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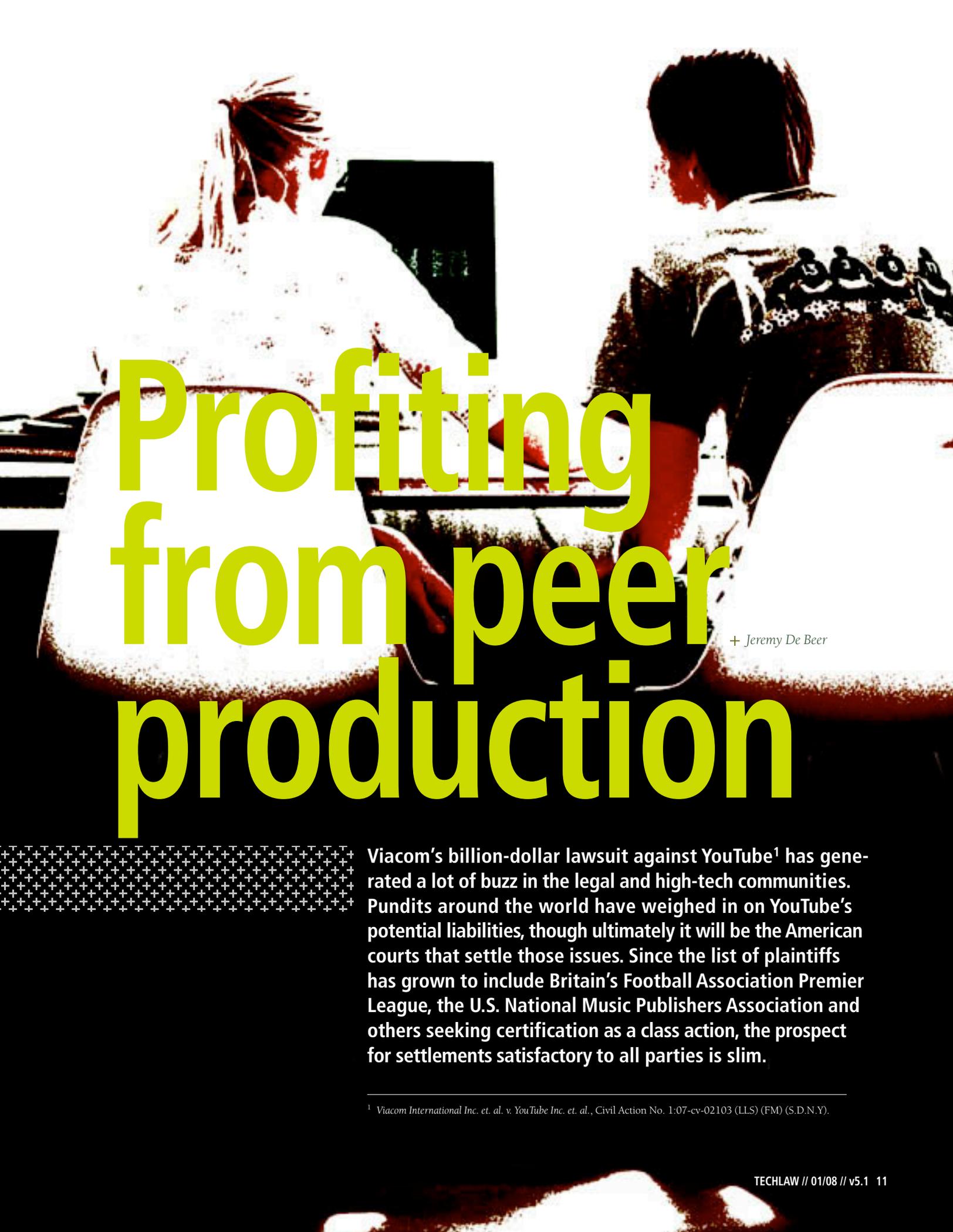
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Profiting from Peer Production

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Profiting from peer production

+ Jeremy De Beer

Viacom's billion-dollar lawsuit against YouTube¹ has generated a lot of buzz in the legal and high-tech communities. Pundits around the world have weighed in on YouTube's potential liabilities, though ultimately it will be the American courts that settle those issues. Since the list of plaintiffs has grown to include Britain's Football Association Premier League, the U.S. National Music Publishers Association and others seeking certification as a class action, the prospect for settlements satisfactory to all parties is slim.

¹ *Viacom International Inc. et. al. v. YouTube Inc. et. al.*, Civil Action No. 1:07-cv-02103 (LLS) (FM) (S.D.N.Y).

The odds are that YouTube would lose a Canadian lawsuit like this. How would things play out north of the border?

While the courts consider the case, it is worthwhile to reflect on the broader consequences of this kind of litigation for the networked information economy. At the end of the day, lawsuits like this are only good for lawyers. Consumers, creators and content owners would be far better off to focus on streamlining licensing solutions rather than stubbornly litigating disagreements.

Let me first say a few words about the case itself and the U.S. legal environment. YouTube is being sued for direct and indirect copyright infringement. Viacom alleges that YouTube directly reproduces, performs and distributes its copyright-protected content. It also alleges that YouTube is secondarily liable for users' infringements on three grounds: contributory, vicarious and inducing copyright infringement.

If no settlement is reached, the outcome of this case will depend mainly on the application of the safe harbour system under the Digital Millennium Copyright Act (DMCA).² Pursuant to § 512 a firm hosting allegedly infringing material at the direction of its user is not liable for infringement if it complies with 'notice-and-takedown' procedures. But to get immunity, the host can't know about the infringement or even be aware of circumstances from which infringement is apparent. Moreover, the host can't receive financial benefits directly from the infringement in a situation where it has the right and ability to control its user's activity.

There's much debate about what all that means, and little precedent to go on. Opinion divided on YouTube's prospects for a successful defence in the U.S..

The situation is even more uncertain in Canada. But the odds are that YouTube would lose a Canadian lawsuit like this. How would things play out north of the border?

In Canada, firms' potential liabilities are determined by different principles than in the U.S.. There are, however, some similarities. Canadian copyright law, like American law, grants exclusive reproduction and performance/communication rights for audio, visual and audio-visual content. It isn't clear how other aspects of the Canadian Copyright Act might apply here, including provisions pertaining to distribution rights, adaptation rights, synchronization rights and so on. But it is safe to say that in both jurisdictions there are a number of different grounds on which a *prima facie* case for direct infringement could be made. That is, it is likely that YouTube could be held liable for its own infringing activities, including reproducing and communicating copyright-protected works.

The key differences between Canada and the U.S. boil down to the nuances of indirect infringement—liability for other people's infringements—and applicable defences. Canadian law imposes liability for authorizing acts of infringement, but not for simply contributing to, benefiting from or inducing them.

PROFITER DE LA PRODUCTION PAR LES PAIRS + Jeremy De Beer

La poursuite d'un milliard de dollars intentée par Viacom contre YouTube a suscité une grande effervescence dans le monde juridique comme dans l'univers de la technologie de pointe. Les sommités du monde entier se sont prononcées quant aux possibles responsabilités de YouTube, bien que le règlement du différend revienne ultimement aux tribunaux américains. Les perspectives de règlements satisfaisants pour toutes les parties sont amoindries par l'ajout, à la liste des plaignants, de la « Football Association Premier League » britannique, de l'« U.S. National Music Publishers Association » et d'autres organismes cherchant à exercer un recours collectif.

À l'heure où les tribunaux étudient cette affaire, il est opportun de réfléchir aux conséquences plus étendues de tels litiges sur l'économie de l'information en réseau. Tout compte fait, des poursuites de ce genre ne profitent qu'aux avocats. Il serait plus avantageux pour les consommateurs, pour les créateurs et pour les propriétaires de contenu de viser des solutions de rationalisation en

matière d'octroi de licences plutôt que de s'acharner à vouloir régler leurs différends devant les tribunaux.

Dans cet article, Jeremy de Beer après avoir envisagé la tournure que prendrait, au Canada, une poursuite comme celle qui oppose Viacom à YouTube, se penche sur les économies engendrées par la production par les pairs. Les entreprises se rendent compte qu'il y a beaucoup d'argent en jeu et prennent en marche le train des contenus produits par des pairs.

Le chevauchement de l'économie commerciale et de l'économie de partage engendre son lot de tensions. On distingue difficilement les contenus piratés de ceux qui sont fournis par des pairs. C'est une tâche ardue que d'effectuer un tri dans un tel éventail de contenus. Qui plus est, comme de nombreuses entreprises œuvrant dans ce domaine souffrent d'une certaine forme de schizophrénie, l'économie de l'information en réseau comporte toute une gamme d'intérêts qui se recoupent.

Le professeur de Beer conclut qu'une bonne option pour les entreprises qui

s'intéressent à la production entre pairs consiste à envisager les possibilités d'octroi de licences, y compris incluant d'éventuelles mégatransactions entre les magnats de l'industrie, des licences générales collectives et des initiatives comme les « Creative Commons ». Ces stratégies nécessitent des concessions de part et d'autre du litige entourant les droits d'auteurs, mais ces concessions se révéleront très avantageuses, puisqu'elles réduiront substantiellement les dommages collatéraux pour ceux qui choisissent de souscrire à une économie parallèle de partage. À long terme, c'est sans doute l'intérêt public qui en tirerait le plus d'avantages. //

Professeur Jeremy de Beer est membre du groupe Droit et technologie. Il donne le cours de Musique numérisée, dont la description figure dans cette revue. Son étude sur l'obtention de licences pour les œuvres orphelines, pour le compte de la Commission du droit d'auteur du Canada sera publiée prochainement.

Australian law is also different than American law, in that it too incorporates the concept of authorization. Yet, despite the legal differences, the Federal Court of Australia and the U.S. Supreme Court reached roughly similar conclusions about liability for indirect infringement in the Kazaa and Grokster cases respectively.³

It does not follow, however, that a Canadian court would reach the same result. The leading Canadian case on liability for authorizing infringement is *CCH v. LSUC*.⁴ In it the Chief Justice of Canada, writing for a unanimous Supreme Court, explicitly rejected the principles of Australian law upon which the Kazaa decision was based, saying: “The [Australian] approach to authorization shifts the balance in copyright too far in favour of the owner’s rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole.” To be held liable based on conventional principles of Canadian copyright law the alleged authorizer must sanction, countenance and approve the infringement. And even if a defendant could be said to authorize users’ activities, courts must presume they do so only insofar as it is in accordance with the law.

One way YouTube’s users might act legally is by making fair uses of copyright-protected content. In this respect, Canadian law is less forgiving than American law. Most notably, there is no clearly established parody defence in Canada. Nevertheless, the distinction between ‘fair use’ in the U.S. and ‘fair dealing’ in Canada isn’t particularly important to the outcome of this case, given that much of the content on YouTube falls outside the scope of this defence. Yes, there is ample non-infringing content, but there is also much material that is clearly illegal.

Moreover, firms that actually host or transmit copyright-infringing content are treated differently from firms that merely contribute to or induce infringement. Perhaps surprisingly, hosts and intermediaries are less likely to be liable, due to the availability of safe harbour provisions in the

intellectual property laws of most countries. If this seems anomalous, consider Columbia law professor Tim Wu’s analogy. Wu explains that if the internet were a red-light district, Napster, Kazaa and Grokster would be the pimps while YouTube would be the hotel.

A Canadian safe harbour for hosts and transmitters is found in paragraph 2.4(1)(b) of the Copyright Act. It provides that persons who only supply “the means of telecommunication necessary for another person to so communicate” are not themselves parties to the communication. The leading case on this point is *SOCAN v. CAIP*,⁵ in which the Supreme Court of Canada considered whether internet service providers were liable to pay a tariff (*SOCAN’s* Tariff 22) for the online communication of musical works. The Court held they were not. An intermediary falls within the safe harbour so long as it “confines itself to providing ‘a conduit’ for information communicated by others.” The use of techniques to improve the efficiency of communications, such as caching, does not affect intermediaries’ legal liability.

Unlike the U.S. provision, however, the Canadian safe harbour does not apply to activities other than communication. A service provider or host might still be liable for reproductions that occur when content is cached. (Canadian broadcasters have litigated and lobbied unsuccessfully against a copyright tariff requiring payments for ephemeral reproductions.) Or, a service provider or host might be held to authorize the infringing acts of its customers.

SOCAN v. CAIP also dealt with that question. The Court found that “when massive amounts of non-copyrighted material are accessible to the end user, it is not possible to impute ... an authority to download copyrighted material as opposed to non-copyrighted material.” However, Justice’s Binnie’s *obiter dicta* suggests that copyright liability may exist if a service provider has notice of infringing material on its system and “fails to take remedial action.”

What sort of remedial action might be required? Well, the Court hinted that upon notice of infringing content, the host might be required to “take it down.”

Canadian legislators might have adopted a different approach. In 2005, Bill C-60 was introduced to reform parts of Canadian copyright law. Though the Bill died before passing into law, it would have established a ‘notice-and-notice’ system. That means a firm notified of alleged infringement could have escaped liability by forwarding the notice to its customer. Though less strict than a ‘notice-and-takedown’ or ‘notice-and-termination’ regime, it has been reported to be nonetheless effective. The Bill also would have immunized network services from all liability for caching, including communications and reproductions.

The U.S. litigation against YouTube should provoke Canadians to ask another question when designing legislative reforms: What exactly is a network service? Bill C-60 would have provided a safe harbour for firms “providing services related to the operation of the Internet or other digital network.” A firm that “provides digital memory in which another person stores a work or other subject-matter” would have also been protected. But would this have covered YouTube? Should it have?

Yale law professor Yochai Benkler observes that a networked rather than industrial information economy “holds great practical promise: as a dimension of individual freedom; as a platform for better democratic participation; as a medium to foster a more critical and self-reflective culture; and ... as a mechanism to achieve improvements in human development everywhere.”⁶

Lawrence Lessig treats this ‘second economy’ as distinct from and complementary to the traditional one based on *quid pro quo* transactions.⁷ Yet there seems to be increasing convergence between the two economies. Commercial entities are scrambling to capitalize on the sharing economy.

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² 17 U.S.C. § 512.

³ *Universal Music Australia Pty Ltd. v. Sharman License Holdings Ltd.*, [2005] FCA 1242; *Metro-Goldwyn-Mayer Studios, Inc et al. v. Grokster, Ltd et al.*, 545 U.S. 913, 125 S. Ct. 2764 (2005).

⁴ *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13.

⁵ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45.

⁶ Yochai Benkler, *The Wealth of Networks* (New Haven: Yale University Press, 2006) at 2.

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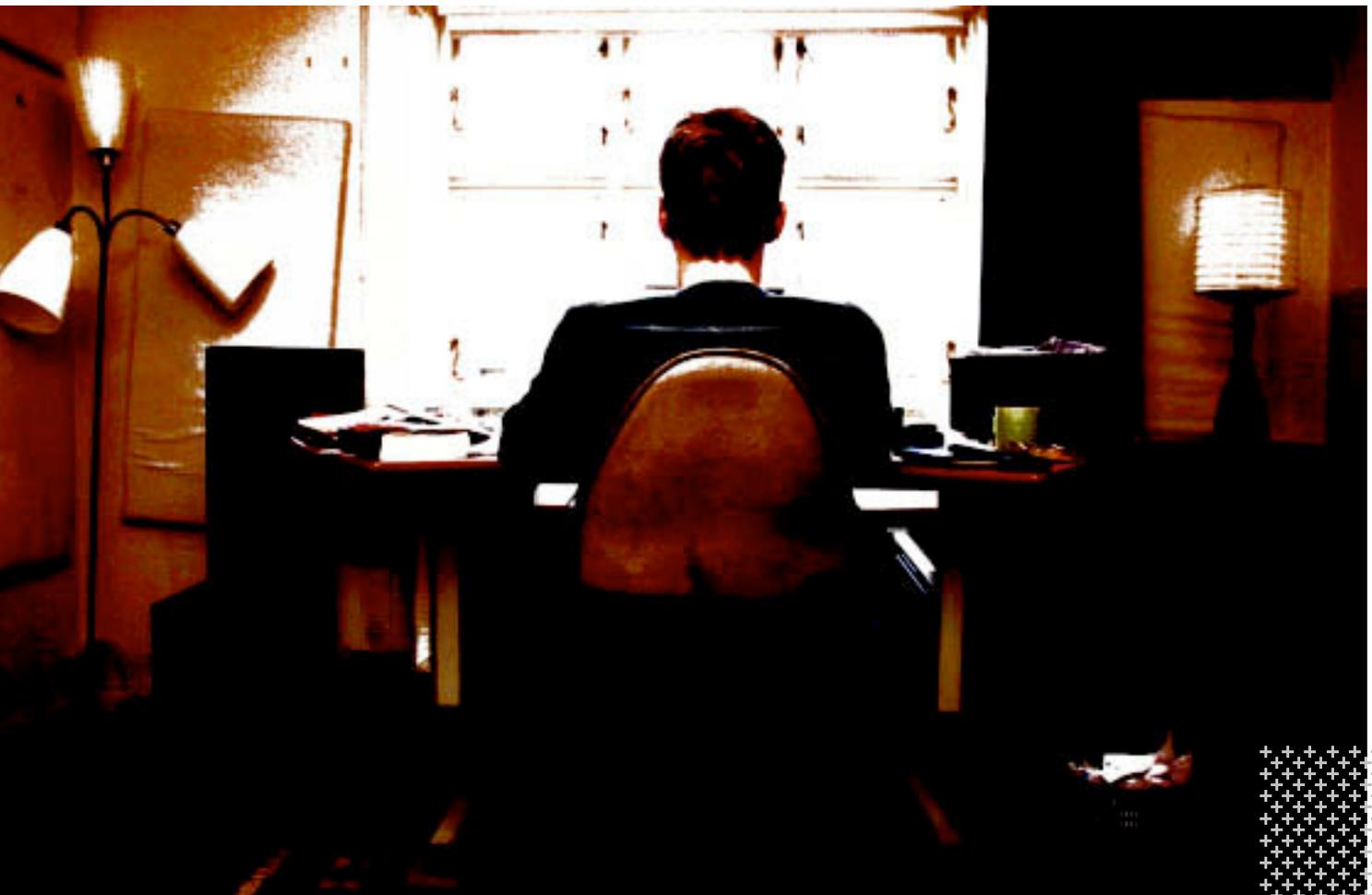
Two famous examples include the US\$580 million purchase of MySpace by News Corporation and Google's acquisition of YouTube for US\$1.65 billion. On a related note, an empirical study commissioned by the European Union concluded that open-source software is worth €12 billion per annum to the European economy.⁸ Firms are realizing that there are big bucks at stake and jumping aboard the bandwagon of peer-produced content.

The overlap of the commercial and sharing economies has caused tensions. There is no bright line between pirated and peer-produced

content. Some of the material available on sites such as YouTube is blatantly copyright infringing and directly competes with copyright owners' offerings on their websites, at digital download retailers and through television broadcasts or DVD video recordings. Other material incorporates copyright-protected content into legitimate derivative works, such as music or video mashups or soundtracks added to home movies. And still more material is genuinely creative in the very strictest sense of the word, as is the case with many independent films, music videos or other works produced by professionals

and amateurs alike. Separating this spectrum of content is not an easy task.

It doesn't help matters that many of the firms operating in this environment suffer from a sort of schizophrenia. News Corporation owns MySpace. Viacom has relied on the same safe harbours that protect YouTube to operate its own video-sharing sites, iFilm and AtomFilms. Sony is trying to protect its interests in music, film, television and video games, while at the same time Universal Music has sued Sony-owned Grouper.com. Consumers have become creators, and consequently, intellectual



⁷ Lawrence Lessig, "On the Economies of Culture" *Lessig Blog* (28 September 2006), online: *Lessig Blog* <<http://www.lessig.org/blog/archives/003550.shtml>>.

⁸ Rishab Aiyer Ghosh, "Economic impact of open source software on innovation and the competitiveness of the Information and Communications Technology (ICT) sector in the EU" (20 November 2006), online: EUROPA European Commission <<http://ec.europa.eu/enterprise/ict/policy/doc/2006-11-20-flossimpact.pdf>>.

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property rights-holders. Many professional artists and producers endorse their fans' social media networks. The networked information economy involves a web of overlapping interests.

So what can the YouTube case teach us about legal strategies for profiting from peer-produced content in this complex environment? And by 'profit,' I mean both direct and indirect financial returns as well as social, cultural and democratic gains achievable through systems of peer-production.

The cutting-edge business literature refers to several alternative market strategies that may be preferential to costly legal battles. Authors of a recent study on managerial approaches reveal that a firm's attitude toward consumer innovation can be either positive or negative while its actions can be either active or passive.⁹ Differentiating on these two axes, the authors classify firms into four categories, depending on whether they discourage, resist, encourage or enable creative consumers. Firms that discourage creativity have a negative attitude, which they assert only passively. Resisting firms, by contrast, share a negative attitude but take active steps to restrain consumer creativity. A positive attitude differentiates firms that encourage or enable consumer creativity, but only enablers act overtly to facilitate consumers' behaviour.

The best business models involve cooperation between incumbent copyrights-holders, innovative entrepreneurs and independent peer producers. For instance, The BBC actively enables consumer creativity through its 'Creative Archive' project. Bands like the Barenaked Ladies are also building success by embracing peer-production. They have enabled fan remixes by selling the raw tracks behind their recordings, encouraged fans to capture and share concerts and released music videos incorporating social media celebrities.

There is no single strategy that suits all firms dealing with peer-produced content. Nevertheless, the models being implemented by the likes of the Barenaked Ladies and the BBC offer significant and generally underappreciated benefits to all stakeholders.

Discouraging or resisting consumers' creativity can be ineffective and, in some cases, counterproductive. Even merely encouraging consumer creativity, as opposed to enabling it, may leave revenue-generating opportunities untapped.

Obviously, one of the primary challenges firms face is to balance competing sentiments and strategies. The typical tension is between the publicity viral marketing provides and the control needed to monetize momentum. One of the advantages of most countries' safe harbour provisions is that they allow copyright owners some of the best of both worlds. Content owners can tolerate certain uses of their works while prohibiting others. When consumers' behaviour becomes cause for discomfort, copyright owners can complain.

Unfortunately, many firms find it difficult to take advantage of the flexibilities offered under safe harbour schemes. For large corporate copyrights-holders, notifications might be ineffective. Though the specifically identified infringing work may be removed, another copy of the same work may reappear within days or hours. The giant game of whack-a-mole can be tedious and costly.

Recipients of such notifications might also find it onerous to comply with their legal obligations. Though automation might help, where value judgments are appropriate, automation can be highly problematic. Given the lack of judicial or quasi-judicial oversight, unsubstantiated notifications might result in the unwarranted removal of non-infringing content.

A better option, therefore, is to embrace licensing possibilities. Options include mega-deals between powerhouse players, voluntary collective blanket licenses and initiatives like the Creative Commons. For mainstream music, movies and television programs posted in their entirety, large-scale agreements might

be reached with conglomerates representing multiple subsidiary labels, studios or networks. Another way to deal with such content might be collective blanket licensing, either on a voluntary or compulsory basis. Collective blanket licensing could also work well to enable the creation of a wide range of derivative works. For many other creative works, individual creators might enter into express agreements; though the host or provider will normally stipulate take-it-or-leave-it licensing terms through clickwrap contracts. In some circumstances, Creative Commons or similar licenses might be appropriate.

These strategies require concessions from both sides of the copyright debate. Rights-holders will be required to relax legal and technological control over their creations and tolerate certain uses of their intellectual property. Distributors will have to accept the legitimacy of copyright concerns and perhaps pay for activities that should arguably be free.

These trade-offs among private parties are, however, worth the price. In this way, creators of all sorts will experience increased profits, distributors and other intermediaries will be able to build innovative business models and society will benefit from a more democratic and participatory culture.

Perhaps most importantly, this strategy for capitalizing on creative consumers in the traditional economy will minimize collateral damage upon those who wish to participate in the parallel sharing economy. And, in the long term, the public interest will perhaps be the greatest beneficiary of all. //

Professor Jeremy de Beer is a member of the Law & Technology group. He teaches Digital Music, profiled elsewhere in this magazine. His study of orphan works licensing at the Copyright Board of Canada will be published soon.

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⁹ Pierre R. Berthon et al., "When Customers Get Clever: Managerial Approaches to Dealing with Creative Consumers" (2007) 50 *Business Horizons* 39 at 44-45.