



COVER SHEET

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Digital copyright law in a YouTube world

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A 12 year old girl uploads a video of herself lip syncing the latest Shakira pop song onto YouTube and is served with a copyright infringement notice. Has she breached copyright law? Has she infringed moral rights or performers' rights? Is she entitled to rely upon the defence of fair dealing? Can YouTube be held liable for authorising copyright infringement? And on what terms may her video be reused? The popularity of online video sharing websites has grown enormously over the past year, with the most famous of these YouTube now ranked as the 4th most popular website on the internet with over a 100 million videos viewed every day. However, the copyright and other related issues surrounding these video sharing websites – in particular the content which is uploaded to them – remain less clear. This article will provide an overview of key copyright law issues facing online video sharing websites, such as YouTube from an Australian perspective.

YouTube

YouTube, the most popular video sharing website on the internet was founded in February 2005 as a consumer media website that enables people from all over the world to watch, upload and share videos online. Today YouTube has grown to be one of the fastest growing websites on the internet, evidenced by the recent acquisition of YouTube by Google for 1.65 billion US dollars.¹ Currently YouTube is ranked as the 4th most popular website on the internet with over 100 million videos viewed each day and more than 65 000 new videos uploaded every day.² YouTube's main form of revenue is through advertisements which feature on both the search pages and above the videos themselves. The success of YouTube arguably lies in its simple three step process to what YouTube calls 'broadcast yourself on YouTube':

- watch – instantly locate and watch millions of fast streaming videos online;
- upload – quickly and simply upload and tag videos in almost any format; and
- share – easily share your videos with anyone in the world.³

In addition to this, users can also search, join and create video groups with people of similar interests, subscribe to member videos, save favourites, make playlists, embed videos on blogs or websites and make videos private or public.

Copyright law

The content

¹ Tom Krazit, *Google makes video play with YouTube buy* (2006) CNET News <http://news.com.com/Google+makes+video+play+with+YouTube+buy/2100-1030_3-6124094.html>.

² USATODAY.com, *YouTube serves up 100 million videos a day online* (2006) USA Today <http://www.usatoday.com/tech/news/2006-07-16-youtube-views_x.htm?>; Alexa, *Traffic Rankings – youtube.com* (2006) <http://www.alexa.com/data/details/traffic_details?url=YouTube.com>.

³ YouTube, *Broadcast Yourself* (2006) <<http://www.youtube.com>>.

The content which features on video sharing websites can generally be classified into three broad categories:

- original creations – such as home videos, original short movies and music;
- transformative derivatives – such as mashups or remixes of original content which have been altered in some way to form something new and creative;⁴ and
- copied or ‘ripped’ content – such as clips of original content which have been reproduced without any element of transformation.

Within these three general categories you are likely to find everything from home videos, current events, news, movies, movie trailers, television shows, commercials, music, music videos, photos, live concerts, sports events and just about anything else that can be captured on a video camera freely available to watch online. Generally, the content which is available tends to be quite short in nature, enabling it to be uploaded and viewed quickly. However, this is not always the case with some video sharing websites such as Google Video providing full length documentaries, television shows and movies.

The types of subject matter involved

The content which is featured on video sharing websites, like YouTube is most likely to be always classified as a subject matter which will be protected under the *Copyright Act 1968* (Cth). Most commonly the subject matter involved in terms of infringement, will be that of ‘sound and television broadcasts’ and ‘cinematograph films’.⁵ In many cases the subject matter involved will also consist of a number of other underlying works or other subject matter as well. It is clear that the content uploaded such as films, videos, music videos and television programs will be protected as a ‘cinematograph film’ under the *Copyright Act 1968* (Cth). Similarly, content such as news, current events, television shows and sports events that have been broadcast on television will be classified as a ‘television broadcast’ for the purposes of the *Copyright Act 1968* (Cth).

Copyright infringement

Copyright infringement will occur where a person who is not the copyright owner, does or authorises someone else to do, without licence, any of the acts within the copyright owner’s exclusive rights.⁶ In the context of uploading a video of a ‘television broadcast’ or a ‘cinematograph film’ to a video sharing website, like YouTube, the person uploading it, without a licence will be infringing the copyright owner’s exclusive right to communicate the television broadcast to the public⁷ and the right to make a copy of the film and communicate it to the public.⁸

⁴ For an overview of mashups and remixes see Damien O’Brien and Brian Fitzgerald, ‘Mashups, remixes and copyright law’ (2006) 9(2) *Internet Law Bulletin* 17.

⁵ *Copyright Act 1968* (Cth) ss 10(1), 23(1), 90, 91; *TCN Channel Nine Pty Ltd v Network Ten Ltd* [2002] FCAFC 146 [10]-[13].

⁶ *Copyright Act 1968* (Cth) ss 36(1), 101(1).

⁷ *Copyright Act 1968* (Cth) s 87.

⁸ *Copyright Act 1968* (Cth) s 86; for a recent example of copyright infringement on YouTube see the United Kingdom Cabinet Office decision to withdraw infringing videos from YouTube, Will Sturgeon, *YouTube blunder: Egg on face for Cabinet Office* (2006) silicon.com <<http://www.silicon.com/publicsector/0,3800010403,39161833,00.htm>>.

It should also be noted that video sharing websites, like YouTube may be liable for direct infringement for communicating a ‘television broadcast’ or ‘cinematograph film’ to the public through the online streaming of videos. In this regard it is uncertain whether s 22(6) of the *Copyright Act 1968* (Cth) which provides that the person determining the content of a communication is the person deemed to have made the communication, will apply to YouTube. Although the *Copyright Act 1968* (Cth) provides no further guidance in determining responsibility for communication, *Universal Music Australia Pty Ltd v Cooper* does suggest that it is relevant to consider the extent to which, in this case, the website involved determined, formulated or created the content.⁹ However, it is unclear whether the level of involvement of video sharing websites will be such that they will be deemed to have made the communication.

A substantial part

Once it has been established that the exclusive rights of the copyright owner have been infringed, it is then necessary to determine whether the act has been done in relation to a substantial part of the work or other subject matter involved.¹⁰ In determining what will amount to a substantial part, it is necessary to take into account the quality of the part taken, as opposed to its quantity and the importance the part taken bears in relation to the work as a whole.¹¹ An analysis of whether a substantial part of the work, other subject matter or underlying works is involved will be particularly important given the nature of many of the short videos which are uploaded to websites such as YouTube. Where the video uploaded is a whole copy of the original content, such as television shows, movie trailers or music clips, a substantial part of the other subject matter will almost always be involved. However, it is more difficult in determining substantiality in relation to transformative derivatives, such as mashups or remixes which feature only very short parts of the original content. Such assessments of substantiality will need to be made on a case by case basis, and even then it may be that the court interprets the substantial part test narrowly so that even transformative derivatives are held to be a substantial part of the work or other subject matter in question.

In an attempt to avoid ‘substantial’ reproductions of copyrighted material, YouTube and other video sharing websites have introduced time limits for videos which are uploaded. In YouTube’s case videos are now limited to 10 minutes. However, this is not necessarily an effective measure given that much of the original content which is uploaded is less than 10 minutes in its entirety, for example music videos or movie trailers, so the requirement of substantiality will always be satisfied.

Authorisation of copyright infringement

⁹ [2005] FCA 972 (Tamberlin J, 14 July 2005) [69]-[76].

¹⁰ *Copyright Act 1968* (Cth) s 14(1).

¹¹ *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273, 294; *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300, 305; *Data Access Corporation v Powerflex Services Pty Ltd* (1999) 45 IPR 353, [84]; *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)* [2005] FCAFC 53 (Sundberg, Finkelstein and Hely JJ, 26 May 2005) [12], [50]-[52]; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* [2005] HCA Trans 842 McHugh and Kirby JJ; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 78 ALJR 585, 589, 605.

It is also necessary to consider whether video sharing websites, like YouTube can be held liable for authorising copyright infringement through the content they provide. Under the *Copyright Act 1968* (Cth) a person or organisation that authorises another person to do an infringing act without licence, will themselves infringe copyright.¹² However, in order to protect the position of intermediaries such as carriage service providers (CSPs), a defence to authorisation liability was introduced under ss 39B and 112E of the *Copyright Act 1968* (Cth). This defence provides that a person, including CSPs will not be held to have authorised copyright infringement merely because the facilities provided by them for making a communication are used by someone else to infringe copyright.¹³ The effect of this defence was first considered in *Universal Music Australia Pty Ltd v Cooper* where the Federal Court held that s 112E did not apply, as Cooper had done more than simply provide the facilities for the making of communications by encouraging users to download infringing music files.¹⁴ Likewise, in *Universal Music Pty Ltd v Sharman Licence Holdings* the Federal Court held that the defence under s 112E did not apply to the defendants as they had committed positive acts designed to encourage copyright infringement.¹⁵

There remains little judicial guidance on the interpretation of ss 39B and 112E of the *Copyright Act 1968* (Cth). However, from the decided cases it would appear that where the person or organisation is intimately involved with the infringing content then this defence to authorisation will not apply. For example, in *Universal Music Pty Ltd v Sharman Licence Holdings* Wilcox J held that something more is required than simply providing the facilities for someone else to infringe copyright to be held liable for authorisation.¹⁶ Notably, Wilcox J held that the legislative intention of s 112E was to ‘protect the messenger’, ie carriers and internet service providers.¹⁷ Although, YouTube does not in anyway encourage copyright infringement, applying the reasoning of Wilcox J it would seem that YouTube is more than a mere ‘messenger’, as they are essentially running a business which provides a content service to the public. Furthermore, the fact that YouTube exercises some discretion in removing infringing videos in some circumstances and that it is in YouTube’s financial interests that infringing videos are uploaded, is likely to mean that YouTube will not be protected by s 112E.¹⁸

Safe harbour provisions

As a result of the *US Free Trade Agreement Implementation Act 2004* (Cth) a number of changes have been made to the *Copyright Act 1968* (Cth) concerning the liability of CSPs

¹² *Copyright Act 1968* (Cth) ss 36(1), (1A), 101(1), (1A); *University of New South Wales v Moorhouse and Angus & Robertson* (1975) 133 CLR 1.

¹³ *Copyright Act 1968* (Cth) ss 39B, 112E; note this also applies to moral rights under *Copyright Act 1968* (Cth) s 195AVB.

¹⁴ [2005] FCA 972 (Tamberlin J, 14 July 2005) [97]-[99].

¹⁵ [2005] FCA 1242 (Wilcox J, 5 September 2005) [405].

¹⁶ [2005] FCA 1242 (Wilcox J, 5 September 2005) [401].

¹⁷ *Universal Music Pty Ltd v Sharman Licence Holdings* [2005] FCA 1242 (Wilcox J, 5 September 2005) [398], [418].

¹⁸ *Copyright Act 1968* (Cth) ss 36(1A), 101(1A); *Universal Music Pty Ltd v Sharman Licence Holdings* [2005] FCA 1242 (Wilcox J, 5 September 2005) [404].

for the infringement of copyright.¹⁹ These new provisions are an attempt to bring Australian copyright law in line with the ‘safe harbor’ provisions in the United States under the *Digital Millennium Copyright Act 1998*. Notably, these provisions do not provide a complete defence for CSPs for copyright infringement; instead they act to mitigate liability by limiting the remedies available against them for copyright infringement in certain circumstances. There are four categories of online activities outlined in ss 116AC to 116AF which will qualify for a limitation of remedies for authorisation of copyright infringement under the *Copyright Act 1968* (Cth). In YouTube’s case they will most likely fall within the ‘Category C Activity’ under s 116AE, which refers to the storing of copyright material at the discretion of the user on a system or network operated by or for the CSP. Under this category in order for a CSP to qualify for the limitation of remedies they must comply with each of the conditions outlined in s 116AH, in particular the CSP must not receive a financial benefit directly attributable to the infringing activity where they have the right and ability to control the activity.

Will YouTube qualify as a CSP?

The key question to be determined in considering whether YouTube will be entitled to the limitation of remedies under the ‘safe harbour’ provisions will be whether YouTube falls within the definition of a CSP. Under s 87 of the *Telecommunications Act 1997* (Cth) a CSP is defined narrowly as a person supplying a carriage service to the public using a network. It would seem unlikely that YouTube would fall within this definition as they do not supply a carriage service to the public, unlike internet service providers.

YouTube does not provide internet access or any other carriage services or facilities, they simply provide visual content, being uploaded videos to the public via a website. Therefore, YouTube is unlikely to be classified as a CSP and thus will not be entitled to the benefit of the ‘safe harbour’ provisions.²⁰ Even if YouTube were to be classified as a CSP it is unlikely they would qualify for the relevant ‘safe harbour’ provision as the advertisements featuring above the videos would be likely to be seen as being directly attributable to the infringing activity in circumstances where they have the right and ability to control the activity.²¹

Tur v YouTube Inc

In the first case to be brought against a video sharing website, in July Robert Tur, a journalist and helicopter pilot filed an action against YouTube in a Californian court alleging copyright infringement in his works which were uploaded to YouTube.²² Tur the copyright owner of numerous famous videos including the beating of Reginald Denny in the 1992 Los Angeles riots, the OJ Simpson police chase and the North Hollywood shootout claims that YouTube is violating the United States Supreme Court decision in

¹⁹ *Copyright Act 1968* (Cth) s 116AA.

²⁰ Note that under the *Digital Millennium Copyright Act 1998* (US) the ‘safe harbor’ provisions apply to both ‘service providers’ and ‘online service providers’ which would include video sharing websites, like YouTube.

²¹ See the discussion in *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972 (Tamberlin J, 14 July 2005) [108].

²² *Tur v YouTube Inc*, (CD Cal), 797.

MGM v Grokster,²³. Tur's lawyer's claim that YouTube is not merely a 'Grokster redux' as YouTube, unlike peer to peer networks is a centralised service which provides the computer servers and data facilities that enable users to upload copyrighted material. However, the merits of these claims would appear to be questionable under United States copyright law, given the somewhat broader operation of the equivalent United States 'safe harbor' provisions.²⁴

Moral and performers' rights

Where an original author or creator's copyright work has been uploaded to a video sharing website, like YouTube the issue of moral rights will need to be considered. An analysis of the content which is available on YouTube reveals that in many cases questions about the infringement of an author or creator's moral rights will arise. This will be particularly relevant where an author or creator's original work is not attributed²⁵, where the person submitting the video claims attribution in the work as if it were their own²⁶ and where a video is subjected to derogatory treatment which could be interpreted to demean the author or creator's reputation²⁷.

Similarly, issues involving the infringement of performer's rights may arise where the videos uploaded are in the form of a live performance. For example a search of U2 in YouTube returns hundreds of videos of U2 from various live concerts. It would seem clear that users who submit unauthorised videos of a performers live performance will infringe the performer's copyright in the sound recordings of their live performance, as well as the performers' rights regarding communicating, recording and broadcasting a live performance.²⁸

Fair dealing

Under the current fair dealing provisions in Australia it would seem highly unlikely that users who upload videos to video sharing websites like YouTube would qualify for the defence of fair dealing.²⁹ It had been hoped that the Attorney General's proposals for reform in this area would bring the law up to date with technology and indeed the online 'clip culture' of the internet. However, the recent announcement of major copyright reforms by the Attorney-General would appear to be of little assistance for those uploading videos which could be classed as highly transformative, non-commercial derivatives that do not compete with the primary market of the copyright owner. It is

²³ 125 S Ct 2764, 2770 (2005); 380 F3d 1154 (9th Cir 2004).

²⁴ Fred von Lohman, *YouTube's Balancing Act: Making Money, Not Enemies* (2006) *The Reporter Esq* <http://www.hollywoodreporteresq.com/thresq/spotlight/article_display.jsp?vnu_content_id=1002802746>

²⁵ *Copyright Act 1968* (Cth) s 193.

²⁶ *Copyright Act 1968* (Cth) s 195AC.

²⁷ *Copyright Act 1968* (Cth) s 195AQ.

²⁸ *Copyright Act 1968* (Cth) ss, 22(3A), 248G.

²⁹ *Copyright Act 1968* (Cth) ss 40, 103C, 41, 103A, 42, 103B, 43, 104.

possible that the proposed defence for the purposes of parody or satire may apply where uploaded videos fall within this definition. However, a more flexible defence for creativity or a 'remix right' for non-commercial purposes would have provided greater clarity and certainty in determining the extent to which existing content may be lawfully reused.

Licensing issues

There are also a number of licensing issues which arise in relation to video sharing websites, such as who owns the intellectual property rights in the uploaded videos and on what terms they may be reused or distributed. In particular, the YouTube submission licence has raised much concern among users submitting videos. The YouTube licence provides that the author retains all ownership rights in their submissions.³⁰ However, as a condition of submission YouTube retains a licence to reuse videos at their sole discretion and for any purposes. Similarly, viewers are also granted a broad licence to use submissions, seemingly even for commercial purposes and without the need to give attribution. From the terms of this licence it would be completely legal for example for YouTube to commercially produce a DVD comprising user submissions or for viewers to prepare derivative works of a user's video and then sell it commercially without any requirement for attribution.

Conclusion

The question which remains is whether video sharing websites, like YouTube, will be able to survive the many challenges raised by copyright laws. The rise of the online 'clip culture' through websites such as YouTube, also highlights the importance of achieving real reform in the area of copyright law. Issues such as fair dealing provisions which reflect the great potential of websites like YouTube and how the law can accommodate highly transformative, non-commercial derivatives all need to be considered. In this regard, copyright law needs to establish clear provisions within the existing law in which individuals can create new works which build upon existing content. The proposed introduction in Australia for an exception for parody and satire is a positive step. However, more work must be done if we are to realise the very great potential which video sharing websites like YouTube can have for society.

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³⁰ YouTube, *Terms of Use* (2006) <<http://www.youtube.com/t/terms>>.

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