



“Means-Plus-Function” Claims

- Means-Plus-Function claims must disclose the structure by which to execute the function
- Now, the mere absence of the word “means” will not save a claim from the requirements of §112, paragraph 6

The Long Reach of A Big Hammer: DMCA’s Creep Into Corporate Adjudication of Pre-Crime

When the DMCA was made into law at the turn of the century, the excitement over new powers given to the enforcement of intellectual property rights was tempered by deep concerns of possible regulatory overreach and unintended consequences. With the law having over a decade to now play out, some of the more consequential, albeit tangential, unintended consequences are beginning to show their head. Most recent example is the unilateral and ban of online payments to a VPN service by popular payment provider PayPal. Their justification: copyright infringement under the DMCA.

There are a number of characteristics that make this story unique, and consequential, which must be unpacked. To begin, February of this year PayPal suddenly announced it would no longer allow payments to the Canadian VPN service UnoTelly. A VPN service is used to add security and privacy to private and public networks, normally by re-routing your Internet connection to hide the source of the connection, and content carried within. Among other uses, such services can be used to circumvent things like “geo-blocking”, a restriction on accessing content depending on where your Internet connection originates. In the case of UnoTelly, their website specifically advertises one of the benefits of its services as “removes geo-blocks imposed by streaming sites and allows you to watch geo-restricted channels regardless of where you live”. According to PayPal:

“Under the PayPal Acceptable Use Policy, PayPal may not be used to send or receive payments for items that infringe or violate any copyright, trademark, right of publicity or privacy, or any other proprietary right under the laws of any jurisdiction.”

In short, UnoTelly got caught directly advertising something that was counter to PayPal’s terms of service, and therefore were banned from doing business with PayPal; story seems simple, rationale seems justified. However below this first layer brews a dangerous precedent and uncharted territory.

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The main issue with PayPal's justification is that every single VPN provider can be used for this purpose. While UnoTelly may have been more overt than others in their advertisement, they are not unique in the way which their services can be used. Based on this justification, PayPal has just set the precedent of refusing to do business with any VPN because of their ability to be utilized to circumvent copyright law under the DMCA. The real weight of this decision however comes with the fact that PayPal has nearly 160 million users; 30% of all ecommerce transactions in the US are processed through PayPal. Further, with the exception of Bitcoin (which has its own issues of low adoption and high barrier to entry), PayPal is the only means of payment accepted by many VPN providers. These two facts combine to create a de-facto ban on the use of VPN services, for any reason, by making it impossible or impractical for customers to pay VPN providers. What is worse, this is done as a prophylactic measure against the potential of such services being used for copyright infringement. It is not too big of an intellectual stretch to say this is analogous to banning martial arts training providers because it is a means which can be used for battery, as well as personal defense and fitness.

In the US legal system we have laws against actions not thoughts. The prosecution pre-crime is seen as socially, legally, and logically untenable. However, PayPal's actions here raise a very concerning trend; broadly worded intellectual property laws (i.e.: DMCA) creating pre-emptive legal enforcement by corporate America. While it may seem reasonable companies are trying to stay ahead of potential legal pitfalls and liability, the corporate interest of companies like Netflix (who have been lobbying heavily for the restriction of VPN services) must be acknowledged. With so much power and consumer base consolidated in so few providers (as is the case in the payment service industry), the real issue of denial of service must be considered when there are little to no market alternatives. Lawmakers and impacted companies (ie: Netflix) know they cannot make VPN services illegal, however their usage can be made overly onerous or impractical by critically limiting ability to pay for the service. When laws are used in an extra-judicial manner, acting as the basis for corporate policies denying vast amounts of consumers a service based on potential legal liability, rather than acting as the basis of litigation in courts as intended, there is a serious issue in the balance of power.

In conclusion, intellectual property laws have a longer reach, and act as a heavier hammer, than ever before. We are just now starting to see the evolution of the DMCA into a broad reaching legal tool that can be applied to issues well removed from the traditional ambit of intellectual property disputes. As such, is it more crucial than ever to consult an informed, and creative thinking IP attorney when pursuing any business involving consumer-facing interaction with media and intellectual property.



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