

YOUTUBE: MYTH VERSUS REALITY

MYTH #1: YouTube is a website for amateur “user generated videos.”

REALITY: That is only a small part of the story. Although YouTube provides an outlet for creative user-generated videos and holds the potential to be a valuable new means for making copyrighted video works available online, YouTube is also chock full of unauthorized copies of copyrighted works. Viacom alone was able to identify more than 100,000 of its video works being displayed on YouTube without permission (and those videos were viewed billions of times), and there are many thousands more. The availability of these copyrighted works is the real driver of YouTube’s popularity and its soaring advertising revenues, and YouTube refuses to take reasonable steps to stop the posting of copyrighted works.

MYTH #2: YouTube is just like any other internet service provider entitled to protection under the DMCA because it is simply a passive conduit for content of individual users.

REALITY: YouTube is (in its own words) a “consumer media business,” not a provider of basic internet services -- transmission, caching, storage and linking -- entitled to protection under the DMCA. A service provider is protected from damages only when it is sued for infringement by reason of performing one of these specified functions. § 512(n). YouTube’s business -- displaying, performing and distributing video content online -- is completely different. Unlike a traditional service provider, YouTube is an ad-supported service that earns revenues *because* it makes copyrighted content available, and YouTube itself controls all rights to the content it posts. Moreover, DMCA protection ends when the service provider knows it is storing infringing material, or becomes aware of a ‘red flag’ from which infringing activity is apparent, and takes no action to remove the infringing material -- a description that fits YouTube to a tee. And the DMCA provides no protection for a business like YouTube that receives a direct financial benefit (increased ad revenues) from infringing material on its website and that has the right and ability to control the infringement (which YouTube clearly does).

MYTH #3: YouTube can’t do anything about the proliferation of copyrighted videos on its website.

REALITY: YouTube can do plenty. It already monitors its website to filter out pornography and hate speech. It can do the same for copyrighted works. The effort can be aided by established technology -- acoustic fingerprinting and watermarking -- but YouTube refuses to implement it. Remarkably, YouTube has already implemented filtering to prevent infringement of the works of companies that have agreed to do deals with it. YouTube is withholding filtering simply to gain a business advantage in negotiations.

MYTH #4: Content owners can protect their copyrighted video works by monitoring YouTube and sending DMCA “take down” notices when they identify infringing works.

REALITY: Content owners cannot protect themselves by monitoring and issuing “take down” notices. Constant monitoring and issuance of “take down” notices is extremely expensive and burdensome for content owners, thousands (or even millions) of whom are artists or small

companies. And monitoring is never fully effective. By the time an infringing video is identified on YouTube, it will already have been viewed many times. YouTube's process for responding to "take down" notices always involves a time lag, during which the infringing videos remain available. And YouTube users post new infringing clips faster than YouTube can take old clips down. Moreover, YouTube users can post videos that are available only to restricted groups of "friends," making it impossible for content owners to identify infringing works. And a YouTube search will only return a maximum of 1,000 video clips -- but often there are far more than 1,000 infringing copies of videos available. As a result, YouTube remains full of infringing video clips despite content owners' best efforts at monitoring. It is far cheaper and more efficient -- as well as far more fair -- to require YouTube to make use of available filtering technology to prevent this infringement.