

YouTube

One can presumably buy a lot for \$1.65 billion. Google, which already has a lot, has just spent this purchasing YouTube, one of the current web spots on which to see and be seen. It serves over 100 million video clips a day and attracts over 20 million users a month. YouTube is certainly an interesting site, wherever on the scale between electoral politics and watching what other people can do with coke bottles and mentos your interests lie. But has Google simply acquired a host of copyright problems for its money?

YouTube may represent a fundamental change in the way video content is accessed and enjoyed and sound the death knell of traditional television, or it may not. What it certainly does represent is yet another new stage in the continuing evolution of how copyright applies to digital uses of content. The question it highlights in particular, is the extent to which a website that relies upon third party content but which it has not necessarily cleared with the owners of that content, can use such content without expecting to be sued.

Although many of the clips on YouTube are made by its users on a purely amateur basis, and they consent to YouTube making their content available, a large amount is owned by third parties such as the major broadcasters, film companies and record labels, who may well not have consented. Rumours abound about behind-the-scenes elements of the Google acquisition that may insulate YouTube against copyright claims. But one of these at least, that a large part of the \$1.8 billion has been held back by Google in case copyright claims are brought against YouTube, does appear to have a basis in truth. Google have confirmed that \$206 million has been held back for a year "to secure certain indemnification obligations". So is Google taking a huge risk or is this all part of a deliberate strategy? Few people would bet against Google's ability to see the big picture, and the strategy appears to have several elements.

Do safe harbours apply?

First, there is the degree of protection that may be afforded by the law. Digital copyright issues are rarely about the basics of copyright infringement. Proving ownership and subsistence of copyright, and that copying has taken place, usually pose no difficulties. The interesting issues lie around which defences or exceptions apply. These are of two sorts; specific protections for online service providers ("safe harbours") and fair dealing defences.

The US debate over what online services are legally able to do has been dominated since 2000 by the provisions of the Digital Millennium Copyright Act (the "DMCA"). This affords powerful safe

harbour for service providers through whom content passes, provided – in summary - that they remove the content as soon as notified about it by the rights-owner and that they enjoy no commercial benefit from the specific content. Some relatively small rights-owners have already sued YouTube because their content has appeared on the site, and challenge whether the DMCA protections apply. They ask whether a site that is clearly a commercial enterprise and which is operating on such huge scale can really fall within the safe harbour. These questions have yet to be conclusively answered by the Courts. The position in Europe (should YouTube fall within a relevant jurisdiction) would be yet more favourable to the rights-owners, as the comparable safe harbours are understood to be narrower in scope than those under the DMCA.

Fair dealing defences may apply to some of the content, such as those permitting reporting of current events. But overall their value to YouTube is likely to be much less. It is very unlikely that, for example, fair dealing defences will apply to music videos, of which there are many on YouTube.

Has the Grokster decision harmed content-owners?

Even if the DMCA would apply, there is powerful precedent for saying that it can only go so far in protecting online activity. When the suit against the peer-to-peer file sharing software company Grokster reached the US Supreme Court in 2005, Grokster was held liable, even though it did not itself make any copies of infringing content as YouTube does. That the majority of the files shared on Grokster consisted of infringing copies was certainly relevant, but the Justices' findings that Grokster had actively promoted the technology's potential for unauthorised access to copyright recordings and films ("by the clear expression or other affirmative steps taken to foster infringement") in order to drive up the level of usage and therefore increase their advertising revenues seemed to be the key to their decision.

On one view, the basis of what YouTube is doing is not that different from what Grokster and the others were doing. But is YouTube an example of use of technology to distribute content that falls the right side of the law, in contrast to Grokster? Until the US Supreme Court decision, it had been widely thought that the rights of the copyright owners to pursue those who provided consumers with technologies that were capable of being used for copyright infringement (as well as legitimate purposes) did not extend to circumstances where the technology provider had no actual means of controlling a consumer's use of the devices or software in question.

When the Grokster decision came out it was portrayed as a dramatic victory by the rights owners, with the unanimous bench upholding their rights. However, when looked at more closely it became apparent that the Supreme Court had been very careful not to label the technology itself as infringing, but simply the way it was used. If anything therefore the Supreme Court has introduced greater

clarity – and therefore scope - for services that use to use copyright works without their owner's permission.

Getting consents

Although here have been some concerns voiced by major rights-owners over YouTube, the relative lack of outcry has been perhaps indicative of another part of the strategy, which is to keep your potential enemies close. YouTube has done content deals with several of the majors, including granting some of them shares in the company before the Google acquisition form which they made substantial sums (though nothing like as substantial as those made by the site's founders).

Some commentators have speculated that these consents are for a limited period of time (perhaps 6 months) while YouTube seeks to introduce technology that may limit use of unauthorised content. This would address an area of vulnerability for Grokster before the Supreme Court, which indicated that at least part of the reason for Grokster's liability was because it had not introduced such technologies. The question of who ultimately bears the responsibility to protect content, the owner or the service provider, is on that will soon get an airing in the US Courts, as Universal Music has just sued MySpace in respect of video material on MySpace's site.

Choosing your battles

Perhaps underlying Google's strategy is that, if there is a battle to be had over rights in digital content, then better for it to be on ground of its own choosing and YouTube may simply be that. It is no doubt a taste of services to come, but as it is limited to short clips it is less obviously damaging than if it made available full length feature films (though try telling that to sports rights owners). The Grokster case contains some helpful guidance for such sites as to how to avoid liability, and if Google can buy some time from major rights-owners, it may be able to do enough to reduce the apparent harm posed by the site that any suit against it fails. In the meantime, it can watch what happens to MySpace, and learn from that. \$1.65 billion may seem a lot of money to buy a legal battleground, but set against the potential that true digital content convergence has for a company in Google's position, it may be a small price to pay.

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