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Big Media in Copyright Litigation

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What role does Big Media play in the courtroom?

Major media companies are often portrayed as aggressive drivers of expansive copyright, dominating every aspect of the legal landscape. When it comes to litigation, however, the truth is more nuanced. My colleague Chris Cotropia and I have recently completed a data collection project in which we examined pleadings from approximately 1,000 copyright cases filed over a four-year period (a statistically significant sample). We are still crunching the numbers, but what we've learned so far indicates that record labels, film studios, major software companies, and other behemoths of the copyright world end up in the courtroom more rarely than one would think, and almost entirely in one of two distinct categories of cases.

The first category involves the famous campaign in which major record labels (and occasionally film studios) sued tens of thousands of individuals for illegal file-sharing. This campaign coincided with the time period we studied (2005 through 2008),[1] and it represented 53.2% of all cases filed during that period. It may seem odd, therefore, to claim that Big Media plays a smaller role in litigation than one might expect. But keep in mind that the file-sharing campaign ended in 2008. This means that if the same study were conducted using more recent filings, that category of cases – and Big Media's dominance of the litigation landscape – would presumably disappear entirely.

The second category of cases is what one might call "cost of doing business" litigation: serial suits against defendants who commit some specific, common infringement. The most prominent example is litigation in which music publishers sue bars and restaurants over the failure to pay licenses for musical performances. Also in this category are a handful of cases in which leading software companies like Microsoft and Adobe routinely sue small-scale online sellers of pirated software. The difference between this category and the file-sharing category is that these cases likely continue today, so they cannot be dismissed as a historical artifact. But they constitute only 8.0% of all filings.

Of the remaining cases, Big Media was a plaintiff in only 15.3%.[2] And it was a defendant almost exactly as often – 15.0%. This is not because major media companies sue each other; that happened less than 1 percent of the time. Nor do major media companies often sue individuals; outside of the file-sharing context, only 6.7% of cases involved a big company suing a lone individual. (Indeed, outside of the file-sharing context, individuals filed almost as many suits against Big Media as Big Media filed against individuals.)

No, the fact is that most of the action in everyday copyright cases involves not major media companies, but small firms.[3] Small firms constitute more than half of all plaintiffs and almost three of every four defendants (again, setting aside the now-defunct file-sharing cases). In 47.3% of all cases, small firms constitute both the plaintiff and the defendant.

For the most part, then, the courtroom is where Big Media collects the spoils rather than fights the war. This is not to say that the influence of major media companies in copyright law has necessarily been exaggerated. Industry power may enable them to favorably resolve many disputes without filing suit, using the courtroom mainly to bring occasional "impact litigation"

designed to work a change in the law. And their influence in domestic legislation and international policymaking is well documented. Nevertheless, outside the file-sharing context, Big Media's role in copyright litigation is Surprisingly Small.

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1. We chose this time period not because we were interested in the file-sharing litigation, but because we wanted cases that had come to a close by the time of our study. Choosing more recent cases would have presented a greater risk that cases would still be ongoing, which would have limited our ability to study such topics as how cases terminate and which party prevails.

2. The actual percentages may be even lower than reported here, because what we actually coded was whether the party was a Fortune 1000 company (or a subsidiary thereof), not specifically whether it was a major media company. All major media companies are in the Fortune 1000, but not all Fortune 1000 companies are major media companies. Thus the possible overrepresentation of Big Media in our results. Note also that when there were multiple plaintiffs or multiple defendants, we coded the largest of the group.

3. By "small firms" we mean parties that are not Fortune 1000 companies, and are also not individuals, collective rights organizations, or public sector entities.