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YouTube's Future — And Yes, It Has One

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by Doug Lichtman*

It has been roughly six months since Paramount Pictures partnered with other Viacom subsidiaries to sue YouTube, the online video-sharing site, for copyright infringement. And the nation's newspapers, blogs and airwaves continue to be abuzz with commentary. Many commentators have taken the position that Paramount and Viacom are wrong on the law. YouTube, we are told, has no responsibility for the harm it causes; it is immune under the Digital Millennium Copyright Act. Other commentators, by contrast, have conceded that Paramount is right on the law, only to complain that a valuable and exciting distribution technology is about to be lost.

Neither of these views could be farther from the truth.

Start with the law. The Digital Millennium Copyright Act protects from liability intermediaries that, by providing some form of storage functionality, might inadvertently facilitate copyright infringement. The law is explicitly narrow. For instance, to be excused from liability, the copyright violation must be based on an act of "storage" accomplished "at the direction of a user"; the intermediary must not have "actual knowledge that the material or an activity using the material" is associated with infringement; and even an intermediary that qualifies by these measures still enjoys a safe harbor from liability only with respect to its storage activities, rather than enjoying some broader blanket protection.

This narrowness is not an accident. Pure storage intermediaries are unlikely to cause substantial harm to copyright holders. They provide storage, and maybe even very effective storage, but they do not develop their services along other dimensions (say, distribution) that would exacerbate the harms caused by infringing use. Moreover, storage intermediaries typically do not

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know very much about the information they store. That does not necessarily mean they should be let off the hook – ignorance is not always a defense under the law – but it certainly makes liability less attractive because, in the absence of knowledge, there is little that a storage intermediary can do to combat infringement.

Applying all this to YouTube, it is immediately clear that the site neither qualifies under the explicit statutory text nor satisfies the policy intuitions sketched above. To put it bluntly, YouTube is not a storage intermediary. The site collects, aggregates, indexes, reformats, copies, disseminates, performs and even sublicenses the videos submitted by its users. It tailors its business in support of these non-storage activities. And YouTube concedes in its own marketing materials that it is a “media destination” and a “consumer media company” whose purpose is “delivering entertaining, authentic and informative videos across the Internet” and ultimately becoming “the Internet’s premier video service.” There is nothing wrong with those goals. Indeed, I hope YouTube in the long run succeeds at providing an effective platform for amateur video work. But the result is a business model that, for good reason, falls outside the safe harbor protections of the Digital Millennium Copyright Act.

That takes us to the second mistake made in the conventional commentary: the assumption that, if YouTube loses its safe harbor, the site will be liable for every bad act its users might do and thus be forced to close shop. That is completely untrue. Where the DMCA does not apply, conventional copyright doctrines do. And those doctrines, including the rules of contributory and vicarious infringement and the doctrine of fair use, create a balanced regime that will give YouTube the space it needs to develop as an innovative delivery platform while at the same time forcing it to do what it should have been doing all along: taking steps that would, at a reasonable cost, reduce infringement without substantially interfering with legitimate uses.

What do I have in mind? Google itself has recently acknowledged the first step: sites like YouTube have a responsibility to use one of the dozens of existing services and technologies that, through simple matching algorithms, look for uploaded content that is suspiciously similar to known copyrighted work. These sorts of technologies are already being deployed by other online companies such as Fox Interactive Media on its MySpace website and Microsoft on its Soapbox website; and they likely can very effectively identify the most obviously troubling files: files that blatantly duplicate a portion of a known work’s video and/or audio track, without much changing the work through the incorporation of (say) commentary or criticism.

But I suspect there is even more that should be done. For one thing, YouTube has tremendous internal information about what search terms its users enter when they are looking for content and what tags they submit when they upload new videos. YouTube also has access to public data about character names and movie titles. Moreover, YouTube knows which videos have already been explicitly identified by copyright holders as infringing. Imagine if YouTube, acting in good faith, were to combine all of that information and use it to identify suspicious clips. For example, YouTube could watch for search queries that would have led users to the clips that have already been identified as infringing and then subject to closer scrutiny any new clip that tends to come up in those same searches or be associated with similar descriptive tags.

Other approaches might also work to reduce infringement without much interfering with legitimate use. For instance, YouTube currently invites users to click a button whenever a video contains language or visuals that seem to be inappropriate for younger viewers. Presumably, YouTube keeps track of how many clicks a given video receives and, at some threshold, has its own team take a look. Why not similarly put a copyright compliance button on the screen, allowing YouTube users to identify infringing content and in that way drive out yet another category of videos that threaten to give YouTube a bad name?

In short, the commentary spawned by the infringement suit against YouTube misses the fact that YouTube is part of the copyright ecosystem. It will not be sacrificed merely because some users abuse the technology by uploading copyrighted work without permission. But YouTube also should not be given a free pass when it can, at a low cost, reduce infringement without meaningfully interfering with legitimate use.