: (i) injunctions, (ii) impounding and disposition of infringing articles, (iii) damages and profits, and (iv) costs and attorney's fees. The Copyright Act, Title 17 U.S. Code, § 504, outlines monetary remedies for copyright infringement:

The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

Such monetary remedies are calculated as follows:

- The copyright owner's actual damages,
- The infringer's profit earned attributable to the accused works, or
- Statutory damages only when available.

Recently, the Los Angeles law firm of Venable LLP, on behalf of Jukin Media, Inc., engaged Hampton IP & Economic Consultants in a viral video copyright case against QWorldstar Inc., DBA Worldstar, Worldstar Hip Hop, and Worldstar Candy, to provide an opinion on monetary remedies arising from alleged copyright infringement by QWorldstar. The parties settled prior to trial.

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<sup>3</sup> 17 U.S. Code § 302(a)

Jukin Media is a digital media company that provides licensing resources for internet video content and has a library of over 30,000 pieces of original user-generated content. Jukin Media acquires the right to use videos from copyright owners, often on an exclusive all-rights basis, and monetizes the videos through licensing to various distribution channels for use in advertisement, entertainment productions, and news programs, as well as use on Jukin Media's platforms and in its own productions. Jukin Media employs full-time staff to scour the internet for videos that infringe the copyrights it owns.

The defendant, QWorldstar, operates as a content aggregation site, where editors upload articles, photographs, and videos on one of three proprietary websites as well as on Facebook, Instagram, and Twitter.

Jukin Media alleged QWorldstar infringed over 300 of its videos, although Jukin only accused 62 federally registered copyrighted videos. Without Jukin Media's consent, QWorldstar allegedly uploaded Jukin Media's videos to its websites, passing the videos off as its own original content. Jukin Media claimed the unauthorized use of its copyrighted videos reduced the value of those videos to Jukin, as Jukin no longer controlled their distribution and promotion.

Hampton IP's expert witness, Scott Hampton, was asked to prepare a Rule 26 Expert Report outlining his opinions on monetary remedies arising from the alleged copyright infringement. As described, copyright remedies included Jukin Media's actual damages, along with the alleged infringer's profit attributable to the copyrighted works. Case law suggests actual damages can be determined by the loss in fair-market value of the copyright, measured by the profits lost due to the infringement of, or by the value of the use of, the copyrighted work to the infringer. A lost-profit calculation should place a copyright owner in the financial position it would have occupied, but for the infringement.

In addition, the copyright statute provides for recovery of wrongfully obtained profits resulting from infringement. When claiming a portion of the defendant's profits, the copyright owner has the burden of proving the defendant's gross sales attributable to the infringed copyrighted work, while the defendant has the burden of proving (i) deductible costs and (ii) the amount of profit attributable to factors other than the copyrighted work.

The Digital Millennium Copyright Act is the foundation of congressional efforts to move copyright law into the digital age. However, as Congress has recognized, "the only thing that remains constant is change."<sup>4</sup> As technology evolves, laws and regulations protecting intellectual property must follow suit. Currently, owners of original content are protected under the DMCA and should consider registering their copyrights to enhance enforcement capabilities.

Contact Hampton IP & Economic Consultants with any additional questions regarding copyright remedies at 801-328-9888.

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<sup>4</sup> Executive Summary, Digital Millennium Copyright Act, Section 104, Report. Web accessed 09 Aug. 2017: [https://www.copyright.gov/reports/studies/dmca/dmca\\_executive.html](https://www.copyright.gov/reports/studies/dmca/dmca_executive.html).