

10-3270

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

VIACOM INTERNATIONAL INC., COMEDY PARTNERS, COUNTRY MUSIC TELEVISION,
INC., PARAMOUNT PICTURES CORPORATION, AND BLACK ENTERTAINMENT
TELEVISION LLC,

Plaintiffs-Appellants,

v.

YOUTUBE INC., YOUTUBE, LLC, AND GOOGLE, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Caption Continued on Reverse)

**Brief for Amicus Curiae the Business Software Alliance
in Support of Reversal**

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10-3342

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED, BOURNE CO., CAL IV ENTERTAINMENT, LLC, CHERRY LANE MUSIC PUBLISHING COMPANY, INC., NATIONAL MUSIC PUBLISHERS' ASSOCIATION, THE RODGERS & HAMMERSTEIN ORGANIZATION, EDWARD B. MARKS MUSIC COMPANY, FREDDY BIENSTOCK MUSIC COMPANY, ALLEY MUSIC CORPORATION, X-RAY DOG MUSIC, INC., FEDERATION FRANCAISE DE TENNIS, THE MUSIC FORCE MEDIA GROUP LLC, SINDROME RECORDS, LTD., MURBO MUSIC PUBLISHING, INC., STAGE THREE MUSIC (US), INC., and THE MUSIC FORCE, LLC,

Plaintiffs-Appellants,

v.

YOUTUBE, INC., YOUTUBE, LLC, GOOGLE, INC.,

Defendants-Appellees.

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Corporate Disclosure Statement

The Business Software Alliance (“BSA”) has no parent corporation. No publicly held corporation owns 10 percent or more of BSA’s stock.

Table of Contents

Corporate Disclosure Statement i

Table of Authorities iii

Statement of Interest 1

Summary of Argument 3

Argument 4

 There Is A Genuine Dispute Of Material Fact As To Whether YouTube Was
 Aware Of Facts Or Circumstances From Which The Infringing Activity On Its
 Website Was Apparent. 4

Conclusion 15

Certificate of Compliance 16

Certificate of Service 17

Table of Authorities

Cases

A&M Records, Inc. v. Napster, Inc.,
114 F. Supp. 2d 896 (N.D. Cal. 2000).....8

ALS Scan, Inc. v. RemarQ Cmtys. Inc.,
239 F.3d 619 (4th Cir. 2001)4

Arista Records LLC v. Usenet.com, Inc.,
633 F. Supp. 2d 124 (S.D.N.Y. 2009)13

Byrne v. Rutledge,
623 F.3d 46 (2d Cir. 2010)6

Columbia Pictures Indus. Co. v. Fung,
2009 WL 6355911 (C.D. Cal. Dec. 21, 2009).....8, 13

Corbis Corp. v. Amazon.com, Inc.,
351 F. Supp. 2d 1090 (W.D. Wa. 2004).....8

Statutes

17 U.S.C. § 512(c)passim

17 U.S.C. § 512(c)(1).....4, 5

17 U.S.C. § 512(c)(1)(A)5, 14

17 U.S.C. § 512(c)(1)(A)(ii)passim

17 U.S.C. § 512(c)(1)(A)(iii)14

17 U.S.C. § 512(d)(1)(B)8

Other Authorities

BSA and IDC Global Software Piracy Study 2009, available at
<http://portal.bsa.org/globalpiracy2009/index.html>2

Jane C. Ginsburg, *User-Generated Content Sites and Section 512 of the US Copyright Act*, in *COPYRIGHT ENFORCEMENT AND THE INTERNET 183* (Irina A. Stamatoudi ed., 2010)14

H.R. REP. NO. 105-551, pt. 2 (1998).....5, 6

H.R. REP. NO. 105-796 (1998) (Conf. Rep.).....4

S. REP. NO. 105-190 (1998)5, 6

Statement of Interest

The Business Software Alliance (“BSA”) is an association of the world’s leading software companies and their hardware partners. BSA members include Altium, Apple, Autodesk, AVEVA, AVG, Bentley Systems, CA Technologies, Cadence, Cisco Systems, CNC/Mastercam, Corel, Dassault Systèmes SolidWorks Corporation, Dell, HP, IBM, Kaspersky Lab, McAfee, Microsoft, Minitab, Progress Software, PTC, Quark, Quest Software, Rosetta Stone, Siemens, Symantec, Synopsys, and The MathWorks.¹

BSA members have compelling interests in promoting both robust copyright protection and freedom for technological innovation. As creators of software products that are subject to significant piracy, they have a strong interest in effective deterrence of copyright infringement, including in the online environment. At the same time, as leading developers of new Internet technologies and providers of innovative online services, they have a strong interest in preserving the protections that the Digital Millennium Copyright Act (“DMCA”) affords to legitimate online services.

¹ Pursuant to Federal Rule 29(c)(5) and Local Rule 29.1(b), neither party’s counsel authored this brief in whole or in part. No party or person other than amicus curiae, its members, or its counsel, contributed money intended to fund preparation or submission of this brief.

Pursuant to Federal Rule 29(a), all parties have consented to the filing of this brief.

BSA members include most of the world's leading software providers, which collectively suffer enormous financial losses from copyright infringement. The commercial value of global software theft was estimated at \$51 billion in 2009, with \$8.4 billion of those losses occurring in the United States alone. *See BSA and IDC Global Software Piracy Study 2009*, at 8 (2010), available at <http://portal.bsa.org/globalpiracy2009/index.html>. Illegal copies of BSA members' software products are widely available on the Internet, and pursuant to the DMCA, BSA annually issues thousands of requests to Internet service providers to remove pirated software from their websites. BSA members therefore support copyright laws that deter online infringement.

BSA members also offer some of the world's leading online services and are at the cutting edge of developing innovative new online software and services offerings. These include "cloud computing" offerings and similar services by means of which users access software functionality through a web browser while the software itself runs on a remote server. Therefore, BSA members today rely on the DMCA to provide guidance on the services they provide to users.

Given these dual interests, BSA has consistently supported a balanced, pragmatic approach to the interpretation and application of the DMCA safe harbors. BSA brings the same balanced and pragmatic approach to the issues raised in this case. Congress intended 17 U.S.C. § 512(c) to provide a safe harbor from

liability for legitimate online services in order to give service providers room to develop, and provide customers with, innovative services. At the same time, Congress sought to ensure that service providers do not qualify for these safe harbors if they actively encourage and facilitate infringement, yet do nothing to remove the infringing material. By expanding the scope of the Section 512(c) safe harbor to insulate bad actors from liability, the decision below upsets the careful balance that Congress struck in the DMCA. BSA urges this Court to correct it.

Summary of Argument

Although the district court correctly recognized that a jury could find on this record that YouTube “welcomed[] copyright-infringing material being placed on their website,” (slip op. at 6) the court erred in holding that no reasonable jury could find that YouTube was “aware of facts or circumstances from which infringing activity [was] apparent,” 17 U.S.C. § 512(c)(1)(A)(ii). The knowledge standard of § 512(c)(1)(A)(ii) requires a careful and comprehensive inquiry into all of the facts and circumstances that were known to the service provider and that tended to indicate that infringing activity was occurring on its system or network. Plaintiffs introduced evidence suggesting that YouTube’s co-founders and high-ranking employees personally posted infringing content on YouTube, were aware that the website contained specific infringing clips, and intentionally left material that they identified and knew to be infringing on the website – all as part of a

concerted effort to attract more traffic to their site. These facts in the record present a compelling case that YouTube was ineligible for the safe harbor Congress provided in 17 U.S.C. § 512(c), and more than sufficient evidence to merit a trial on that issue. Accordingly, this Court should reverse the entry of summary judgment and remand for further proceedings.

Argument

There Is A Genuine Dispute Of Material Fact As To Whether YouTube Was Aware Of Facts Or Circumstances From Which The Infringing Activity On Its Website Was Apparent.

Congress enacted the Digital Millennium Copyright Act (“DMCA”) to “provide[] greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.” H.R. REP. NO. 105-796, at 72 (1998) (Conf. Rep.). To that end, Section 202(a) of the DMCA offers service providers a safe harbor from liability for copyright infringement by reason of user-directed storage of infringing material on the provider’s system or network. *See* 17 U.S.C. § 512(c)(1). Because Congress wanted to make this protection available “only to ‘innocent’ service providers,” *ALS Scan, Inc. v. RemarQ Cmty. Inc.*, 239 F.3d 619, 625 (4th Cir. 2001), the text of the statute specifies that a service provider is eligible for the safe harbor of § 512(c) only if it:

- (A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
- (ii) in the absence of such actual knowledge, *is not*

aware of facts or circumstances from which infringing activity is apparent; or

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

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

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

17 U.S.C. § 512(c)(1) (emphasis added).

Under § 512(c)(1)(A), a service provider that knows of infringing material or activity on its system or network can claim a safe harbor only if it expeditiously removes, or disables access to, the infringing material. Section 512(c)(1)(A)(ii) makes clear that the responsibility to remove or block infringing material can be triggered even if the service provider lacks “actual knowledge” of infringement; it is triggered if the service provider becomes “aware of facts or circumstances” that make “infringing activity” “apparent.” *Id.* § 512(c)(1)(A)(ii).

The legislative history of the DMCA explains that § 512(c)(1)(A)(ii) establishes “a ‘red flag’ test” that is satisfied if “infringing activity would have been apparent to a reasonable person operating” with the same “subjective awareness” of the facts and circumstances that the service provider had at the relevant time. H.R. REP. NO. 105-551, pt. 2, at 53 (1998); S. REP. NO. 105-190, at

44 (1998) (same). Thus, while a service provider has “no obligation to seek out copyright infringement, . . . it w[ill] not qualify for the safe harbor if it . . . turn[s] a blind eye to ‘red flags’ of obvious infringement.” H.R. REP. NO. 105-551, pt. 2, at 57 (discussing a DMCA provision similar to § 512(c)(1)(A)(ii)); S. REP. NO. 105-190, at 48 (same).

In this case, there is a triable issue of fact as to whether YouTube was aware of facts or circumstances that made infringing activity apparent. The district court acknowledged that “a jury could find that the defendants not only were generally aware of, but welcomed, copyright-infringing material being placed on their website” (slip op. 6), but it ignored or failed to discern the significance of plaintiffs’ evidence that YouTube promoted, participated in, and had knowledge of specific acts of infringement on its site. That evidence establishes a genuine dispute of material fact as to whether YouTube had knowledge of infringing activity on its website but failed expeditiously to remove the infringing material and is therefore ineligible for the protection of the § 512(c) safe harbor. *Cf. Byrne v. Rutledge*, 623 F.3d 46, 52 (2d Cir. 2010) (noting that on appeal from a grant of summary judgment the court “constru[es] the evidence in the light most favorable to the non-moving party and draw[s] all reasonable inferences in its favor”).²

² Because the record contains evidence that YouTube promoted infringing activity (continued...)

1. The district court overlooked evidence that high-ranking YouTube employees actively uploaded infringing videos onto the site. Plaintiffs' evidence indicates that YouTube co-founder Jawed Karim took copyrighted content from other websites, posted infringing copies of it on YouTube, and created a link to the copyrighted material from YouTube's homepage. See Viacom's Statement of Undisputed Facts ¶¶40-41, *Viacom Int'l Inc. v. YouTube Inc.*, No. 07-cv-2103 (S.D.N.Y. June 23, 2010), ECF No. 187 ("SUF"). Co-founder Steve Chen responded to this conduct by noting, "We're going to have a tough time defending the fact that we're not liable for the copyrighted material on the site because we didn't put it up when one of the co-founders is blatantly stealing content from other sites and trying to get everyone to see it." SUF ¶40. On another occasion, YouTube product manager Maryrose Dunton uploaded an infringing copy of a clip from *The Ed Sullivan Show* onto the YouTube site, SUF ¶88, and the record suggests she started several user groups "based on copyrighted material," SUF ¶93.

That high-ranking YouTube employees themselves engaged in infringement supports an inference that the company was aware of users' infringing activity more broadly. In *Columbia Pictures Industries Co. v. Fung*, in which the court

on its website and was aware of "specific and identifiable infringements" (slip op. 15), this case does not require the Court to identify the outer bounds of the knowledge standard described in § 512(c)(1)(A)(ii).

granted summary judgment against a service provider on its DMCA defense, evidence of the provider's own direct infringement helped establish its awareness of users' infringing activity. No. CV 06-5578, 2009 WL 6355911, at *17 (C.D. Cal. Dec. 21, 2009) ("Most importantly, Defendant Fung himself has engaged in unauthorized downloads of copyrighted material; . . . Fung's actions show that Fung was aware that infringing material was available on the Defendant websites. . . . [I]t would have been obvious that United States-based users could access these same infringing materials . . ."). Similarly, in *A&M Records, Inc. v. Napster, Inc.*, the court cited "evidence indicat[ing] that Napster executives downloaded infringing material to their own computers using the service" in finding that the company had knowledge of infringement under Section 512(d)(1)(B). 114 F. Supp. 2d 896, 919 & n.24 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, 239 F.3d 1004 (9th Cir. 2001). Comparable intentional conduct by YouTube employees is only one of several "blatant factors," *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1108 (W.D. Wa. 2004), that a jury could reasonably find made the company aware of its users' infringing activity.

2. Plaintiffs' evidence further suggests that YouTube's co-founders and employees knew of, but failed to expeditiously remove, clips of specific television shows they knew to be copyrighted. The record contains internal YouTube correspondence indicating that company personnel, including top executives, were

aware that the site contained infringing clips of television comedies including *South Park*, SUF ¶¶31-32, ¶110, ¶116, ¶117, ¶132, *The Family Guy*, SUF ¶45, ¶110, *The Daily Show*, SUF ¶69, ¶110, ¶116, ¶132, *Chappelle's Show*, SUF ¶59, ¶110, ¶132, and *Saturday Night Live*, SUF ¶81, SUF ¶84, SUF ¶89, SUF ¶¶98-99.

The evidence suggests, moreover, that in some instances the company was aware of specific infringing files or specific users who uploaded them. *See* SUF ¶31 (April 2005 e-mail from Chad Hurley to his co-founders asking whether YouTube should remove a *South Park* clip because it was “copyrighted material”); SUF ¶32 (testimony of YouTube’s content review manager that *South Park* was “the content that appeared to be most popular and shared at that stage that we suspected could be unauthorized”); SUF ¶45 (August 2005 e-mail from Chad Hurley to all YouTube employees stating, “This user is starting to upload tons of ‘Family Guy’ copyrighted clips. . . . I think it’s time to start rejecting *some of them*. Any objections?” (emphasis added)); SUF ¶69 (February 2007 guidelines for YouTube content reviewers indicating that a clip from *The Daily Show* contained “PG-13 sexual content” that should be approved to remain on the website); SUF ¶81 (November 2005 e-mail from a user to YouTube’s co-founders, asking why the *Family Guy* clips he posted were removed and noting, “I also have other vids that are cartoons from TV Funhouse from SNL, that are still active and live. What is the difference?”).

Indeed, a jury could find that high-ranking YouTube employees regularly ignored specific clips they knew to be infringing. Several conversations involving Maryrose Dunton provide substantial support for that conclusion. In November 2005, another YouTube employee told Dunton about a YouTube user named “Bigjay,” “most of [whose] stuff is copyrighted,” and a user named “UCBearcats1125,” whose content “is almost entirely copyrighted.” SUF ¶78. Without any mention of the steps YouTube should take to remove the copyrighted material from its site, Dunton instead explained that users like Bigjay and UCBearcats1125 could participate in contests designed to encourage users to upload new videos because “I don’t think we care too much if they’ve posted copyrighted videos.” SUF ¶78. When YouTube finally decided to exclude infringing users from the website’s contests in February 2006, another employee told Dunton, “That’s like half our videos.” SUF ¶87. “I know,” Dunton replied. SUF ¶87. In fact, this may have been an understatement. When, later the same month, Dunton surveyed the YouTube videos ranked as “most viewed,” “most discussed,” “top favorites,” and “top rated,” she concluded that “over 70%” of these popular videos contained copyrighted material. SUF ¶95. Dunton later stated that she did not flag the copyrighted content for review. SUF ¶96.³

³ Although the record does not reflect whether plaintiffs in this case hold the (continued...)

There is thus ample evidence to preclude summary judgment on this issue.

3. The evidence also suggests that YouTube deliberately implemented a business model that required strategic disregard of material identified by YouTube to be infringing. In July 2005, for instance, Chen emailed his co-founders about competing video websites, writing, “[S]teal it!” SUF ¶44. “[W]e have to keep in mind that we need to attract traffic. [H]ow much traffic will we get from personal videos? [R]emember, the only reason why our traffic surged was due to a video of this type. . . . [V]iral videos will tend to be THOSE type of videos.” SUF ¶44. Also, when YouTube co-founder Chad Hurley reported in September 2005 that “the site is starting to get out of control with copyrighted material,” SUF ¶54, Chen replied that “if you remove the potential copyright infringements . . . site traffic and virality will drop to maybe 20% of what it is [I]’d hate to prematurely attack a problem and end up just losing growth due to it.” SUF ¶55.

Moreover, a reasonable jury could find that YouTube was in fact successful in its efforts to attract new viewers by intentionally leaving on its site material known to be infringing. Indeed, the record suggests that YouTube knew that as

copyrights to any of the surveyed clips, other evidence relates directly to television programs for which a plaintiff holds the copyrights. *See, e.g.*, SUF ¶¶31-32, ¶69. To the extent YouTube knew of specific acts of infringement not involving copyrights held by plaintiffs, that knowledge, when considered together with other facts and circumstances, could support the inference that YouTube was aware of infringement of plaintiff-held copyrights.

much as 80% of the activity on the website was infringing, SUF ¶¶55, ¶57, ¶95, ¶104, yet continued to carry out its policy of purposefully disregarding infringing material. For example, when Jawed Karim suggested that YouTube ameliorate the rampant infringement on the site by removing “the obviously infringing stuff,” SUF ¶56, Steve Chen replied that “[i]f [we] remove all that content[,] we go from 100,000 views a day down to 20,000 views or maybe even lower.” SUF ¶57. This high level of infringement apparently continued through early 2006, *see* SUF ¶104 (quoting Dunton’s March 2006 observation that “probably 75-80% of our views come from copyrighted material”), and the evidence that YouTube was aware of this high rate of infringement, when considered together with the other evidence discussed above, supports an inference that YouTube had knowledge of infringing activity.

4. Finally, a jury could find on this record that YouTube employees actively facilitated user access to material that they knew to be infringing. In June 2006, YouTube product manager Matthew Liu directed a user to two YouTube pages with copyrighted material including *Superman* videos. SUF ¶120. Explaining YouTube’s general approach to copyrighted material, Liu said: “[Because] its copyrighted . . . technically we shouldn’t allow it . . . but we’re not going to take it off until the person that holds the copyright . . . is like . . . you shouldn[’t] have that [T]hen we’ll take it off.” SUF ¶120.

As at least one court has recognized, such facts may be a sufficient basis for finding that a provider is ineligible for the safe harbor. *See Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 142 (S.D.N.Y. 2009) (“[I]f Defendants were aware of . . . red flags [of users’ infringement], *or worse yet, if they encouraged or fostered such infringement*, they would be ineligible for the DMCA’s safe harbor provisions.” (emphasis added)). Indeed, plaintiffs’ evidence suggests YouTube engaged in precisely the kind of “active bad faith conduct aimed at promoting infringement” that Congress sought to exclude from the DMCA safe harbors, which Congress specifically designed to protect “passive good faith conduct aimed at operating a legitimate internet business.” *Fung*, 2009 WL 6355911, at *18. The district court initially appeared to recognize as much when it observed that YouTube “welcomed” infringement by its users (slip op. 6), but the court granted summary judgment in the face of this and other evidence of YouTube’s knowledge of infringing activity on its site. This was error.

* * *

Congress never intended the DMCA to protect service providers that actively encourage and participate in widespread infringement by their users. By disregarding the evidence of such culpability, the district court “arguably . . . read into the statute a high degree of solicitude not only for online entrepreneurs whose businesses occasionally may accommodate infringing users, but also those who

effectively solicit infringers.” Jane C. Ginsburg, *User-Generated Content Sites and Section 512 of the US Copyright Act*, in *COPYRIGHT ENFORCEMENT AND THE INTERNET* 183, 185 (Irina A. Stamatoudi ed., 2010). As a result, the district court badly upset the balance of interests struck by Congress in the DMCA.

Based on the totality of this record, a jury could find that YouTube was aware of facts or circumstances from which infringing activity was apparent and that, as a result, YouTube cannot claim a safe harbor under Section 512(c). The entry of summary judgment was therefore in error.⁴

⁴ Under Section 512(c)(1)(A), even a service provider that acquires knowledge of infringing activity may still receive safe harbor protection if it expeditiously removes the infringing material or disables access to it. *See* 17 U.S.C. § 512(c)(1)(A)(iii). Based on the evidence discussed above, however, a jury could find not only that YouTube acquired knowledge of infringing activity on its website but also that it did not expeditiously remove, or disable access to, the infringing material once it did acquire such knowledge. As a result, there is a genuine dispute of fact as to whether YouTube’s safe harbor defense is invalid under Section 512(c)(1)(A).

Conclusion

For the reasons stated above, the Court should reverse the judgment of the district court and remand the case for further proceedings.

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Certificate of Compliance

I HEREBY CERTIFY, pursuant to Fed.R.App.P. 32(a)(7)(B) that the foregoing Brief contains 3,404 words, excluding the parts of the Brief exempted under Fed.R.App.P. 32(a)(7)(B)(iii). In accordance with Fed.R.App.P. 32(a)(5)-(6), this Brief has been prepared in 14-point Times New Roman font and was prepared using the Microsoft Word 2003 word processing program.

Dated: Washington, DC
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Certificate of Service

I HEREBY CERTIFY that on this 10th day of December 2010, a true and correct copy of the foregoing Brief for Amicus Curiae the Business Software Alliance in Support of Reversal was served on all counsel of record via CM/ECF pursuant to Local Rule 25.1(h).

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