Internet TV: Legal Issues Presented By A New Consumer-Facing Service

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Outline of Presentation

I. What is “Internet TV”?
   (a) Services, Types of Providers
   (b) Internet TV is a Big Business
   (c) Range of Publisher Clients

II. Liability for “OPC” (Other People’s Content)
   (a) Nature of claims
   (b) Sampling of actual lawsuits
   (c) Direct Liability for Copyright Infringement
   (d) Vicarious Liability for Copyright Infringement
   (e) Contributory Liability for Copyright Infringement

III. Defense Strategies
   (a) Contractual Protection
   (b) Statutory Protection
      (i) CDA
      (ii) DMCA

IV. Summary and Closing Thoughts
   (a) What will happen in the YouTube and MySpace cases?
   (b) What to do?

V. References and Appendices
I. What is “Internet TV”? 
What is “Internet TV”?

» Brightcove is an Internet TV Service

» We provide an open technology platform and marketplace for publishing, distributing, consuming and monetizing video over the Internet

» We generate revenue through advertising sales, pay media sales, and usage fees

» We serve and connect four constituencies:
  - Content Owners
  - Web Distributors
  - Consumers
  - Marketers
Internet TV is a BIG Business

- Online Video Ad market estimated to be approx. $1 billion in 2008, $3 billion in 2010 (eMarketer, Parks Assoc)
- Online Video Pay Media sales estimated to be >$300 million in 2007, approx $1 billion in 2010 (IDC)
- Online Video Platform business estimated to generate revenue of $750 million in 2008, $1.5 billion in 2010 (ABI Research)
- Google paid $1.65 billion +/- for YouTube.  See Appendix A.
Who are Internet TV Publishers/Content Owners?

- Major Media Companies/Cable Networks:
  - e.g., MTV, Discovery, Warner Entertainment

- News Services/Print Media:
  - e.g., NYTimes, WSJ, Newsweek, Hachette

- Record Labels:
  - e.g., Sony BMG, Warner Music

- Independent Producers:
  - e.g., Barrio 305, Dan Myrick, Code TV

- Business launching Broadband Channels:
  - e.g., Mestolando, MIT Tech Review

- Users/Consumers:
  - e.g., Consumer Generated Media ("CGM")
II. Liability for “OPC” (Other People’s Content)
The Liability Landscape: Liability for Other People’s Content—“OPC”

Direct, Vicarious, and Contributory Liability for:

- **Copyright Infringement:**
  
  “You published a copy of my work without permission”

- **Libel:**
  
  “You published something about me that wasn’t true”

- **Privacy:**
  
  “You published information about me without my permission”

- **Other Illegal Conduct/Content:**
  
  “Your service published defamatory statements about me.”
  
  “Your service promoted something illegal”
The Liability Landscape: Sampling of Actual Claims and Cases

**Tur/LANS v. YouTube**, CV06-4436GAF (C.D. Cal. 2006): Plaintiff seeks relief for distribution of copyrighted works on YouTube site (e.g., video of “Beating of Reginald Denny” displayed over 5,500 times). Alleges that YouTube knowingly and intentionally enables massive infringement to occur and pursues advertising model whose success is based upon increasing volume of views. See Appendix B for complaint and plaintiff’s motion for SJ

**Universal Music v. MySpace**, CV06-07361SVW (C.D. Cal 2006): Plaintiff seeks relief for distribution of copyrighted works on MySpace site (e.g., songs and music videos as part of user-created pages). Alleges that MySpace knowingly and intentionally enables massive infringement to occur and pursues advertising model whose success is based upon increasing volume of views. See Appendix C for complaint

*Tur and UMG each claim relief for direct, contributory, and vicarious copyright infringement. If they can make out such claims, do the defendants have protection thru the DMCA Safe Harbors?* See Section III

**Carafano v. Lycos**, 339 F.3d1119 (9th Cir. 2003): Actress sought relief for unauthorized distribution of personal contact information and defamation through creation of scandalous (false) online personal profile available through dating service. See Appendix D for opinion of court. *Is there a statutory defense here?* See Section III
The Copyright Cases—Claims for Direct Infringement

**Direct Liability:** The unauthorized reproduction, adaptation, distribution, or public performance of works embodying copyrighted material constitutes a direct infringement of copyright. 17 U.S.C. § 501(a), see §§ 106(1)-(3) & (5); FN1

YouTube and MySpace each provided the service through which the “uploader” violated the plaintiffs’ copyright. Does that alone constitute direct infringement? Older cases suggest it does. FN2

More recent cases suggest that some “affirmative” or “volitional” act with a close nexus to the illegal activity is required for direct liability. FN3 Corner stores with copying machines have avoided liability. Search engines have avoided liability for presentation of results that include infringing material. Id.
The Copyright Cases—Claims for Direct Infringement

Key Questions:

-- Did the service make an editorial selection to present the content? Or was presentation or distribution automated or solely at the uploader’s selection?

-- Did the service specifically solicit the uploader’s content? Or did the service ingest and store the content at issue passively?

-- Did the service encourage uploaders to submit infringing material? Or did it have an active policy to discourage or filter out infringing material?
Contributory Infringement: One who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another. FN4

Key Questions:

-- Is the service substantially used for lawful purposes? If so, contributory liability may be limited to actual knowledge of a specific instance of infringement. Or is the service rife with infringement? If so, actual knowledge of specific instances may not be necessary to demonstrate. See id.

-- Is the service made available with the object or purpose of promoting its use to infringe copyright, as shown by affirmative expressions or steps to foster infringement? See Grokster, 125 S. Ct. 2764 (2005) (diverting queries for known infringing site to its own, using derivative name, targeting infringing service’s user base).

-- Is there evidence of filtering, attempting to prevent infringement? Or is there evidence of active steps to encourage infringement, such as advertising an infringing use? Id.
The Copyright Cases—Claims for Vicarious Infringement

Vicarious Infringement: One infringes vicariously by profiting from direct infringement while declining to exercise the right/ability to control the activity. Actual knowledge is not required for a finding of vicarious liability. FN5

Key Questions:

-- Did the infringing activity create a “draw”? Meaning, did the number of visitors to the defendants’ sites increase to view the infringing material? FN6

-- If so, did the increased draw cause a direct financial gain for the defendant? Id.

-- How did the defendant monetize the infringing material? Usage fees from the infringer? Advertising fees from marketers? Sales or rental receipts from end users?

-- Did the defendant actively operate/supervise the content admitted into the service? FN7

-- Did the defendant actively operate/supervise the presentation of content displayed through the service? Id.

-- If either or both rights are reserved by the service, did the service exercise such rights to the fullest extent? The right to police the content or the ability to block infringing activity if discovered is not itself sufficient to show the actual right and ability to control the content sufficient to establish vicarious liability. FN8
III. Defense Strategies
How to Protect from Claims Arising Out of OPC

Different Strategies/Protections for Different Sources of OPC:

- **Contractual Strategies** are more valuable for protection from claims arising out of content from substantial content providers (e.g., major media companies).

- **Statutory Defenses** may be necessary for protection from claims arising out of CGM.

- **Business operating choices** likely make the difference in liability and immunity analyses.
How to Protect from Claims Arising Out of OPC

Contractual Strategies:

Incorporate Robust Representations and Warranties:

No Infringement. You represent and warrant that You either own fully and outright or otherwise possess and have obtained all rights, approvals, licenses, consents and permissions as are necessary to exercise Your rights and perform Your obligations hereunder and to grant the licenses granted under this Agreement.

The Content. You specifically represent and warrant that the Content and the distribution and/or publication of the Content through the Service, to the extent enabled by You, directly or indirectly, does not, and shall not, infringe or misappropriate any third party’s rights, nor shall doing so violate any right of any person. You further represent that You have paid all license fees and/or other fees required to be paid to third parties for performance of Your obligations or exercise of Your rights hereunder, for the grant of the licenses hereunder, and for any other act by You under this Agreement (“Third Party License Fees”) and you covenant to timely pay any Third Party License Fees required to be paid in the future for such actions. You further expressly agree that, as between You, on the one hand, and the Service on the other hand, any obligation to pay Third Party License Fees as a result of distribution of the Content pursuant to this Agreement shall be Your obligation and not the obligation of the Service.
How to Protect from Claims Arising Out of OPC

Contractual Strategies (cont.):

Require Full Indemnification:

You agree to indemnify and hold harmless the Service and the Service’s officers, directors, shareholders, employees, accountants, attorneys, agents, affiliates, subsidiaries, successors and assigns (the “Service Indemnitees”) from and against any and all third party claims, damages, liabilities, costs and expenses (each a “Claim”), arising out of or related to any breach of any representation, warranty, covenant and/or agreement made by Company in this Agreement.
How to Protect from Claims Arising Out of OPC – The CDA

Statutory Protections:

*Communications Decency Act of 1996, 47 U.S.C. Section 230(c)(1):*

“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”

CDA immunity requires three things:

1. That the party seeking immunity be an interactive computer service;

2. That the interactive computer service not be an information content provider with respect to the disputed activity;

3. That the information at issue originate from a third-party.
How to Protect from Claims Arising Out of OPC – The CDA

Statutory Protections (cont.):

Carafano Case result:

The Ninth Circuit affirmed judgment as a matter of law for the Online Service finding it was entitled to statutory immunity under the CDA from claims for defamation and “cruel and sadistic identity theft.”

The Court found that Congress enacted the CDA “to promote the free exchange of information over the Internet” and “to promote the continued development of the Internet.” Under the CDA, where the Online service was not itself responsible for the content, it could not be held liable.

- CDA immunity does not extend to claims for Copyright infringement, however. FN9.
How to Protect from Claims Arising Out of OPC — DMCA Safe Harbor

Statutory Protections (cont.):

The DMCA does provide a limited immunity against liability for direct, contributory, or vicarious copyright infringement for qualifying online service providers. See Digital Millennium Copyright Act (1998), 17 U.S.C. Section 512(c) ("Safe Harbor" provisions).

Specifically:

A service provider shall not be liable for monetary 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 meets the following requirements:
Statutory Protections—DMCA “Safe Harbor” (cont.):

(A) (i) does not have actual knowledge that the material is infringing;

   (ii) is not aware of facts from which infringing activity is apparent; or

   (iii) upon obtaining such knowledge, acts expeditiously to remove access to the material;

(B) does not receive a financial benefit directly attributable to the infringing activity in a case where the service provider has the right and the ability to control such activity; and

(C) responds expeditiously to remove access to the material claimed to be infringing
Key DMCA Safe Harbor Questions

Three key questions/issues that courts have looked at in determining eligibility for protection. Wrong answer on any of them precludes immunity:

**Question 1.** What knowledge did the defendant have of the infringing activity or of facts from which a reasonable person would infer infringing activity?

-- This is an “actual notice” standard. FN10

-- The “form” of notice must be “substantially” in accordance with the requirements of the Act or it will not be considered in determining if the defendant has received “actual” notice. FN11
**Key DMCA Safe Harbor Questions**

**Question 2.** Did the defendant (a) receive a financial benefit from activity specifically attributable to the infringement where (b) the defendant in fact controlled the infringing activity?

-- Sec 512(c)(1)(B) seems to capture the doctrine of vicarious copyright liability, see supra, yet legislative history makes plain that the Safe Harbor was intended to provide some protection for service providers from vicarious liability. FN12

-- Whether the defendant is receiving a direct financial benefit from the infringing activity varies significantly based on the business model. FN13

-- The ability to “control” cannot mean simply storing/hosting and having the ability to remove or deny access to the infringing material or numerous provisions of the Safe Harbor section would have no meaning. FN14
Key DMCA Safe Harbor Questions

**Question 3.** What did the defendant do in response to notice (or actual knowledge) of the infringement?

-- Did the service timely take down/remove/block access to the allegedly infringing content?
IV. Summary and Closing Thoughts
What Will Happen In the YouTube and MySpace Cases?

- Application of the different doctrines of direct, contributory, and vicarious liability not clear yet in cases involving the online world.
- Application of the safe harbor factors and the safe harbor immunities overall are not clear yet in cases involving the online world.
- What seems to emerge from the online cases is that courts are effectively conducting a knowledge and intent analysis:
  -- Was the service intended to be used for a legitimate purpose or to promote infringing uses?
  -- Was the service in fact used primarily for legitimate uses or infringing uses?
  -- What did the defendant do in response to facts indicating infringement?
  -- Could the defendants prevent or limit the infringement?
  -- Did the infringement provide a direct financial benefit to the defendants?
What to Do?

Questions for a General Counsel of an Online Service

-- Do you have TOS requiring representations and indemnifications?
-- Do you have TOS prohibiting infringing/unlawful uses of the service and giving you the right to take down content, terminate account?
-- Is your service intended for legitimate or infringing uses?
-- Is your marketing designed to attract infringing or legitimate uses?
-- What are the business models by which you monetize different forms of OPC?
-- Do you have any technology or mechanisms in place to reduce illegitimate uses of the service? (This is a double-edged sword)
-- Is your service in fact predominantly used for legitimate or infringing purposes?
-- Does your service include mechanisms for notification of infringing or illegal uses? (reg. copyright agent, “flag/report this” functionality)
-- How quickly do you respond to flags or notices?
V. References and Appendices
References


FN3. Costar v. Loopnet, 373 F.3d 544 (4th Cir. 2004); Netcom, 907 F. Supp. At 1370 (“although copyright is a strict liability statute, there should still 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”); Perfect10 v. Cybernet Ventures, 213 F Supp. 1146 (C.D. Cal. 2002)(following Netcom); Field v. Google, 412 F. Supp. 2d 1106 (D. Nev. 2006).


FN5. Shapiro, Bernstein v. HL Green, 316 F.2d 304 (2d Cir. 1963); Ellison, 357 F.3d at 1078; Perfect 10 v. Google, 416 F. Supp. 2d 828, 856 (C.D. Cal. 2006).

FN6. A&M Records v. Napster, 239 F.3d 1004 (9th Cir. 2001); Netcom, 907 F. Supp. At 1377; see In Re Aimster, 334 F.3d 643 (7th Cir. 2003).

FN7. See supra FN5; Perfect 10 v. Google, 416 F. Supp. 2d at 858.

FN8. Netcom, 907 F. Supp. At 1366-67; Perfect 10 v. Google, 416 F. Supp. 2d at 858 (having the “right” to monitor and terminate partnerships with publishers that violate another’s copyright is not sufficient to show necessary “control”).


FN10. 17 U.S.C. § 512(c)(1)(A); see also S. Rep 109-150; see Corbis v. Amazon, 351 F. Supp. 2d 1090 (W.D. Wash. 2004)(inquiry is not what a reasonable person would have deduced, but more, did the defendant deliberately turn a blind eye to “red flags” of obvious infringement).
FN11. 17 U.S.C. § 512(c)(1)(A) and (c)(3)(B)(i); see also S. Rep 109-150. In all published cases identified for this presentation, “actual knowledge” of infringing activity was based upon qualifying notice from the holder. Nevertheless, relying upon a “defective” notice to claim lack of “actual” notice would seem to be a very risky strategy. For the reader’s convenience, the requirements of a qualifying notice of infringement under the DMCA are listed here: (a) a physical or electronic signature of person authorized to act on behalf of the owner; (b) precise identification of copyrighted work/s alleged to be infringed; (c) identification of material claimed to be infringing and requested to be removed and information sufficient to permit the service to locate the material within the service, including exact URLs and file references; (d) information reasonably sufficient to enable the service to contact the complaining party; (e) a statement that the complaining party has a good faith belief that the use of the material is not authorized by the owner or by the law; and (f) a statement that the information in the notification is accurate, and, under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

FN12. See Cybernet Ventures, 213 F. Supp. 1146; see Charles S. Wright, Actual vs. Legal Control: Reading Vicarious Liability for Copyright Infringement Into the DMCA, 75 Wash L. Rev. 1005, 1028-31 (July 2000)(“The committee reports leave no doubt that Congress intended to provide some relief from vicarious immunity.”).

FN13. See H. Rep. No. 105-551, at 54 (1998)(“set up fee and flat periodic payments by infringer for service is not required financial benefit directly attributable to infringing activity”); Costar v. Loopnet, 373 F.3d 544 (increased advertising dollars or service fees not based on infringing activity not sufficient to show direct benefit); but see Perfect10 v. Cybernet Ventures, 213 F. Supp. 1146.

FN14. The third prong of the Safe Harbor requires the service provider to remove or deny access to the infringing material. 17 U.S.C. § 512(c)(1)((a)(III)