

COPYRIGHT CHALLENGES FOR USER
GENERATED INTERMEDIARIES:
VIACOM V YOUTUBE AND GOOGLE

Damien O'Brien*

INTRODUCTION

YouTube, the video sharing website has risen to be one of the most popular and profitable websites on the Internet. What was first created in February 2005 as a platform for people all over the world to share videos, has now developed into a billion dollar business, that is an integral part of the Google corporation. However, while the success and popularity of YouTube is clear, the associated copyright issues which lie at the very core of the YouTube platform, are far from settled. Evidencing the legal uncertainty surrounding the operation of YouTube, is the recent high profile litigation which has been brought by entertainment company, Viacom International. The case filed in the United States District Court for the Southern District of New York and any subsequent appeals, have the potential to be one of the most influential copyright decisions in the digital era.

YouTube is not the only user generated intermediary to have encountered legal difficulties, rather it exemplifies the copyright challenges facing user generated intermediaries. Indeed, the evolution of Web 2.0 and other new digital technologies have enabled digital content to be easily reproduced and communicated online, without the permission of the copyright owner. The following chapter will provide an analysis of the recent *Viacom v YouTube* litigation, including the claims

* The law as it appears in this chapter is current as of August 2007.

brought by Viacom, both party's arguments and an examination of the key issues, which are likely to decide the outcome of the case. The chapter will also consider copyright challenges for other user generated intermediaries, such as blogs and wikis. Finally, the chapter will provide an analysis from an Australian perspective of some of the copyright challenges which user generated intermediaries are likely to encounter under Australian copyright law.

VIACOM v YOUTUBE

Viacom's complaint

On 13 March 2007, Viacom International Inc, one of the largest media corporations in the United States brought an action for copyright infringement in the United States District Court for the Southern District of New York against YouTube Inc and its parent company, Google Inc.¹ The complaint begins with an analysis of the technological landscape. In essence, Viacom assert that the emergence of new digital technologies over the past decade have revolutionised the way people inform and entertain themselves. Viacom claims, while many people have used these technologies to express themselves creatively, these very same digital technologies have also been misused to fuel an explosion of copyright infringement. In Viacom's view, YouTube is one such entity. In paragraph two of the complaint Viacom allege that:

YouTube has harnessed technology to wilfully infringe copyright on a huge scale, depriving writers, composers and performers of the rewards they are owed for effort and innovation, reducing the incentive of America's creative industries, and profiting from the illegal conduct of others as well. Using the leverage of the Internet, YouTube appropriates the value of creative content on a massive scale for YouTube's benefit

¹ *Viacom International Inc v YouTube Inc, YouTube LLC and Google Inc*, 07-cv-02103 (United States District Court for the Southern District of New York, filed 13 March 2007). For a copy of the complaint see Evan Brown, *Viacom sues YouTube* (2007) Internet Cases <http://www.internetcases.com/archives/2007/03/viacom_sues_you.html> at 30 June 2007; also see Greg Sandoval, *Viacom sues Google over YouTube clips* (2007) CNET News <http://news.com.com/Viacom+sues+Google+over+YouTube+clips/2100-1030_3-1666668.html> at 30 June 2007.

without payment of license. YouTube's brazen disregard of the intellectual property laws fundamentally threatens not just the Plaintiffs, but the economic underpinnings of one of the most important sectors of the United States economy.²

Viacom further allege in the complaint that the:

Defendants actively engage in, promote and induce this infringement. YouTube itself publicly performs the infringing videos on the YouTube site and other websites. Thus, YouTube does not simply enable massive infringement by its users. It is YouTube that knowingly reproduces and publicly performs the copyrighted works uploaded to its site. YouTube deliberately built up a library of infringing works to draw traffic to the YouTube site, enabling it to gain a commanding market share, earn significant revenues, and increase its enterprise value. YouTube has deliberately chosen not to take reasonable precautions to deter the rampant infringement on its site. Because YouTube directly profits from the availability of popular infringing works on its site, it has decided to shift the burden entirely onto copyright owners to monitor the YouTube site on a daily or hourly basis to detect infringing videos and send notices to YouTube demanding that it "take down" the infringing works.³

At the heart of the complaint, Viacom alleges six causes of action of copyright infringement against YouTube and Google. The first three causes of action attempt to hold YouTube and Google liable for primary or direct copyright infringement. They are for:

1. Public performance – the defendants have, without permission of the copyright owner, publicly performed and authorised the public performance of the infringing uploaded videos;
2. Public display – the defendants have, without permission of the copyright owner, publicly displayed and authorised the public display of the infringing uploaded videos; and
3. Reproduction – the defendants have, without permission of the copyright owner, reproduced and authorised the reproduction of the infringing uploaded videos through the YouTube website.

² *Viacom International Inc v YouTube Inc, YouTube LLC and Google Inc*, 07-cv-02103 (United States District Court for the Southern District of New York, filed 13 March 2007) [2].

³ *Viacom International Inc v YouTube Inc, YouTube LLC and Google Inc*, 07-cv-02103 (United States District Court for the Southern District of New York, filed 13 March 2007) [4]-[6].

The final three causes of action all attempt to hold YouTube and Google liable under the doctrine of secondary or indirect copyright infringement. These claims include:

4. Inducement of copyright infringement – the defendants are liable for inducing the infringing acts of YouTube users, who infringe the plaintiff's copyright by uploading infringing videos to the YouTube website.
5. Contributory copyright infringement – the defendants are liable for contributing to the infringing acts of YouTube users, who infringe the plaintiff's copyright by uploading infringing videos to the YouTube website.
6. Vicarious copyright infringement – the defendants are vicariously liable for the infringing acts of YouTube users, who infringe the plaintiff's copyright by uploading infringing videos to the YouTube website.

Countering the claims by Viacom, YouTube and Google in their defence claim that:

Viacom's complaint in this action challenges the careful balance established by Congress when it enacted the Digital Millennium Copyright Act (DMCA). The DMCA balances the rights of copyright holders and the need to protect the Internet as an important new form of communication. 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. Google and YouTube respect the importance of intellectual property rights, and not only comply with their safe harbor obligations under the DMCA, but go well and beyond what the law requires.⁴

YouTube and Google's defence, essentially denies each of the allegations in Viacom's complaint and raises 12 defences in their favour. These defences include the safe harbors, licence, fair use, failure to mitigate, failure to state a claim, innocent intent, copyright misuse, estoppel, waiver, unclean hands, laches and substantial non-infringing uses.

⁴ See Elinor Mills, *Google denies Viacom copyright charges* (2007) CNET News <http://www.news.com/2100-1026_3-6180387.html> at 30 June 2007.

The key issues likely to decide the case

A 'volitional act'

Viacom v YouTube Inc and Google Inc is likely to be decided on the basis of three key issues, which are in question in the case. The first issue concerns the allegations of primary or direct copyright infringement against YouTube and Google. In particular, whether the necessary element of volition is present in YouTube's operations. In order to establish an action for primary or direct copyright infringement under United States copyright law, there must first be a volitional act committed by the defendant in regard to the infringement.⁵ Generally, the courts in the United States have held that the automated copying by machines, occasioned by others, is insufficient to establish a volitional act. Importantly, in *Religious Technology Center v Netcom On-Line Communications Service Inc*,⁶ the Court held that '[a]lthough copyright is a strict liability statute, there still should be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party.' This issue of volition was more recently examined in *Parker v Google Inc*,⁷ where the Court held '[w]hen an ISP automatically and temporarily stores data without human intervention so that the system can operate and transmit data to its users, the necessary element of volition is missing.'

In the present case, the question will be whether the manner in which the uploaded videos are performed, displayed and created is sufficiently automated enough, so as to negate any active volitional involvement by YouTube in each act. This issue is likely to come down to a technical analysis of YouTube's involvement in the uploaded videos, for example whether transcoding the uploaded videos into Flash format – so that they can be viewed on the YouTube website – constitutes a volitional act, or is simply an automated process without any active, volitional involvement. However, it should be noted that most of the decisions

⁵ Whilst under the *Copyright Act* (US) a person need not intentionally infringe copyright, it does require conduct by a person, who causes in some meaningful way an infringement. *Costar Group Inc v LoopNet Inc*, 373 F3d 544, 549 (4th Cir 2004).

⁶ 907 F Supp 1361, 1368-1370 (ND Cal 1995).

⁷ 422 F Supp 2d 492, 497 (ED Pa, 2006).

involving a ‘volitional act’ have concerned the caching and archiving of data by an Internet service provider. In this regard, the Court may well apply the same reasoning applied in *Playboy Enterprises Inc v Frena*,⁸ where the defendant was found liable for hosting images uploaded by others, despite the defendant claiming there was no active, volitional involvement.

The Digital Millennium Copyright Act

Assuming the necessary element of volition can be established, the second issue likely to be heavily contested is the application of the safe harbor provisions under the *Digital Millennium Copyright Act 1998* (US)⁹. These provisions limit liability for qualifying service providers from monetary relief for direct, vicarious and contributory copyright infringement.¹⁰ The relevant safe harbor in question is § 512(c)(1)¹¹ which provides:

A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider:

- (A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
 - (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
 - (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
- (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

⁸ 839 F Supp 1552 (MD Fla 1993).

⁹ 17 USC § 512.

¹⁰ *Perfect 10 Inc v Cybernet Ventures Inc*, 213 F Supp 2d 1146, 1174 (CD Cal 2002).

¹¹ 17 USC.

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

The 'red flag' provision

In particular, two provisions will be crucial to the case, § 512(c)(1)(A)¹² the 'red flag' provision and § 512(c)(1)(B)¹³ the financial benefit provision. Under § 512(c)(1)(A),¹⁴ a service provider will be disqualified from the safe harbors, if they had actual or 'red flag' knowledge of the infringing material. Under this provision, a service provider, such as YouTube, is not under a positive obligation to remove material, which infringes copyright. However, they will lose their safe harbor, where they become aware of 'red flags', that is facts or circumstances from which infringing activity is apparent, and they fail to act.

In this regard, Viacom asserts that YouTube does have the requisite knowledge of copyrighted material uploaded to their website.¹⁵ They claim that YouTube actively monitors uploaded videos, for example, they remove obscene or offensive videos and create 'channels' and 'featured videos' sections.¹⁶ This aspect of the case is likely to require an analysis, into just how much actual or constructive knowledge YouTube have in regard to the infringing videos, including the technology which YouTube currently uses. It should also be noted, that the comments made by YouTube chief executive, that YouTube will use filtering technology to identify and remove infringing videos for copyright owners who have entered into agreements with YouTube, is likely to count in Viacom's favour.¹⁷

¹² 17 USC.

¹³ 17 USC.

¹⁴ 17 USC.

¹⁵ Michael Fricklas, *Our Case Against YouTube* (2007) The Washington Post <<http://www.washingtonpost.com/wp-dyn/content/article/2007/03/23/AR2007032301451.html>> at 30 June 2007.

¹⁶ *Ibid.*

¹⁷ *Viacom International Inc v YouTube Inc, YouTube LLC and Google Inc*, 07-cv-02103 (United States District Court for the Southern District of New York, filed 13 March 2007) [7], [45].

The 'financial benefit' provision

The second provision which is likely to be heavily litigated, is the financial benefit provision.¹⁸ Under this provision, a service provider will be disqualified from the safe harbor, where they receive a financial benefit, which is directly attributable to the infringing activity, where they have right and ability to control that activity.¹⁹ Generally, a service provider conducting a legitimate business will not be considered to have received a 'financial benefit directly attributable to the infringing activity'. For example, receiving a one-time set-up fee and flat periodic payments from customers, whether they be engaging in infringing activities or not, would not constitute a 'financial benefit'. However, the situation in YouTube's case is quite different, as their main form of revenue is through advertisements which feature on search pages, licensed videos and previously above the videos themselves, including infringing videos.

This provision was recently considered in *Perfect 10 Inc v CCBill*,²⁰ where the United States Court of Appeals for the Ninth Circuit held that the relevant enquiry to make when considering whether a service provider has received a 'direct financial benefit', is 'whether the infringing activity constitutes a draw for subscribers, not just an added benefit'.²¹ Similarly, in a recent summary judgment hearing in *Tur v YouTube Inc*,²² the Court held that a provider's receipt of a financial benefit is only implicated where the provider has the right and ability to control the infringing activity.²³ The Court held that the 'right and ability to control' the activity refers to something more than just the ability of a service provider to remove or block access to material posted on its website or stored in its system.²⁴ Rather, the Court held the requirement

¹⁸ 17 USC § 512(e)(1)(B).

¹⁹ 17 USC § 512(e)(1)(B).

²⁰ 481 F 3d 751 (9th Cir, 2007).

²¹ *Ellison v Robertson*, 357 F 3d 1072, 1079 (9th Cir 2004).

²² cv-06-04436 (CD Cal, filed 14/7/2006).

²³ *Perfect 10 Inc v CCBill*, 481 F 3d 751 (9th Cir. 2007).

²⁴ *Hendrickson v Ebay Inc*, 165 F Supp 2d 1082, 1093 (CD Cal, 2001); *Perfect 10 Inc v Cybernet Ventures Inc*, 213 F Supp 2d 1146, 1183 (CD Cal 2002); *Corbis Corp v Amazon.com Inc*, 351 F Supp 2d 1090 (WD Wash, 2004).

presupposes some antecedent liability to limit or filter copyrighted material.²⁵

In Viacom's view, YouTube is an entertainment destination. 'The public at large are not attracted to YouTube's storage facility or technical functionality – people are attracted to the entertainment value of what's on the site'.²⁶ In this regard, Viacom claim that YouTube will lose their safe harbor, as they are receiving a direct financial benefit from infringing videos, where they have the right and ability to control the activity, through the sale of advertisements. This may potentially be one of Viacom's strongest arguments in the case, as previously YouTube operated banner advertisements directly above the videos, including videos which infringed copyright. Arguably, the effect of this may be that YouTube was not receiving a one-time set-up fee and flat periodic payments, rather a direct financial benefit, every time a user viewed an infringing video.²⁷

COPYRIGHT ISSUES FOR OTHER USER GENERATED INTERMEDIARIES

YouTube is not the only user generated intermediary to encounter difficulties with copyright law. Currently other user generated intermediaries, including MySpace, Veoh, Grouper and Bolt are all the subject of ongoing litigation for copyright infringement.²⁸ It should be

²⁵ *Fonovisa v Cherry Auction Inc*, 76 F 3d 259, 263 (9th Cir, 1996); *MGM Inc v Grokster*, 545 US 913, 926.

²⁶ Fricklas, above n 15.

²⁷ *Viacom International Inc v YouTube Inc, YouTube LLC and Google Inc*, 07-cv-02103 (United States District Court for the Southern District of New York, filed 13 March 2007) [37]. Note that in July 2007 a French Court held online video sharing website, DailyMotion liable for copyright infringement, despite concluding that the website was a mere 'hosting service'. See David Ardia, *French court finds DailyMotion liable for copyright infringement* (2007) Citizen Media Law Project <<http://www.citmedialaw.org/french-court-finds-dailymotion-liable-copyright-infringement>> at 20 July 2007.

²⁸ For example see Greg Sandoval, *Universal sues MySpace for copyright violations* (2007) CNET News

<http://news.com.com/Universal+sues+MySpace+for+copyright+violations/2100-1030_3-6136829.html> at 30 June 2007; *Tur v YouTube Inc*, cv-06-04436 (CD Cal, filed 14/7/2006); *Io Group Inc v Veoh Networks Inc*, cv-06-3926 (ND Cal, filed 23/6/2006);

noted, that YouTube is also the subject of a number of other actions for copyright infringement.²⁹ In particular, a recent class action filed against YouTube and Google by the English Premier League and independent music publisher, Bourne Co.³⁰ The copyright issues associated with these user generated intermediaries also have the potential to extend to more participatory intermediaries, such as blogs and wikis.³¹ Indeed, in many cases the copyright issues involved are likely to be more prevalent, given the highly personalised form of content production which blogs and wikis provide. In this regard, it should be noted that thus far, there is yet to be a major reported decision involving issues of copyright infringement on a blog or wiki, although there have been a number of cases filed against blogs and bloggers, which have failed to proceed to trial.³²

Universal Music Group Recordings Inc et al v Grouper Networks Inc, No 06-6561 (CD Cal, filed 16/10/2006); *Universal Music Group Recordings Inc et al v Bolt Inc*, No 06-6577 (CD Cal, filed 16/10/2006); *Universal Music Group Recordings Inc et al v MySpace Inc*, No 06-7631 (CD Cal, filed 17/11/2006). Note also that in July 2007 the Motion Picture Association of America Inc filed suit in a United States District Court in Los Angeles against YouTVpc.com and Peekvid.com on behalf of a number of film studios. See Kevin Delaney, *Web sites face film studios' copyright suits* (2007) *The Wall Street Journal Online* <http://www.online.wsj.com/article/SB118298577921950757.html?mod=googlenews_sj> at 16 July 2007.

²⁹ *The Football Association Premier League Limited and Bourne Co v YouTube Inc, YouTube LLC and Google Inc*, 07 CV-3582 (United States District Court for the Southern District of New York, filed 4 May 2007); *Tur v YouTube Inc*, cv-06-4436 (CD Cal, 2006); *Cal IV Entertainment v YouTube Inc*, cv-00617; also see Greg Sandoval, *French sports join suit against YouTube* (2007) *CNET News* <http://news.om.com/French+sports+groups+join+suit+against+YouTube/2100-1030_3-6188948.html> at 20 July 2007.

³⁰ For more information see <http://www.youtubeclaimaction.com>.

³¹ For an overview of the legal issues involving blogs see Damien O'Brien, 'Blogs and the Law: Key Legal Issues for the Blogosphere' (2007) 12 *Media and Arts Law Review* 141; also see Peter Black, Hayden Delaney and Brian Fitzgerald, 'Legal issues for wikis: The challenges of user-generated and peer-produce knowledge, content and culture' (2007) 14 *eLaw Journal* 245.

³² For example a Maine advertising agency in May 2006 filed a copyright infringement suit against a local blogger who had posted a number of draft advertisements from the Maine Department of Economic and Community Development website, to his blog. The case was eventually withdrawn by the advertising agency. See *Warren Kremer Paino Advertising v Duston*, Civil No 06-047 (5 May 2006); Harry Wessel, *Orlando lawyer is Web hero after defending blogger* (2006) *Orlando Sentinel* <<http://www.orlandosentinel.com/business/orl->

USER GENERATED INTERMEDIARIES UNDER AUSTRALIAN COPYRIGHT LAW

While user generated intermediaries are afforded a degree of certainty and protection under the safe harbor provisions in the United States. The situation is less clear in other jurisdictions, like Australia. While the Australian *Copyright Act 1968* (Cth) contains similar safe harbour provisions to the United States, their operation is significantly narrower. In addition to this, Australian courts have also interpreted the legislative provisions regarding authorisation liability (secondary liability) strictly. Further uncertainties arise in regard to the multiple levels of potential liability under copyright law, for user generated intermediaries.

Authorisation of copyright infringement

Under the *Copyright Act 1968* (Cth) a person or organisation that authorises another person to do an infringing act, without the licence of the owner, will themselves infringe copyright.³³ In determining whether a person or organisation has authorised the doing of an act which infringes copyright, it is necessary to consider:

- (a) the extent (if any) of the person's power to prevent the doing of the act concerned;
- (b) the nature of any relationship existing between the person and the person who did the act concerned; and
- (c) 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.³⁴

However, in order to protect the position of intermediaries, such as carriage service providers (CSPs), a defence to authorisation liability was

blogsuit1206may12,0,2087986.story?track=rss> at 30 June 2007; Robert Weisman, *Blogger who criticized Maine tourism office faces lawsuit* (2006) *The Boston Globe* <http://www.boston.com/business/articles/2006/04/28/blogger_who_crititized_main_e_tourism_office_faces_lawsuit/> at 30 June 2007. Also see *NXIVM Corporation and First Principles Inc v The Ross Institute*, WL 22298756 (NDNY 2003); *NXIVM Corporation and First Principles Inc v The Ross Institute*, F 3d 471 (2nd Cir 2004); *NXIVM Corporation and First Principles Inc v The Ross Institute*, 543 US 1000 (2004).

³³ *Copyright Act 1968* (Cth) ss 36(1), 101(1).

³⁴ *Copyright Act 1968* (Cth) ss 36(1A), 101(1A); *University of New South Wales v Moorhouse and Angus & Robertson* (1975) 133 CLR 1.

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.³⁵ 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.³⁶ Similarly, 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.³⁷

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.³⁸ Notably, Wilcox J held that the legislative intention of s 112E was to ‘protect the messenger’, ie CSPs and Internet service providers.³⁹

In this regard, the critical question for user generated intermediaries under Australian copyright law will be firstly, whether they will be held liable for authorising copyright infringement for the infringing acts of their users and secondly, whether they will be entitled to the defence to authorisation of copyright infringement. Although, most user generated intermediaries do not in anyway encourage copyright infringement. Applying the reasoning of Wilcox J it would seem that some user

³⁵ *Copyright Act 1968* (Cth) ss 39B, 112E; note this also applies to moral rights under *Copyright Act 1968* (Cth) s 195AVB.

³⁶ [2005] FCA 972 (Tamberlin J, 14 July 2005) [97]-[99]; Affd *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187 (French, Branson and Kenny JJ, 18 December 2006).

³⁷ [2005] FCA 1242 (Wilcox J, 5 September 2005) [405].

³⁸ [2005] FCA 1242 (Wilcox J, 5 September 2005) [401].

³⁹ *Universal Music Pty Ltd v Sharman Licence Holdings* [2005] FCA 1242 (Wilcox J, 5 September 2005) [398], [418].

generated intermediaries, for example YouTube, are more than a mere 'messenger'; as they are essentially providing a content service to the public, which extends beyond traditional services offered by CSPs or Internet service providers. Furthermore, the level of involvement by some user generated intermediaries, which for example transcode uploaded content into different formats or offer users additional services, may mean that they will be found liable for authorising copyright infringement and the defence under s 112E denied.⁴⁰

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 for the infringement of copyright.⁴¹ 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 CSPs 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 the authorisation of copyright infringement under the *Copyright Act 1968* (Cth). Generally, most user generated intermediaries will fall within the 'Category C Activity' under s 116AE, which refers to the storing of copyright material at the direction 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 of the *Copyright Act 1968* (Cth), including adopting and implementing a policy to terminate the accounts of repeat infringers, complying with relevant industry codes, not receiving a financial benefit directly attributable to the infringing activity where they have the right and ability to control the activity and expeditiously

⁴⁰ Other indicative factors include, exercising discretion in removing infringing content and obtaining a financial benefit from the infringing content. See *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].

⁴¹ *Copyright Act 1968* (Cth) s 116AA.

removing or disabling access to infringing material they are hosting when they become aware of it, or facts that make it apparent that the material is infringing.

The key question to be determined in considering whether user generated intermediaries will be entitled to the limitation of remedies under the ‘safe harbour’ provisions, will be whether they fall 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 user generated intermediaries would fall within this definition, as they do not per se supply a carriage service to the public, unlike Internet service providers or CSPs. User generated intermediaries do not provide Internet access or any other carriage services, they simply provide the facility to host user generated content. Therefore, user generated intermediaries are unlikely to be classified as a CSP and thus will not be entitled to the benefit of the ‘safe harbour’ provisions under the *Copyright Act 1968* (Cth).

It should be noted that under the equivalent ‘safe harbor’ provision under § 512(c) of the *Digital Millennium Copyright Act 1998* (US)⁴² in the United States, that user generated intermediaries will be entitled to the protection of the ‘safe harbor’ provisions, providing they comply with the necessary pre-conditions. This provision in the United States has broader operation, due to the fact that it applies to not only service providers, but also online service providers. An online service provider is defined broadly under § 512(k)(1)(b) as a provider of online services or network access, or the operator of facilities therefor. This broad definition will therefore include virtually every online service.⁴³ The courts have also endorsed the expansive nature of the definition of an online service provider, holding that peer to peer file sharing services, Amazon and eBay all fall within the definition of an online service provider.⁴⁴ Indeed, in *Re Aimster Copyright Litigation*,⁴⁵ the United States

⁴² 17 USC.

⁴³ Fred von Lohmann, ‘DMCA “Safe Harbors” for Online Service Providers’ (2006) 237 *InfoSys* 1, 3.

⁴⁴ *Corbis v Amazon.com*, 351 F Supp 2d 1090 (WD Wash 2004); *Hendrickson v Amazon.com*, 298 F Supp 2d 914, 915 (CD Cal 2003); *Re Aimster Copyright Litigation*, 252 F Supp 2d 634

District Court for the Northern District of Illinois held that the term online service provider ‘is defined so broadly that we have trouble imagining the existence of an online service that would not fall under the definitions...’.

CONCLUSION

Copyright law by its very nature fundamentally challenges the operation of user generated intermediaries, such as YouTube. The rapid development of Web 2.0 and other new digital technologies have enabled consumers to easily reproduce and communicate digital content online, without the permission of the copyright owner. These challenges are highlighted in the recent *Viacom v YouTube and Google* litigation, which has the potential to redefine copyright law in the digital era. This litigation will also be a vital test case for other user generated intermediaries, such as blogs and wikis which face similar copyright challenges. While, it is impossible to predict how the court will decide in the *Viacom v YouTube and Google* case, assuming it does not settle, there are certainly strong arguments in favour of Viacom.

In this regard, the safe harbor provisions in the United States and similar jurisdictions, were designed to strike a balance between competing interests. Service providers are given a degree of certainty, in that they need not actively monitor their services for copyrighted material, whilst copyright owners receive the benefit of expedited procedures to remove infringing content. The safe harbors were not designed to protect service providers who fail to satisfy the necessary preconditions. Indeed, any service provider’s business model, which places such a high degree of reliance upon the judicial interpretation of a legislative provision, is fraught with legal danger. Other intermediaries have developed successful business models which minimise the risk of copyright infringement and fall safely within the safe harbors. There is no reason why YouTube should not do the same.

(ND Ill 2002); *Re Aimster Copyright Litigation*, 334 F 3d 643, 655 (7th Cir 2003); *Hendrickson v eBay Inc*, 165 F Supp 2d 1082, 1087 (CD Cal 2001).

⁴⁵ 252 F Supp 2d 634, 658 (ND Ill 2002).

