Profiting Off Infringement

Author : Christopher J. Buccafusco

Date : July 29, 2021

Kristelia Garcia, *Monetizing Infringement*, 54 **U.C. Davis L. Rev.** 265 (2020).

It's hard to imagine people tolerating intentional violations of their physical autonomy, never mind seeking to monetize such behaviors. But as Kristelia García argues in her new essay, *Monetizing Infringement*, many copyright owners find this strategy appealing.

According to copyright's standard narrative, infringement reduces the returns to creative effort and, thus, undermines authors' incentives to produce new works. Here, however, García "destabilizes long-held but problematic assumptions about the interplay between copyright law's purported goals and its treatment of infringement by challenging the received wisdom that rightsholders are necessarily anti-infringement." (P. 270.)

Building on work by Tim Wu, Dave Fagundes, and Rebecca Tushnet, among others, García catalogues three distinct forms of monetizing copyright infringement across a variety of creative domains: (1) profitable infringement, in which infringement results in income for the rightsholder; (2) remedial infringement, in which infringement mitigates a worse outcome for the rightsholder; and (3) promotional infringement, in which infringement amounts to valuable and cost-efficient promotion for the rightsholder's content.

It is well known that owners of sound recording copyrights have found user-generated content on YouTube to be a profitable form of infringement, thanks to YouTube's Content ID system. When musicians' fans create and post videos to YouTube, record labels can reap the advertising revenue without having to generate their own content. But García also describes how video game developers rely on sales of extra downloadable content, like additional levels and characters, to benefit from pirated versions of their games. While users may be able to pirate a game for free, they are often willing to pay for added content that increases its appeal.

Game developers also encourage what García calls remedial infringement, encouraging piracy when it is a less significant problem than others that they face. For example, gray market resellers offer game "keys" that allow purchasers to access games and promotional content for lower prices than the developer is charging. Often, however, the keys don't work, and the developers spend considerable time and money responding to complaints about fake and broken keys. In response, García notes that several developers have opted to encourage users to simply pirate their games, instead of using gray market sites. Either way, the developers argue, they aren't being paid. But at least they don't have to deal with the additional headache.

Most interesting to me is García's category of promotional infringement and her example of musicians encouraging fans to create videos that incorporate the musicians' songs and post them online. In some cases, the original video will generate millions of views and promote fan interest in the song. In other cases, the video will inspire others to create their own versions. But in either case, the potentially infringing videos can generate new streams and new revenue for musicians. García and I elaborate on this phenomenon in our forthcoming article, "Pay-to-Playlist: The Commerce of Music Streaming."

Having cataloged various forms of monetizing infringement, García then elaborates on potential reasons why copyright owners might engage in this behavior rather than simply suing (or threatening to sue) for infringement. She notes how copyright law covers a wide variety of content and actors with a fairly similar set of legal rights. This opens up the possibility that owners simply have very different preferences and norms with respect to uses of their works. García also suggests that monetization may be an effective strategy in situations where technology changes more rapidly than law. Although authors might not prefer this strategy in a perfect world, they may come to rely on it where industrial changes outpace legal ones.

Finally, although this article is largely descriptive rather than normative, García considers the potential costs and benefits of monetizing infringement. On the benefits side, she includes the efficiencies of private ordering, tailoring the law's one-size-fits-most approach, and an effective shrinking of copyright's scope and duration, at least for those who aren't targeted with infringement actions. But monetizing infringement has costs as well. It is easier and safer for larger established players than it is for upstarts or independents. Selective copyright enforcement can also lead to confused norms and user uncertainty. If one gaming company allows or encourages infringement, that doesn't mean that others will—or that this one will continue to do so in the future and for everyone.

The realities of how copyright law is wielded in the hands of owners often differ from the standard narratives that lobbyists and scholars articulate about incentives and access. García's work joins a growing movement of scholars who are exploring the ways in which the law interacts with the particularities of actual creative industries. This is an important contribution for scholars who want to move beyond just-so stories and abstract theories.

Cite as: Christopher J. Buccafusco, *Profiting Off Infringement*, JOTWELL (July 29, 2021) (reviewing Kristelia Garcia, *Monetizing Infringement*, 54 **U.C. Davis L. Rev.** 265 (2020)), https://ip.jotwell.com/profiting-off-infringement/.