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Tech, enforcement themes at Sundance highlight shrinking end user privacy

As the indie film industry descended on Park City, Utah, last month for the 2016 Sundance Film Festival, two clear themes emerged.

One was the critical role of virtual reality in pushing the boundaries of video storytelling. I experienced some breathtaking VR technology that will make future movies both more personal and more realistic.

The second theme was the ongoing problem of digital piracy and the best methods for maintaining the ability of content owners to secure an adequate return to fund future works. Without such protections, there was concern the international distribution market will be left to large blockbusters like "Star Wars: The Force Awakens."

In the shadow of these two themes is a third international trend that is rarely mentioned, but appears to be growing: the shrinking zone of privacy afforded to end users who post or share copyrighted content online.

The United States has always been notorious for allowing copyright owners relatively easy access to end user identities to enforce copyrights online. Section 512(h) of the Digital Millennium Copyright Act, 17 U.S.C. §512(h), grants copyright owners the ability to discover the identity of end users who post infringing content without the need for judicial review. Submission to a clerk of a subpoena alleging a "good-faith belief" in copyright infringement is generally sufficient.

There is no obligation on any party to warn the end user about the requested disclosure. To the contrary, the statute requires the online service provider disclose the requested identity "expeditiously."

Other countries do not generally allow such relatively unsupervised access to end user identities. The European Union's notoriously strong privacy protections require a "proportional" approach to copyright enforcement that does not always place copyright protection on the winning side of the balance. As the Court of Justice of the Eu-

ropean Union recognized in *Telekom Austria AG v. Constantin Film Verleih GmbH*: "There is nothing whatsoever ... to suggest that the right to intellectual property is inviolable and must for that reason be absolutely protected." (Case C-314/12).

To ensure the appropriate balance between copyright enforcement and personal privacy, the EU proportionality test requires proof beyond evidence of prima facie infringement. In *Bonnier Audio AB v. Perfect Communication Sweden AB*, the CJEU required "clear proof" of infringement, evidence that the requested identity "facilitated the investigation" and reasons supporting disclosure that "outweigh the harm" caused to the "affected" person. (Case C-461/10). Since the CJEU has yet to issue a more detailed balancing test, rules for end user identity disclosure vary throughout the EU.

Other countries impose a similarly strict balancing test for identity disclosure. Perhaps the high water mark internationally for the protection of privacy over copyright occurred in Canada in *BMG Canada Inc. v. John Doe* where three-month-old infringement data was considered so "unreliable" that end user privacy concerns "outweighed" the public interest in copyright enforcement. (High Court Canada 2004).

Over time, U.S. law has reflected these international developments. Although section 512(h) has not been amended, courts have limited its impact to end users who post unauthorized content. All other activities, including offering infringing files for download, require judicial review of identity disclosure requests. (*Verizon*, 351 F.Supp.2d 153).

Under *Sony Music* and its progeny, this judicial review includes a searching analysis of the actual need for the sought-after identity as well as consideration of "other, less intrusive ways of obtaining the information" and the need to protect First Amendment privacy interests. (326 F. Supp.2d 556).

To further ensure stronger protection for end user identities,



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some U.S. courts require the online service provider to notify end users of the disclosure demand. In numerous cases, court-ordered notifications include advice regarding the end user's legal right to consult an attorney and a list of possible representatives. (*Elektra Entertainment Group*, 2004 U.S. Dist. LEXIS 22673).

Content owners have long claimed such heightened privacy protection adversely affects their rights. There is growing evidence this protectionist trend is changing. Strong privacy protection in the EU has not prevented the use

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of one of the most effective enforcement tools internationally — injunctions blocking end user access to designated pirate websites. Even when such tools are subjected to demand for proof of effectiveness to support potential invasions of personal privacy, they have been upheld.

The paradigmatic case demonstrating this new trend toward

supporting copyright protection over end user privacy may be *Voltage Pictures LLC v. John Doe*. (High Court Canada 2015). *Voltage Pictures* holds the copyright to various films, including "The Hurt Locker." It sought the disclosure of 2,000 end user identities from TekSavvy, a third-party service provider.

The court did not apply the heightened disclosure standards discussed above. Instead, evidence of "bona fide infringement" was sufficient. Furthermore, once infringement was established, the court held: "The enforcement of Voltage's rights as a copyright holder outweighs the privacy interests of the affected Internet users."

However, to ensure privacy rights be "invaded in the most minimal way possible," the court ordered TekSavvy to provide notice to end users verifying their identification prior to disclosure. TekSavvy's notice included information directing end users to its website containing information regarding end user legal rights. Ultimately, the court reduced TekSavvy's requested costs for providing such disclosures from \$346,480.68 to \$21,557.50. Among other items, the court specifically rejected all costs associated with TekSavvy's end user notification, holding: "The rules do not require TekSavvy to have provided notice of the motion to its affected clients." To the contrary, it found that all such efforts were "voluntary."

I have little doubt that other online service providers will be willing to undertake such "voluntary" notices when the next identity disclosure demand is received. End users will be once again on their own.

VR will undoubtedly make movies more exciting. Unfortunately, it will also increase the ability of end users to share such films outside authorized distribution channels. If the current trend is any indication, such sharing will put end user identities at greater risk of disclosure. The battle between privacy and copyright is far from over.