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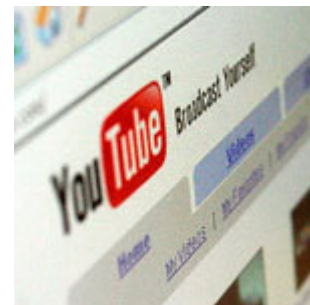
Copyright laws caught in the web. 04/05/2007. ABC News Opinion

[This is the print version of story <http://www.abc.net.au/news/opinion/items/200705/s1913562.htm>]

Last Update: Friday, May 4, 2007. 7:47am (AEST)

OPINION

Copyright laws caught in the web



By Dr Matthew Rimmer

Back in the 1996, the World Intellectual Property Organisation promulgated internet treaties to help protect copyright owners in the digital environment. The United States passed the Digital Millennium Copyright Act 1998 (US) to comply with its treaty obligations; and Australia has spasmodically revised its copyright laws in 2000, 2004, and 2006 to deal with new technological developments.

Such a regime has been ill-adapted to deal with a new generation of Internet services - described by the open source publisher, Tim O'Reilly, as "Web 2.0" - which have encouraged users to create, share, and remix content. The term, "Web 2.0", has been applied to the internet video site YouTube, the online community MySpace, the open access encyclopaedia Wikipedia, and the digital photography site Flickr.

Recent litigation between Viacom International and YouTube has highlighted the tensions between anachronistic digital copyright laws and new "Web 2.0" services.

Viacom International Complaint

In 2007, Viacom International demanded in the United States District Court for the Southern District of New York that YouTube take down over 150,000 copyright works - including television programming and motion pictures, such as *SpongeBob SquarePants*, *The Daily Show with Jon Stewart*, *The Colbert Report*, *South Park*, *Ren & Stimpy*, *MTV Unplugged*, *An Inconvenient Truth*, and *Mean Girls*.

The media behemoth alleged that the internet video site had facilitated massive copyright infringement: "Using the leverage of the internet, YouTube appropriates the value of creative content on a massive scale for YouTube's benefit without payment or license."

Viacom International complained: "YouTube's brazen disregard of the intellectual property laws fundamentally threatens not just Plaintiffs, but the economic underpinnings of one of the most important sectors of the United States economy."

The media giant contended that YouTube had failed to take sufficient legal and

technological measures to filter copyright infringing material: "YouTube has deliberately chosen not to take reasonable precautions to deter the rampant infringement on its site."

The media conglomerate argued that YouTube had directly infringed its economic rights in respect of public performance, public display, and reproduction of copyright works.

Viacom International also contended that the internet video site was also guilty of secondary copyright infringement because it had induced consumers to engage in copyright infringement.

The lawsuit seeks more than \$US 1 billion in damages, as well as an injunction prohibiting Google and YouTube from engaging in further copyright infringement.

YouTube Defence

In its defence, YouTube has contended that Viacom's complaint threatens the freedom of the internet users: "By seeking to make carriers and hosting providers liable for internet communications, Viacom's complaint threatens the way hundreds of millions of people legitimately exchange information, news, entertainment, and political and artistic expression."

YouTube has raised a number of defences to the claims of copyright infringement.

First, YouTube has maintained that the internet video site has substantial, non-infringing uses. Most notably, the internet video site hosts authorised, amateur content - such as the musings of Octogenarian, Geriatric1927; the soap opera of LonelyGirl15; experiments with diet coke and mentos; 'Dancing' Matt and the Free Hugs Campaign.

Moreover, YouTube has entered into a number of agreements with content providers, such as Warner Brothers and Network Ten, to provide legitimate copyright content.

Vidmeter suggests that unauthorised copyright content comprises only a small minority of the videos featured on YouTube.

Second, YouTube has emphasised that it is shielded by the safe harbour provisions of the Digital Millennium Copyright Act 1998 (US), because it has expeditiously removed copyright-infringing material when contacted by copyright owners: 'Google and YouTube respect the importance of intellectual property rights, and not only comply with their safe harbour obligations under the DMCA, but go well above and beyond what the law requires.'

Moreover, the company has been developing content identification architecture - so-called video fingerprinting - to better identify infringing content.

Third, YouTube suggests that many of the videos, which appear upon the service can be protected by the defence of fair use.

For instance, Viacom International demanded that YouTube take down a parody of *The Colbert Report*.

The Electronic Frontier Foundation intervened, and sought a declaration that the parody was a self-evident fair use and therefore not infringing the copyrights of Viacom

International.

The civil liberties organisation protested that the action harmed the capacity of film-makers to exercise their rights to freedom of speech under the United States Constitution and the First Amendment.

YouTube suggests that the legal action represents a breakdown in the compromise reached between copyright owners and intermediaries, such as telecommunications carriers and Internet service providers: "Viacom's complaint in this action challenges the careful balance established by Congress when it enacted the Digital Millennium Copyright Act."

Copyright Law Reform for Web 2.0

The litigation between Viacom International and YouTube demonstrates that there is a need to reform digital copyright laws both in the United States and Australia.

The rules in respect of secondary copyright infringement are cast too broadly at present. The United States Supreme Court ruled in the Grokster case: "One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." This formula provides little certainty for technology developers of such Web 2.0 services as YouTube, MySpace, Wikipedia, and Flickr.

The rickety and cumbersome safe harbours regime set up the Digital Millennium Copyright Act 1998 (US) is struggling to cope with the sheer volume of take-down notices provided by copyright owners. The Chilling Effects Clearinghouse suggests that copyright owners have abused this regime. There needs to be greater protection for the rights of consumers in respect of privacy, anonymity, freedom of political speech, and artistic expression.

The defence of fair use needs to be respected by copyright owners. There should be ample scope for legitimate activities - such as criticism and review, research and study, reporting the news, parody and satire, and various transformative uses.

There is a pressing urgency revise Australia's anachronistic copyright laws. At present, the safe harbours regime is limited to telecommunications carriers and Internet service providers; search engines and Web 2.0 sites cannot benefit from such immunities. Moreover, the defence of fair dealing is limited to specific purposes. Entities like Google and YouTube would find it difficult to maintain that their commercial activities were covered by the exceptions under the Copyright Act 1968 (Cth).

Internationally, the World Intellectual Property Organisation should replace its internet treaties with a treaty on Access to Knowledge.

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