
Legal Controversies Surrounding Wikipedia

³⁴ See 'Seigenthaler controversy' on Wikipedia, accessible at http://en.wikipedia.org/wiki/John_Seigenthaler_Sr._Wikipedia_biography_controversy at 8th June 2007.

³⁵ John Seigenthaler, "A False Wikipedia 'Biography'", *USA Today* (USA), 29th November 2005, accessible at http://www.usatoday.com/news/opinion/editorials/2005-11-29-wikipedia-edit_x.htm, 8th June 2007.

³⁶ See 'Seigenthaler controversy', above n 34.

³⁷ The statements, in their entirety, were quoted by Seigenthaler in his *USA Today*, piece. See Seigenthaler, above n 35.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Jimmy Wales in Ken S. Myers, "Wikimmunity: Fitting the Communications Decency Act to Wikipedia" (2006) 20(1) *Harvard Journal of Law & Technology* 163 at 170 – 171.

⁴² Seigenthaler, above n 35.

⁴³ *Id.*

⁴⁴ See Myers, above n 41 at pp. 172 – 201.

⁴⁵ See 'Seigenthaler controversy', above n 34; see also Katharine Q. Seelye, "A Little Sleuthing Unmasks Writer of Wikipedia Prank", *The New York Times* (New York), 11 December 2005, accessible at

<http://www.nytimes.com/2005/12/11/business/media/11web.html?ex=1291957200&en=a50503d3b281b485&ei=5088&partner=rssnyt&emc=rss> at 12th June 2007.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Myers, above n 41, at p. 170.

⁴⁹ See 'Criticisms of Wikipedia – Copyright Issues', above n 14.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

GooTube: Who is the empire now and will it strike back?*

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**Note: This article is not intended to be, and must not be used as a substitute for, legal advice. The thoughts and arguments presented herein have been formulated in the abstract, and without the benefit of the full range of materials which must be considered before advising in respect of these issues in relation to a particular service or entity. The article is designed only to be a comparative analysis of US and Australian Copyright law, with specific reference to topical subject matter.*

Introduction

The high profile legal battles between the Record Industry Association of America and Napster¹, and more recently, Universal Music and Sharman Networks (the *Kazaa* litigation)², are part of the folklore of the internet. These disputes were played out both in and out of the courtroom, with sophisticated spin merchants on both sides casting the victims either as "poor, unremunerated artists" or conversely, "disfranchised music lovers".

The originating claims in both matters were brought when the popular use of file sharing technology was relatively new. At the time, much was made of the new era in digital file sharing and manipulation: "Rip.Mix.Burn." proclaimed an advertisement for Apple computers. The prevailing climate encouraged users to cease being simply passive consumers of information, and to become active agents in the creation (and distribution) of their own audio-visual destinies.

Napster has long since settled and *Kazaa* decided, but since these cases, the proliferation of high speed broadband (except, perhaps, in Australia) and various innovative new applications have combined to focus attention even more greatly on the consumer as 'creator'.

Indeed, pundits and the popular media alike have proclaimed the arrival of "Web 2.0". Whether Web 2.0 ought properly to be distinguished from Web 1.0 is a moot point³, because there is no doubt that a fundamental shift has occurred in the way 'consumers' think of, and use, the internet⁴. No longer limited to sharing audio files, consumers are armed with an impressive arsenal of expressive multimedia tools, which they seem happy to deploy in conjunction with licensed and unlicensed copyright materials alike.

Another notable shift has occurred in the content ownership landscape. Whereas in the Napster days, traditional media content owners were battling 'upstart' companies with little

market power, the lines are no longer so easily drawn. Google's purchase of YouTube and News Corporation's purchase of MySpace have thrown the traditional content ownership models into disarray. Suddenly, 'progressive' content delivery models are owned by major corporates. Consequently, it is more difficult to confidently predict the endurance of the status quo.

In light of this shift, and the expanding role of consumer-producers, the question which presents itself is: was that early, triumphant, litigation by incumbent content owners a portent of things to come, or just an anomaly which would only delay the demise of outdated business models?

The recent filing of a complaint by media giant Viacom against Google⁵ gives us our first glimpse into the future battles for control of the distribution of copyright materials.

Given the global jurisdiction of the internet, and Australia's prominence in copyright prosecutions, the purpose of this article is to briefly summarise

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the Viacom claim, and explore whether and on what basis a similar claim might be decided in Australia.

YouTube: the Story So Far

The story is pure Hollywood. In 2005, two college students, Chad Hurley and Steve Chen, were dissatisfied with their inability to email a video file between themselves, and created a forum on which users could exchange video clips. The name gave the first indication of how this site would be different: it was about what “you” wanted to watch; it contained content that “you” generated and uploaded.

The types of clips uploaded to the site were manifold. Users posted live footage from rock concerts, videos of home-karaoke and alternative video clips to popular songs. These video clips incorporated unlicensed reproductions of audio files. Perhaps even more significantly, users also posted innumerable episodes of their favourite television shows and movies.

YouTube proved to be enormously popular with the public (although less so with copyright owners), with an estimated 6 million clips hosted, growing at the rate of 20% per month, with some 1.73 billion views to date.⁶

In November 2006, Google acquired YouTube for a staggering US\$1.65 billion. Suddenly, user-generated content was to be linked with one of the world’s most lucrative online advertising businesses.

Not only did the acquisition create a handful of instant multi-millionaires, but it also created a minefield of legal questions. Some analysts opined that the question was not if, but when, Google (with its fabulously deep pockets) would be sued for copyright infringement on or by YouTube. It is even rumoured that Google earmarked US\$200 million for the defence of lawsuits.

YouTube: Legal Proceedings

The claim

Google did not sit back and wait for the lawsuits to flow in. Rather, it took the offensive and began negotiating with content owners to licence their material for use on YouTube. One of Google’s negotiations was with media

giant Viacom International Inc (“Viacom”).

Evidently, these negotiations did not go well. On 13 March 2007, Viacom (and others) lodged a complaint against Google in the District Court of New York. Viacom alleged that, amongst other things:

- (a) the operation of the YouTube service involved the unauthorised public performance of copyrighted audiovisual works;
- (b) the operation of the YouTube service involved the unauthorised public display of copyrighted audiovisual works; and
- (c) the operation of the YouTube service made, or caused to be made, and purported to authorise the making of, unauthorised copies of Viacom’s copyrighted audiovisual works.

This claim is based on section 106 of the US *Copyright Act*⁷, which relevantly provides:

the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

...

(4) in the case of...motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of...pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly...

For the purposes of the US *Copyright Act*, “works” includes motion pictures and other audiovisual works.

Google’s defence

Google has publicly stated that it is protected by the “safe harbour” provisions of the *Digital Millennium Copyright Act* (“the DMCA”).⁸

The safe harbour provisions were included into the *DMCA* to protect service providers from liability for the infringing behaviour of the users of

their services in circumstances where the service provider was unaware of the infringement and was acting as a mere “conduit” for infringing material.

Broadly, the provisions provide that a “service provider” (which is defined to include a provider of traditional carriage services, as well as providers of online services or network access, “or the operator of facilities therefor”) will have limited liability in respect of:

- transitory digital network communications;
- system caching;
- information residing on systems or networks at the direction of users; and most relevantly;
- referring or linking users to an online location containing infringing material or infringing activity, provided that the service provider:
 - does not have knowledge that the material or activity is infringing, or of the fact that the infringing material exists on its network;
 - takes down infringing material of which it becomes aware; and
 - does not gain financial benefit directly from the infringing material or behaviour, in circumstances in which it has the right and ability to control such activity.

On a cursory reading of the relevant provisions, it is not immediately obvious that YouTube would be eligible for protection under the safe harbour provisions. Certainly, it appears to fall within the definition of an online service provider, but for the safe harbour provisions to make sense, this phrase surely cannot extend to every website owner. At the very least, there appear to be some very significant legal questions to be answered by YouTube, including:

- to what extent, if at all, is YouTube aware of infringing copies of copyrighted works on its website;

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- to what extent can the financial benefits of YouTube (remember, Google was prepared to pay US\$1.65 billion for it) be directly linked to the infringement of copyrighted material;
- can YouTube really be said to be a conduit only? That is, does it really only hold “intermediate or transient” copies of infringing material, or is such material in truth stored permanently on YouTube’s servers?

Analysis under Australian law

Given the increasingly international nature of internet jurisprudence, and the increasing alignment of the *Copyright Act 1968* (Cth) (*‘Copyright Act’*) and the *DMCA*⁹, it is interesting to consider whether similar proceedings might be brought in Australia.

Copyright in cinematographic films and television broadcasts

It is worth noting at first that, as distinct from the US legislation, which defines “works” to include “audiovisual materials”, the *Copyright Act* defines cinematographic films, sound recordings and television broadcasts (*‘Audiovisual Works’*) separately from the more traditional “works”.

The copyright in relation to Audiovisual Works is set out separately in the *Copyright Act*, and, broadly, gives the copyright owner the exclusive right to:

- make a copy of the Audiovisual Work;
- cause the Audiovisual Work to be seen in public;
- cause the Audiovisual Work to be communicated to the public.¹⁰

Authorisation of acts of infringement

In relation to Audiovisual Works, section 101(1) of the *Copyright Act 1968* (Cth) provides that:

...a copyright subsisting by virtue of this Part is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in

Australia, or authorises the doing in Australia of, any act comprised in the copyright.

In our hypothetical analysis, the first issue to address is whether the playing of clips of television programs and films on or by way of the YouTube site would infringe any copyright in Audiovisual Works.

Without knowing the technical basis of YouTube’s architecture and service delivery model, it is difficult to say whether YouTube might directly infringe copyright when it allows unlicensed Audiovisual Works to be played by way of its website. The question of whether copying and reproduction takes place on YouTube’s servers is likely to be a complex technical matter.

However, when an unlicensed Audiovisual Work is played by way of the YouTube site, it is likely that *someone* has committed at least the following breaches of the Copyright Act:

- the making of a copy of a cinematographic film or television broadcast (ss 86(a) and 87(a)); and
- communicating a cinematographic film or television broadcast to the public (ss 86(c) and 87(c)).

Having established the threshold question that a breach of copyright has occurred, the next is to consider whether any relevant acts of infringement are performed in Australia. Obviously, any website is now accessible across the world, so any relevant acts of infringement could occur anywhere. However, on the basis of *Kazaa*, it appears to be sufficient that *some* of the prohibited acts were performed in Australia.

As Justice Wilcox noted in that case:

“[s]ection 101(1) makes an infringement of copyright only the ‘doing in Australia’ of an act specified in s 85(1) of the Act. In the present case, it is apparent that many Kazaa users reside outside Australia; the infringing activity of these users is not done in Australia. However, it seems to me that this is immaterial. The

evidence...is that copyright infringement also takes place in Australia. If the respondents, or any of them, authorise Kazaa users generally to infringe copyright, they authorise the doing of the infringing acts both within Australia and outside Australia. It does not matter that the latter activity is outside the scope of s 101 of the Act.”¹¹

Separate from the question of who performs the relevant act of infringement, section 101 of the Copyright Act proscribes the “authorisation” of a breach of copyright. As stated above, whenever a user plays a video clip without the licence of the copyright owner, *someone* is likely to have committed at least the acts of infringement listed above.

Therefore, it is relevant to consider if YouTube can be said to have authorised that infringement. I will focus on the ‘authorisation’ cause of action, given that a misunderstanding of YouTube’s architecture may render moot a ‘direct’ infringement analysis.

Section 101(1A) provides that the following factors are to be taken into account when determining whether a party has “authorised” the doing of an act which is prohibited under section 101(1):

- the extent (if any) of the person’s power to prevent the doing of the act concerned;
- the nature of any relationship existing between the person and the person who did the act concerned; and
- whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

I will briefly deal with each of these in turn.

The power to prevent acts of infringement

YouTube’s power to prevent copyright infringement is a contentious issue. Whilst it, and other service providers, argue that it is difficult or even impossible to filter

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each film clip for copyright material, critics point to its success in removing a wide range of hateful, pornographic and other materials (often after licensing agreements have been executed).

One practical difficulty is that, even if YouTube were to remove copyright materials, it is not likely to simply be a case of doing it once. For instance, file names and file extensions can be modified by users to hide the content of files. In addition, once identified and taken down, material can be re-posted in a slightly different form (eg, shortened by some seconds). The effect of this strategy is to create a new file with the same content, thereby ameliorating the effect of any take down.

However, as discussed above, the “technical difficulties” argument is met with some scepticism in light of some notable and effective filtering practices. Indeed, at the time of writing, another high profile social networking site, MySpace, had announced the imminent introduction of advanced filtering technology to enable the detection of copyrighted material, and prevent the reappearance of that material once a user posted it again.

The MySpace solution is called “Take Down Stay Down”, which gives an idea of the intended permanence of that solution. This service analyses the actual content of files, rather than simply file names, and is able to recognise alternative versions (e.g. shortened versions) of what is essentially the same material, and is able take those alternative versions down too.

Once such technology is more widely deployed, it may be that the “technical difficulties” argument is more difficult to sustain.

The relationship between the person and the person who performed the act of infringement

At its core, the relationship between YouTube and its users is very similar to that which existed between Kazaa and its users.

It is clear from *Kazaa* that providing the means by which infringement may be conducted is not enough to

establish “authorisation” and that something more is needed¹². In *Kazaa*, it was considered relevant that the financial interests of the proprietors were tied to the increasing use of the system¹³.

In light of Google’s likely business model, in which it is speculated that advertising revenues will increase as the traffic to the YouTube website increases, it is to the benefit of the website operators if traffic is increased to its site.

From *Kazaa*, we can also surmise that the level of “control” is also relevant.

As with *Kazaa*, YouTube is unable to “control” which files a user uploads, plays and links to; however, it is able to “control” which files are and are not made available to the user. In *Kazaa*, it was held on this basis that Sharman had a necessary relationship of control with the users of *Kazaa*¹⁴, sufficient to satisfy this limb of s 101(1A).

Reasonable steps taken to prevent or avoid the doing of the act

Whether a service provider has taken reasonable steps to prevent infringing acts is a matter of fact in the circumstances. In *Kazaa*, it was not sufficient to discharge this obligation that Sharman Networks had made statements on the website that it did “not condon[e] copyright infringement”. Nor was it sufficient that users were required to accept a EULA which prohibited unlawful behaviour.

It is not known what steps YouTube has taken in this regard.

Finally, it should be noted that the satisfaction of each of the three tests above may not be sufficient to avoid liability under section 101(1). In *Cooper*¹⁵, it was suggested that these factors are not exhaustive. Whilst not required to decide on the issue, Justice Tamberlin noted that:

*These factors are not exhaustive and do not prevent the Court from taking into account other factors, such as [a party's] knowledge of the nature of the copyright infringement*¹⁶.

It is entirely possible that on this basis a court may consider, in addition to the above, any other materials service

provider who is publicly linked with supplying materials in contravention of the *Copyright Act* may face an overarching consideration of this behaviour by the Court.

Safe Harbour Provisions

Section 112E of the *Copyright Act* provides that:

...a person (including a carrier or carriage service provider) who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright in an audio-visual item merely because another person uses the facilities so provided to do something the right to do which is included in the copyright.

In *Cooper*, an ISP was held to have been aware of the infringing activities of the website which it hosted and it could not argue that it had not authorised the infringement of copyright. It is highly unlikely that YouTube would be able to argue that this provision applied to it.

Division 2AA of Part V of the *Copyright Act* contains more extensive ‘safe harbour’ provisions. This division limits the remedies available against a carriage service provider which:

- transmits or routes infringing material;
- automatically caches infringing materials;
- stores infringing materials at the direction of a user;
- references online locations which host infringing material, and
- complies with various conditions, including by complying with relevant industry codes.

Fundamentally, these provisions mirror those in the *DMCA*, but crucially, relate only to “carriage service providers”, as defined in the *Telecommunications Act 1997* (Cth). The *DMCA* safe harbour provision, which relate to “service providers”, will capture a broader range of entities.

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On the basis of the author's understanding of the YouTube architecture, it is unlikely that YouTube would fall within the definition of a carriage service provider.

Conclusion

It will be interesting to watch the progress of this dispute. At the time of publication, other parties were rumoured to be filing suits against YouTube, due to their dissatisfaction with its failure to implement the long-promised copyright filtering technology.

To the knowledge of the author, no Australian copyright owner has yet commenced proceedings against YouTube. However, as the recent Kazaa litigation has shown, Australian content owners are prepared to prosecute breaches of their copyright, and will no doubt be watching with keen interest the outcome of the Viacom proceedings. It would appear from the analysis above that there are sound reasons for investigating the possibility of such a claim in Australia.

On the other hand, Google has entered into numerous licensing agreements with copyright owners, and seems determined to establish YouTube as a non-infringing user-centric distribution business. With one of the world's largest technology brands behind it, we may well be witnessing a

move towards new, non-infringing forms of content distribution.

¹ *A&M Records Inc v Napster Inc*, 239 F.3d 1004; 2001 U.S. App. LEXIS 5446 (9th Cir. 2001)

² *Universal Music Australia Pty Limited & Ors v Sharman Licence Holdings & Ors* [2005] FCA 1242.

³ Sir Tim Berners Lee, founder of the internet, claims in a pod-cast interview conducted for IBM on 28 July 2006 that the characteristics of Web 2.0 are in fact the intended characteristics of the original internet architecture and do not, therefore, warrant a special moniker. A transcript of the interview is available at: <http://www-128.ibm.com/developerworks/podcast/dwi/cm-int082206.txt>

⁴ This article focuses exclusively on the consumer applications which have become synonymous with Web 2.0. It does not purport to deal with the shifts in business models such as SOAs and hosted systems. Such business applications raise significant technical and legal issues, including with respect to privacy, data protection and business continuity planning, which exceed the scope of this article.

⁵ Filed on 13 March 2007 in the United States District Court for the Southern District of New York. A copy of the complain is available at: <http://online.wsj.com/public/resources/documents/ViacomYouTubeComplaint3-12-07.pdf>

⁶ Figures originally identified by Lee Gomes and quoted at: www.micropersuasion.com/2006/08/youtube_by_the.html.

⁷ *Copyright Right Act* of 1976, Title 17 of the United States Code.

⁸ See section 202 of the DMCA, which amended Chapter 5 of Title 17 of the United States Code.

⁹ Particularly in light of the *Copyright Amendments (Digital Agenda) Act 2000* and the *Copyright Amendment Act 2006* (Cth) (which implemented, amongst other things, certain principles of the Free Trade Agreement between Australia and the United States of America), the differences between the Australian *Copyright Act* and the DMCA have become less pronounced.

¹⁰ See generally Division 2 of Part IV of the *Copyright Act*.

¹¹ *Universal Music Australia Pty Limited & Ors v Sharman Licence Holdings & Ors* [2005] FCA 1242 at 388 per Wilcox J.

¹² *Ibid*, at 401.

¹³ *Ibid*, at 404.

¹⁴ *Ibid* at 414.

¹⁵ *Cooper v Universal Music Australia Pty Limited* [2006] FCAFC 187.

¹⁶ *Ibid*, at 81.