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Intellectual Property, E-Commerce and Entertainment Law

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Selected Legal Info, News And Trends

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## **YOU TUBE: IS JIM HENSON ROLLING IN HIS GRAVE OR APPLAUDING?**

Close your eyes. Imagine your life about a year ago just before Thanksgiving 2005. Had you even heard of YouTube? Probably not. And yet today it seems like YouTube is sort of taking the world by storm. How else can we characterize a business that is only about a year old, has yet to turn a profit and has nonetheless been purchased by Google Inc. for somewhere between \$1.65 and \$1.8 billion?<sup>1</sup> Those kinds of numbers, of course, beg the question of what a profitable business should sell for.

The whole YouTube phenomenon also has copyright and intellectual property lawyers scratching their heads. Why? Because it looks like YouTube is a walking laboratory for major-league copyright violations even though it has struck some unique and clever deals with a few record companies and music publishers to allow YouTube users to use music for their do-it-yourself videos. In fact, Google Inc. announced this week that it is

holding onto at least \$200 million worth of the stock it paid to acquire YouTube in case it gets stuck paying damages or legal fees for copyright infringements.

How Google/YouTube might get stuck paying damages for copyright infringement is a prime example of how legal issues continue to be at the forefront of the development of the Internet<sup>2</sup>. The main issue is whether YouTube should be held liable for the posting of the videos that make up the YouTube universe. For example, some times YouTube users post clips from pre-existing tv shows or films that neither the YouTube user nor YouTube have permission to display. Since the right to control the display of a copyrighted work is one of the primary rights granted to a copyright owner, YouTube could be held accountable. Not only can the owners of the films or tv shows make a legal claim, but so can the owners of any music contained in those film/video clips.

On the other hand, YouTube will argue that it takes down any unauthorized clips once it's been notified of a problem and that The Digital Millenium Copyright Act provides

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<sup>1</sup> It was also revealed this week that Google Inc. had to pump \$15 million into YouTube after the deal was announced to help YouTube pay its bills until the deal closes.

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<sup>2</sup> True or false? In five to ten years today's version of the Internet will be looked at as the equivalent of black and white tv in the 1950's.

YouTube with an exemption from liability.<sup>3</sup> Given the huge number – (tens or hundreds of thousands?) – of videos posted on YouTube, it is hard to believe that YouTube will be able to completely escape liability. But given that YouTube and Google have decided to hold back \$200 million worth of Google stock from the deal, perhaps YouTube and Google have decided that the risk is manageable. After all, statutory damages under the Copyright Act of 1976 for willful copyright infringement max out at “only” \$150,000 per work infringed. And since it’s rare (but not impossible) for a court to award the \$150,000 maximum, the Google \$200 million holdback pot ought to cover them for several hundred (or more) potential copyright infringement lawsuits.

And then there are the YouTube “spoof” videos. For a prime example of this variety of YouTube video, check out the brilliant spoof movie trailer called “Martin Scorsese’s Sesame Streets” which can be found at <http://youtube.com/watch?v=fqT13ZWKq48>. [WARNING: This video is for adults only].

In the “Sesame Streets” video, the producers have combined dialogue from several of director Scorsese’s most famous films with various video clips from the “Sesame Street” tv series to create something new. In the process it’s hard to tell whether the resulting satire is directed more at Scorsese and his actors or at “Sesame Street”.

Nonetheless, the producers of the spoof video and YouTube could be in legal hot water unless the Copyright Act’s “fair use” doctrine provides them with a defense. [We think it will].

Any way one slices it, YouTube is now at the cutting edge of the interface between

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<sup>3</sup> The afore-mentioned deals that YouTube has cut with some record companies and music publishers should also make it easier for YouTube users to get music legally – at least for their original productions – and to insulate YouTube from liability for copyright infringement.

entertaining new technologies and the legal system.

YouTube therefore seems to be following in the new tradition of Internet businesses like MP3.com, Napster, Grokster and Morpheus (and dozens of others) in terms of pushing the boundaries of the legal system. But in some ways this is nothing new. The tension between new technologies and old ways of doing things goes back at least as far as the fight between human piano players and mechanized player-pianos. [Films were also supposed to mean the end of live theatre and tv was considered the end of films].

In other words, every new technology is decried by the champions of the old paradigm as the end of everything good that was old. For example, Jack Valenti – the former long-time head of the Motion Picture Association of America - famously stated about twenty years ago that “the VCR is to the American film producer and the American public as the Boston Strangler is to the woman home alone”. VCR’s, of course, turned out to be the best thing that ever happened to the motion picture studios and Mr. Valenti ended up eating his words.

We believe YouTube will end up spending some money defending itself and paying some damages. But at the end of the day it will probably be just a cost of doing business for Google.

Will we still be talking about YouTube next Thanksgiving or will we be talking about some other new Internet phenomenon? Only time will tell.

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