

I. Introduction

Copyright is the set of exclusive rights which are automatically assigned to an original piece of work for the purposes of protecting the skill, labour and judgement involved in the production of the work rather than any creative merit.¹ Thus, the fundamental premise for copyright protection is the impartial grant of an exclusive property right to control the replication and dissemination of an author's works in order to reduce the supply of these works. Accordingly, this secures and rewards the author with a financial incentive to continuing producing such works and for the effort required in creating such works.² It is evident that there is a positively correlated relationship between the financial incentive which is remunerated for an author's creative expression and the level of community acceptance surrounding the works. Thus, the recognition which is achieved by the author in the production of such works typically drives society to demand more of the works and therefore spurs the creative process forward. It is obvious that this is more of a critically important aspect in the online world than in the offline one because of the ability for authors to replicate and deliver their works at only a single initial cost. Due to advancements in digital processing and growth of the internet, the ability for an author to now produce only one original version of their work and then replicate it an infinite number of times to reach millions of people around the globe instantly is effortless.

Thus, it is clear that the future of copyright law is a digital one. It is increasingly apparent that there is a vast disparity between current copyright laws and the copyright laws needed to protect the dissemination of original work in the online world. While this paper does not attempt to define a clear solution to the online problem of copyright – it does seek to draw systemic comparisons between Australian and American copyright laws and how to appropriately manage them in the digital world. It also seeks to focus on the YouTube and Myspace websites due to their sheer size, capacity and volume of users and the fact they are typically branded as the largest copyright infringements websites on the internet - although they are by no means alone. Finally, the discrepancies in relation to what content is and isn't objectionable on the internet is still questionable in many countries, and attempting to draw tentative conclusions around these arguments and current copyright legislation is what this paper endeavour's to explore.

II. The Internet

The internet is intensely reshaping the way we interact in our world. It has transformed not only the way in which we share and communicate information, but also how we locate, learn and explore different types of media online. This profound reshaping has led to the establishment of new online social structures in the form of viral communities which have allowed millions of people and businesses to interconnect with each other in ways that would have never been thought possible³. It has also allowed for increased facilitation and collaboration on research activities which have been spearhead by the creation of new

¹ *Sands & McDougall Pty Ltd v Robinson* (1917) 23 CLR 49

² Panel Three, *Beyond Napster: Debating the Future of Copyright on the Internet* (2000), Viewed 12th September 2007

³ IronBound Press, *The Internet Revolution* (2006), <http://www.ironboundpress.com/pdf/intrev-chap0.pdf>, Page 3, Viewed 6th September 2007

networked computing structures. These networked or distributed computing structures allow for idle computer processes around the world to disseminate complex scientific research that would have been otherwise impossible to compute unless these distributed structures were adopted⁴.

As with the rapid expansion of the internet, so comes the rapid expansion of innovation and technological revolutions. Improvements in programming concepts, coding languages, server tools, network speeds and the increasing usage of heavy bandwidth content have meant that millions of people flock to the internet to communicate, view media and get updated on the latest news every second. While this rapid expansion of the internet has eased the manner in which information can be disseminated – it has also increased the focus on legal and regulatory obligations that society is forced to place around its management. The internet is now perceived to be a ‘*natural, low-cost distribution channel*’⁵ for information and media such as films, videos and music. Consequently, consumers now view the internet as a vehicle to obtain free and unaltered copies of such material at no cost – with the majority of internet users adopting the view that it is their right to obtain such material freely⁶. As a result, it is obvious that both common and legislation laws have not matched the speed at which the internet has grown, and nor have industrial or government bodies sought to educate internet users on the serious nature of copyright. Subsequently, these bodies are now scrambling to modernize out-of-date technology policies and update internet regulation legislation⁷.

Their trend in updating these policies is becoming increasingly clear, such that all activities which take place in the online world will be regulated in the same manner and to the same extent as the activities in the offline one, if not more⁸. The complexities involved with adopting such an approach are increasingly large. The inherent nature of the internet is a global one, and no authority has ever attempted to regulate all human activities in all parts of the world. The interaction and interpretation of content in one country or culture is entirely different to that in another - and it is this intrinsic problem which makes any type of world regulatory legislation extremely difficult, if not impossible.

III. Myspace and Youtube

MySpace and YouTube are both revolutionary concepts which have changed the way the people around the world interact together. MySpace revolutionized the Internet in what is dubbed the ‘*Dot-Com Era*, by spearheading a new type of online social interaction where communities and people can create, share and group information together⁹. YouTube on the other hand is somewhat different – they have been able to capitalise on three revolutionary concepts. The first is the revolution in video production made possible by cheaper camcorders and easier-to-use video software; the second is the social revolution that MySpace capitalised on in the early 2000’s and has continues to do so with; and the third is a cultural one – where consumers no longer want to be forced into the media content they view,

⁴ Stanford University, Folding@Home (2007), <http://folding.stanford.edu/>, Page 1, Viewed 6th September 2007

⁵ United States Department of Commerce, *The Emerging Digital Economy*, September 1998 at 33

⁶ Ibid 5

⁷ Timofeeva, Yulia A., Establishing Legal Order in the Digital World: Local Laws and Internet Content Regulation (2006), <http://www.jiclt.com/index.php/JICLT/article/viewFile/7/6>, Viewed September 10th 2007

⁸ Ibid 3

⁹ Time Magazine, Time Magazine: Invention of Year 2006, <http://www.time.com/time/2006/techguide/bestinventions/inventions/youtube2.html>, Viewed September 11th 2007

but rather choose what they want to watch, when they want to watch it and subsequently engage in producing this content themselves¹⁰.

As with any new innovative and distributive technology - there is always criticism - typically associated and aimed at the technology, company and brand value. MySpace and YouTube have been not been indifferent to this criticism and both are regular targets of it. Despite this criticism, the success of MySpace and YouTube has been phenomenal and their accomplishments have been predominately focused around the ease in which users can share information. This information is typically broken down into three broad categories:

- **Original Creations** – Home Videos, Original Short Movies, Music, Text;
- **Transformative Derivatives** – Mashups, Remixes, Mashups/Remixes that have altered the content in some way that is new and creative¹¹;
- **Copied or ‘Ripped’ Content** – Snippets of original content which have been reproduced without any element of transformation or alteration¹².

These three main categories cover almost all of the content featured on YouTube and MySpace - with most of it being short in nature to enable quick viewing. In creating a medium in which information can be shared so easily, both YouTube and MySpace have exposed themselves to one of the largest problems in the digital age today – namely, the infringement of copyrighted material. The content featured on user generated websites such as MySpace and YouTube is almost always intrinsically correlated to copyrighted material, and as a result, will be material that is protected under relevant copyright legislation. This creates an inevitable problem for not only YouTube and MySpace, but for any site which allows direct user generated submissions to fuel content aggregation. For both of these sites to continue their dominance as internet juggernauts whose collective daily viewing exceeds 3 Billion page views¹³, they must not only work with copyright owners to remove infringing content immediately but produce innovative technology solutions to directly stop copyright infringement from occurring in the first place.

IV. Resolving Copyright Infringement

There are a varying number of ideologies that provide some insight into the most effective way to deal with copyright infringements arising on the Internet - with some offering a more realistic approach than others. It has been hypothesised that computer code could effectively restrict the boundaries of online activities more effectively than law¹⁴, such that stricter data controls could be placed on the movement of content data from the author to the content provider, and then finally to the end user. While many have theorized¹⁵ that the best way to control data online is to start at the source and continue through to the end-user, the difficulty arising in policing such a hypothesis is not only in the controlling of data, but also

¹⁰ Ibid 5

¹¹ Damien O’Brien, Mashups, remixes and copyright law (2006) 9(2) *Internet Law Bulletin* 17, <http://eprints.qut.edu.au/archive/00004239/01/4239.pdf>, Viewed September 12th 2007

¹² Damien O’Brien & Professor Brian Fitzgerald, Digital Copyright Law in a YouTube World (2006), <http://eprints.qut.edu.au/archive/00005230/02/5230.pdf>, Viewed September 13th 2007

¹³ Alexa.com, Traffic Rankings – youtube.com & myspace.com (2007), http://www.alexa.com/data/details/traffic_details?url=YouTube.com, Viewed September 13th 2007

¹⁴ Lessig, Lawrence, Code and Other Laws of Cyberspace, Basic Books New Edition (June 2000)

¹⁵ Jonathan Zittrain, Internet Points of Control (2003), http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bclawr/44_2/10_FMS.htm, Viewed 14th September 2007

in the fact that cyberspace has severely destabilized the relationship between what is considered legally significant and what is not in a globalised environment. Due to the absence of an international copyright policy between differing nations, any attempt to apply territorially-based copyright legislation to electronic works simultaneously everywhere around the planet is near impossible¹⁶. Thus, alternative solutions must be explored.

A strategy that both YouTube and MySpace have adopted in order to limit copyright infringement online is through the sharing of advertising revenue with copyright owners, and even more recently with users¹⁷. Not only does this strategy ensure that authors are provided with financial rewards for their content, but it also increases their socio-reputational capital which leads to higher community acceptance and ultimately, higher financial rewards. While such a strategy has been adopted from the offline world, it is still a sensible approach to apply in the online one. It must be recognised that such a strategy is only an interim solution to a greater problem and it is not a rational plan to continue ad-infinitum. Thus, a longer term solution must be identified and implemented to ensure that financial remuneration is provided to those who own the copyrights to material disseminated online.

V. The Australian Perspective

The Australian Copyright Act 1968 states that copyright will subsist in any original literary, musical, dramatic and artistic works or other subject matter including sound recordings, cinematographic films and radio broadcasts and published editions of works. Generally, the subject matter concerned with websites such as Youtube and Myspace will be classified as either ‘*sound and television broadcasts*’ or ‘*cinematograph films*’¹⁸. For the purposes of the Copyright Act 1968, copyright infringement occurs when a person who does not own the copyright to a piece of work, authorizes someone else to use it - without permission – and breaches the true authors exclusive rights¹⁹. In applying this logic to websites such as YouTube or Myspace, the uploading of a video of a ‘television broadcast’ or ‘cinematograph film’ without a license is clearly infringing the copyright owners right to not only disseminate the broadcast or film to the public²⁰, but also the owners right to make a copy of the film and share it with the public²¹.

It is in this regard that current Australian copyright does not distinguish clearly who is responsible for infringement – the person uploading the content to a website or the website itself. s22(6) of the Copyright Act provides that the person determining the content of a communication is the person deemed to have made the communication – which clearly places the infringement directly on Myspace and Youtube. Unfortunately, the Copyright Act 1968 provides no additional direction in determining and clarifying who is responsible for the communication. The only relevant case law on the matter is *Universal Music Australia Pty Ltd v Cooper* which considered the extent to which a website is involved in the dissemination and promotion of copyright protected content²². However, this case does not provide

¹⁶ David G. Post & David R. Johnson, *Law and Borders, The Rise of Law in Cyberspace* (1996), <http://www.temple.edu/lawschool/dpost/Borders.html>, Viewed 14th September 2007

¹⁷ Paul Haven, *YouTube Plans revenue sharing with Users* (2007), <http://www.msnbc.msn.com/id/16842857/>, Viewed September 14th 2007

¹⁸ *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].

¹⁹ *Copyright Act 1968* (Cth) ss 36(1), 101(1)

²⁰ *Copyright Act 1968* (Cth) s 87

²¹ *Copyright Act 1968* (Cth) s 86

²² *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972

guidance to the extent in which video sharing sites such as Myspace and Youtube are infringing copyright ownership under Australian law, if any.

Once the establishment of copyright infringement has been confirmed, the Copyright Act 1968 requires the determination of whether the work has been infringement in part or in whole²³. The investigation into whether a substantial or whole part of the underlying works has been infringed will be particularly important because of the nature of many of the short clips which are uploaded to both Myspace and Youtube. This is another area in which the Copyright Act 1968 does not provide clear guidance. While the uploading of a whole copy of original content such as a full television show or musical video clip is clearly an infringement of the author's copyright and is actionable under the act, transformations of content such as cutting and pasting a variety of different content into one clip is not clearly considered. The obvious problem is that each of these derivatives of works would need to be measured on an individual basis by the court – a solution which is definitively impractical considering the volume of clips being uploaded to video sharing sites each and every day. Thus, additional and alternative solutions need to be found.

In considering whether video sharing sites such as Myspace and Youtube can be held liable for copyright infringement under Australian copyright law, it is necessary to determine the degree to which they are a vehicle for harbouring copyrighted content. According to s 36(1) of the Copyright Act 1968, a person or organisation which authorises another person to do an infringing act without a licence will themselves be liable for infringing copyright. However, there is a provision within s39B and s112E of the Copyright Act 1968 for the protection of 'carriage service providers' or 'CSP's'. This defence provides protection for CSP's such that they will not be held liable for copyright infringement if the facility provided by them for the making of a communication is used by another party to commit copyright infringement²⁴. This defence was used in the *Universal Music Pty Ltd v Sharman Licence Holdings* case where Wilcox J suggested that the legislative objective of s112E in regards to 'protecting the messenger' relates to services such as Internet Service providers, not software companies²⁵. Thus, although Youtube and Myspace do not actively promote and encourage their users to commit copyright infringement on their website, it is obvious they are promoting the services of their websites as more of a direct content provider to the public - which places them outside the provisions of s112E and offers no protection for them under this provision. Additionally, under s87 of the *Telecommunications Act 1997* – a CSP has been redefined very narrowly as a person or entity 'supplying a carriage service to the public using a network'. Since neither YouTube or Myspace provide internet access or any other carriage services and/or facilities which are encompassed within this definition, it would seem highly unlikely that the court would provide them with statutory protection under this section.

It is also relevant to note at this point, that there have been some substantial revisions of this section when the introduction of the United States Free Trade Agreement (USFTA) was finalised. These new provisions specifically relate to the liabilities concerning CSP's and attempt to parallel Australia copyright laws with provisions contained under the United States Digital Millennium Copyright Act 1998. The amendments have been introduced into s116AC through s116AF and attempt to establish limitation remedies for plaintiffs attempting to enforce copyright provisions on CSPs. As with the US Digital Millennium Copyright Act

²³ *Copyright Act 1968* (Cth) s 14(1)

²⁴ *Copyright Act 1968* (Cth) ss 39B, 112E

²⁵ *Universal Music Pty Ltd v Sharman Licence Holdings* [2005] FCA 1242 at both [398] & [418]

1998, sites such as Youtube and Myspace would only be provided protection under these new provisions and specifically under s116AH in the instance there were not receiving ‘*financial benefit*’ from the infringing activity where they have the ‘*ability to control the infringing activity*’. It was apparent in the instances of both websites when they initially launched that they were running advertisements alongside infringing videos and therefore would not be eligible for protection under this section.

VI. The United States Perspective

In comparison to Australia copyright law, the United States has a very different approach in relation to copyright protection and infringement of digital content online. It is evident that it would be impossible for YouTube and MySpace to gain authority from every copyright holder that has content featured on either site, and consequently they now both rely on statutory legislations provided by the Digital Millennium Copyright Act or ‘DMCA’²⁶. Both YouTube and MySpace are incorporated companies in the United States of America and as a result, they are eligible for protection under s512 of the DMCA. Accordingly, s512(c)(1)²⁷ provides limited liability protection for “*service providers (who) provide infringing material on websites (or other information repositories) hosted on their systems*”. The DMCA states that in order to be eligible for protection, the following conditions must be met:

- *The provider must not have the requisite level of knowledge of the infringing activity, as described below.*
- *If the provider has the right and ability to control the infringing activity, it must not receive a financial benefit directly attributable to the infringing activity.*
- *Upon receiving proper notification of claimed infringement, the provider must expeditiously take down or block access to the material.”*

Interestingly, the most relevant section of s512(c)(1) to both YouTube and MySpace is the point (ii) which states that a provider “*must not receive a financial benefit directly attributable to the infringing activity*” – a provision not dissimilar to the s116AH in the Australian Act. It was obvious from visiting either site when they were first created and as they became more popular, that both YouTube and MySpace ran advertisements alongside all content which was posted on their sites. It was not until both websites were acquired by Google and News Corp respectively that systems were implemented which attempt to identify and remove advertising from alongside potentially infringing content - although these systems are by no means perfect. It is also noted that the implementation of these systems indicates that the operators of both websites knew of extent to some degree, in which infringing content was being posted to their websites. Consequently, both YouTube and Myspace are in direct violation of s512(c)(1)(b), which does not allow either site to use s512 as an eligible defence, nor does it allow them to limit their liability in the instances where copyrighted content is shown with advertisements. If no advertisements are shown alongside copyrighted content then s512(c) does provide a high degree of flexibility for both MySpace and YouTube in the event of copyright infringement. s512(c)(3) - which is prominently displayed on both YouTube’s²⁸ and MySpace’s²⁹ Terms of Use - states that if a company receives a “*notice (or) takedown*” request, and they comply with it ‘*expeditiously*’ – then

²⁶ Digital Millennium Copyright Act 1998

²⁷ Ibid 15, s512(c)(1)

²⁸ YouTube, Terms of Use (2007), <http://www.youtube.com/t/terms>, Viewed September 14th 2007

²⁹ MySpace, Terms of Use (2007), <http://www.myspace.com/Modules/Common/Pages/TermsConditions.aspx>, Viewed September 14th

they will be “*exempt from (any) monetary liability*” and “*protected from any liability to any person for claims based on it having taken down the material.*”³⁰

Both YouTube and MySpace have entered into revenue sharing arrangements with copyright owners in order to provide a viable solution to their copyright infringement problems. They have done this predominately to block legal action from large copyright owners, and must recognise that it is not a fundamental solution to the much wider, and longer term copyright problem. While YouTube has stated³¹ numerous times that the company is developing its own technology to filter content containing unauthorized content from being uploaded - it has not yet eventuated. Instead, YouTube is developing a technology which will allow copyright owners to identify their content and make a decision as to whether they wish to remove it.³² Unfortunately, this technology does not provide any surety to copyright owners that YouTube will stop displaying their content completely. Unless the technology fingerprinting system is entirely accurate in its identification of infringing content, it can still appear on the site. Furthermore, it is impossible for such a system to identify and inform copyright owners who are not aware their content is even posted on the YouTube site. Evidently, YouTube’s new system will not provide any increased regulation of content but rather act as a means to more appropriately identify and manage content. Whether this will finally satisfy copyright holders and resolve many of the copyright infringement conflicts YouTube has faced so far remains to be seen.

Presently, the primary way in which YouTube identifies infringing content on its site is through search terms or “tags” assigned to content when it is uploaded³³. Content which matches trademarked names or commonly used media names are automatically removed if copyright holders have previously filed take down notices. YouTube also offers a flagging feature which is intended to allow users to report possible infringing content; however this feature is open to regular abuse and its effectiveness in identifying copyrighted content is questionable. There are two other burdens placed on content aggregators such as YouTube and MySpace by the DMCA which deserve comment. These are illustrated below:

- Blocking Users – s512(i)

S512 (i) suggests that there is a global obligation of service providers to instigate account termination policies for users who are ‘*repeat infringers*’. The specific definition of ‘*repeat infringers*’ is unclear although YouTube defines the expression on its Terms of Use³⁴ page as “*a user who has been notified of infringing activity more than twice and/or has had a User Submission removed from the Website more than twice*”. While both YouTube and MySpace implement this policy in accordance with the DMCA, it is ineffective because a user who has their account terminated can easily re-register a new account, with a new email address and re-upload the infringing content.

³⁰ Ibid 15, s512(c)(3)

³¹ Alex Veiga, Anti-piracy system could hurt YouTube (2006), <http://www.msnbc.msn.com/id/15240348/>, Viewed September 15th 2007

³² Ibid 20

³³ Wikipedia, YouTube.com (2007), http://en.wikipedia.org/wiki/YouTube#Copyright_infringement, Viewed 15th September 2007

³⁴ Ibid 17

- Revealing Users – s512(h)

S512(h) of the DMCA allows copyright owners or persons who are authorized to act on the copyright owners behalf to issue a subpoena to a service provider for the identification of an alleged infringer. 20th Century Fox served YouTube with such a subpoena on 18th January of this year³⁵ demanding that YouTube “*disclose information sufficient to identify the User so that Fox can stop the infringing activity*”. In February, YouTube allegedly complied with this demand and provided Fox with the all available user details including the user’s registered details, email address and any retained internet address information. The user had apparently uploaded to YouTube “*unaired episodes of the television series ‘24’, which could have caused Fox irreparable harm*”.

It is apparent that YouTube relies specifically on s512(1) of the DMCA for protection in regards to take down notices and the limited liability protection offered under this legislation. This implies that service providers such as YouTube and MySpace are in a position of relative power against copyright owners because of the indemnity provided by US copyright law in regards to the safe harbour provisions in the DMCA legislation³⁶. The continued dependence of this protection offered under the DMCA is under intense scrutiny in the current Viacom International Inc vs. YouTube Inc case.³⁷

According to the preliminary filing, Viacom International is suing YouTube for “*statutory damages...and present wilful infringement, or actual damages plus profits, of at least one billion dollars*”.³⁸ The damages are not being filed under the DMCA but rather under the U.S. Copyright Act 1976 in an attempt to remove the limited liability protection offered by s512. While YouTube and MySpace specifically state in their Terms of Use that any charges in relation to infringement are to be filed under the DMCA, Viacom has disregarded this condition and is attempting to seek damages in relation to the infringements under the so called ‘*offline copyright legislation*’ or the U.S Copyright Act 1976.

Viacom have allegedly identified more than 150,000 unauthorized clips of their copyrighted programming content which have been viewed more than 1.5 billion times on YouTube. They purport that YouTube have shifted the burden of proof onto copyright owners to monitor the YouTube site daily to detect infringing works and send take down notices while YouTube continues to profit from advertising revenue on infringing content. The filing states that YouTube’s Terms of Use grants YouTube a “*worldwide...licence to use, reproduce, distribute, prepare derivative works of, display and perform*” any video’s added to YouTube’s library. It would seem definitively obvious that this condition only extends the copyright infringement that YouTube exposes itself too, unless it is assumed YouTube does not have a “*requisite level of knowledge of the infringing activity*”. The final outcome of this case will undoubtedly define the extent to which the DMCA can be used for protection, and also determine whether the U.S. Copyright Act 1976 is applicable to digital content.

³⁵ Andrew Wallenstein, Fox Seeks YouTube User’s Identity (2007), http://www.hollywoodreporter.com/hr/content_display/television/news/e3i8e461f30b83c62d920b85a10ae9e813c, Viewed September 15nd 2007

³⁶ Melbourne Law School Research Paper - David Brennan, YouTube and the Broadcasters (2007), <http://ssrn.com/abstract=978710>, Viewed 15nd September 2007

³⁷ Viacom International Inc vs Youtube Inc [2007], <http://www.lessig.org/blog/archives/vvg.pdf>, Viewed 15nd September 2007

³⁸ Ibid 23, Page 5, Viewed September 15nd 2007

While MySpace³⁹ has only recently entered into an agreement with a third party digital fingerprinting provider, they are taking a stricter approach in relation to copyright management. Undoubtedly their decision is a reflection of MySpace's parent company, News Corps Inc, and the subsequent preservation of its internal and external stakeholder relationships. MySpace's technology automatically "*filter screens content uploaded by users and blocks any content matching a fingerprint in the MySpace database*".⁴⁰ This implies that MySpace blocks any content which is infringing copyright owners' rights and restricts any users from uploading said content. While this is a more effective way in which to deal with Copyright and ensure that MySpace is completely compliant with the DMCA – it does severely impact the user's experience in sharing content. Furthermore, there are no technical or legal guarantee's that the implementation of this technology will be able to filter all of the infringing content uploaded – rather, it will attempt to remove the majority of it. It is clear that MySpace's approach has been definitively more active in comparison to YouTube's, and as a result, the future strategies of the two companies differ immensely. In the pending Viacom vs. YouTube case, Viacom contends that YouTube "*has deliberately withheld the application of available copyright protection measures in order to coerce rights holders to grant it licenses on favourable terms*"⁴¹. This contention specifically implies that YouTube is aware of all the infringing activities occurring on its site, and is suggesting that YouTube is forcing copyright holders to licence content with them before they will filter out any relevant copyrighted material. Viacom also contend that YouTube already has the capability to filter content since it can automatically filter adult content, or content which features pornography – a claim which seems unsubstantiated by any tangible evidence in the preliminary filing. Conversely, MySpace is more actively seeking content and licensing deals with major copyright holders to allow users to upload media with content that has already been licensed.

Thus, the real test for YouTube, MySpace and other related websites that rely on user-generated content aggregation is whether they can steel themselves inside the s512 DMCA shell of copyright immunity. The Viacom action will undoubtedly determine the future success of these business models and determine whether broadcasters can do more than just issue takedown notices and subpoenas. Regardless of the outcome in this case, it is definitively apparent that increased regulation and management of uploaded content is needed to effectively deal with copyright infringement. Whether the upcoming YouTube, or currently implemented MySpace technologies are the best way to do this is a issue that remains to be seen.

VII. Conclusion

While YouTube and MySpace face real and difficult issues in regards to copyright law if they do not completely block infringing content the moment it is uploaded - it does not necessarily mean a solution is not achievable. While both the Australian and United States provisions relating to copyright infringement do not attempt to go as far to protect websites such as YouTube and Myspace, they also do not provide definitive clarification of the laws relating to such sites. It is evident that this lack of clarification puts the interpretation of the legislation into the courts hands in deciding whether these websites infringe the copyrights of

³⁹ Audible Magic Inc, MySpace Implements Video Filtering System to Block Unauthorized Use of Copyrighted Content (2007), <http://www.audiblemagic.com/news/press-releases/pr-2007-02-12.asp>, Viewed September 16th 2007

⁴⁰ Ibid 28

⁴¹ Ibid 26, Page 4, Viewed 16nd September 2007

an original work, or whether they are merely a facilitating mechanism to display such content. YouTube, as the founding user-generated video website seeks to ensure that any type of content can be uploaded to its site and can be shared with millions of people regardless of the copyright implications. This user-orientated strategy seeks to put the YouTube community ahead of any relative copyright legislation and reiterates YouTube's famous logo to *'Broadcast Yourself'*. In vast contrast, MySpace has decided to implement technologies which restrict content and are distinctly more corporate in nature. While this strategy ensures that MySpace avoids the majority of potential litigation, it is in no way infallible.

Thus, it is clear that the *Viacom Inc vs. YouTube Inc* case will pave not only the path, but also the future direction of user-generated content and digital copyright legislation. The vast majority of companies which own similar technologies to YouTube and MySpace are comforted by the limited liability clauses in s512 of DMCA to provide sufficient protection against serious litigation, and wait for the outcome of the case fought by the deep pockets of Google – YouTube's owner. While the continued reliance on this protection will be determined in this case, it is in the author's opinion that this one outcome should not realistically be the focus on the future of copyright laws. Rather, one of the more important aspects that need to arise out of the *Viacom vs. YouTube* case is a clear set of technological guidelines to uniquely identify content. Currently, s512 suggests that service providers can avoid legal action if they do *"not have (a) requisite level of knowledge of the infringing activity"*⁴² which is realistically a cop-out for the owners of these technologies as most are fully aware of the content being distributed and shown on their sites.

It is obvious that if a universal set of guidelines were established with a standardised set of unique identifiers to encode into copyrighted content, it would be easier to expose YouTube, MySpace and similarly related sites of copyright infringement. Equivalently, it would also make it abundantly easier for these user-generated services to identify and immediately restrict infringing content. In addition, the adoption and integration of unique identifiers would more precisely allow for the correct identification and notification of copyright owners, and would more accurately assist service providers with a means of calculating the appropriate revenue owed to content owner.

Thus in conclusion, any attempt to enforce a non-technological solution to an obvious technological problem will not resolve the current copyright infringement crisis surrounding digital content. A clear set of internationally accepted guidelines regarding content identification need to be established in order to reduce DMCA safe harbour provisions and place control of copyrighted content back in the hands of copyright owners. Although it is applauded that both YouTube and MySpace are both attempting to proactively create solutions to reduce the amount of copyrighted content displayed on their sites – it has not been done quickly enough. The unreasonable expectation placed on copyright owners to manage the identification of their content in the digital world is an impractical solution – particularly if service providers are profiting from it. While innovative technological solutions which revolutionize the way media is disseminated are encouraged, it is also critical to ensure the interests of protecting and rewarding copyright owners for their content are protected for without their input – sites like YouTube and MySpace would not be as popular as they are today.

⁴² Ibid 15, s512(c)(1)

Bibliography

1. *Sands & McDougall Pty Ltd v Robinson* (1917) 23 CLR 49
2. Panel Three, Beyond Napster: Debating the Future of Copyright on the Internet (2000), Viewed 12th September 2007
3. IronBound Press, The Internet Revolution (2006), <http://www.ironboundpress.com/pdf/intrev-chap0.pdf> , Page 3, Viewed 6th September 2007
4. Stanford University, Folding@Home (2007), <http://folding.stanford.edu/> , Page 1, Viewed 6th September 2007
5. United States Department of Commerce, *The Emerging Digital Economy*, September 1998 at 33
6. Timofeeva, Yulia A., Establishing Legal Order in the Digital World: Local Laws and Internet Content Regulation (2006), <http://www.jiclt.com/index.php/JICLT/article/viewFile/7/6>, Viewed September 10th 2007
7. Time Magazine, Time Magazine: Invention of Year 2006, <http://www.time.com/time/2006/techguide/bestinventions/inventions/youtube2.html>, Viewed September 11th 2007
8. Damien O'Brien, Mashups, remixes and copyright law (2006) 9(2) *Internet Law Bulletin* 17, <http://eprints.qut.edu.au/archive/00004239/01/4239.pdf> , Viewed September 12th 2007
9. Damien O'Brien & Professor Brian Fitzgerald, Digital Copyright Law in a YouTube World (2006), <http://eprints.qut.edu.au/archive/00005230/02/5230.pdf> , Viewed September 13th 2007
10. Alexa.com, Traffic Rankings – youtube.com & myspace.com (2007), http://www.alexa.com/data/details/traffic_details?url=YouTube.com, Viewed September 13th 2007
11. Lessig, Lawrence, Code and Other Laws of Cyberspace, Basic Books New Edition (June 2000)
12. Jonathan Zittrain, Internet Points of Control (2003), http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bclawr/44_2/10_FMS.htm, Viewed 14th September 2007
13. David G. Post & David R. Johnson, Law and Borders, The Rise of Law in Cyberspace (1996), <http://www.temple.edu/lawschool/dpost/Borders.html>, Viewed 14th September 2007

14. Paul Haven, YouTube Plans revenue sharing with Users (2007), <http://www.msnbc.msn.com/id/16842857/>, Viewed September 14th 2007
15. *Copyright Act 1968* (Cth)
16. *TCN Channel Nine Pty Ltd v Network Ten Ltd* [2002] FCAFC 146 [10]-[13].
17. *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972
18. *Universal Music Pty Ltd v Sharman Licence Holdings* [2005] FCA 1242 at both [398] & [418]
19. Digital Millennium Copyright Act 1998
20. YouTube, Terms of Use (2007), <http://www.youtube.com/t/terms>, Viewed September 14th 2007
21. MySpace, Terms of Use (2007), <http://www.myspace.com/Modules/Common/Pages/TermsConditions.aspx>, Viewed September 14th
22. Alex Veiga, Anti-piracy system could hurt YouTube (2006), <http://www.msnbc.msn.com/id/15240348/>, Viewed September 15th 2007
23. Wikipedia, YouTube.com (2007), http://en.wikipedia.org/wiki/YouTube#Copyright_infringement, Viewed 15th September 2007
24. Andrew Wallenstein, Fox Seeks YouTube User's Identity (2007), http://www.hollywoodreporter.com/hr/content_display/television/news/e3i8e461f30b83c62d920b85a10ae9e813c, Viewed September 15nd 2007
25. Melbourne Law School Research Paper - David Brennan, YouTube and the Broadcasters (2007), <http://ssrn.com/abstract=978710>, Viewed 15nd September 2007
26. Viacom International Inc vs Youtube Inc [2007], <http://www.lessig.org/blog/archives/vvg.pdf>, Viewed 15nd September 2007
27. Audible Magic Inc, MySpace Implements Video Filtering System to Block Unauthorized Use of Copyrighted Content (2007), <http://www.audiblemagic.com/news/press-releases/pr-2007-02-12.asp>, Viewed September 16th 2007