10-3270-cv, 10-3342-cv

United States Court of Appeals

for the

Second Circuit

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

Plaintiffs-Appellants,

– v. –

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

Defendants-Appellees.

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

BRIEF FOR *AMICUS CURIAE* THE INTERNATIONAL INTELLECTUAL PROPERTY INSTITUTE IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus curiae* certifies the following information:

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The International Intellectual Property Institute (IIPI) is a non-partisan, not-for-profit 501(c)(3) corporations located in Washington, DC. As an international development organization and think tank, IIPI is dedicated to increasing awareness of intellectual property as a tool for sustainable economic growth. Since 1998, the institute has been involved in research, public education, training workshops, technical assistance, institution building, and consultative services to achieve this goal.

The Honorable Bruce A. Lehman is the Chairman and President of IIPI. From August 1993 through December 1998, Mr. Lehman served as Assistant Secretary of Commerce and U.S. Commissioner of Patents and Trademarks. During this time, Mr. Lehman chaired the Working Group on Intellectual Property Rights of the National Information Infrastructure Task Force. The Clinton Administration established the Working Group to examine the intellectual property implications of the National Information Infrastructure, of which the Internet was and is the

[1] No part of this brief of *amicus curiae* was written by counsel to a party in this case, no party or counsel to a party contributed any sum of money that was intended to fund the preparation or submission of this brief of *amicus curiae*, nor has anyone else – outside of the a*micus curiae*, it members, or its counsel – contributed any sum of money that was intended to fund the preparation or submission of this brief.

principal component, and to make recommendations on how to update U.S. intellectual property law and policy to meet the challenges of the digital age.

IIPI does not have an interest in any party to this litigation and does not have a financial stake in the outcome of this case. IIPI's interest in this litigation is in the creation of a balanced public policy that creates economic opportunities while effectively protecting the rights of copyright holders.

SUMMARY OF THE ARGUMENT

The defendant claims that the safe harbor provision of the Digital Millennium Copyright Act (DMCA) exempts it from liability for the copyright infringement from which it profited and knowingly facilitated. However, both the plain text and history of the DMCA indicate that this is not what Congress intended when it passed the Act.

The DMCA's safe harbor provision was designed to encourage the continued growth of the Internet as a medium for legitimate commerce. The provision accomplished this by assuring telecommunications and related industries that they would not be held liable for third-party misuse of the infrastructure they created in good faith.

By contrast, the DMCA's safe harbor was not designed to immunize entities that receive a financial benefit from their users' infringing activity or those whose value lies in providing access to infringing material. Rather than consider these entities to be service providers, a term of legal consequence under the DMCA, these entities should be considered content providers since what they provide is access to content.

This Court should respect congressional intent and not extend the DMCA's safe harbor to include content providers. Protecting companies that benefit from infringing content encourages them to enable infringements in order to gain a competitive advantage. This increases the ease of availability and volume of infringing material and makes it much more difficult for authors to protect their works, undermining their incentive to create.

Holding content providers responsible for the infringements they enable does not mean the death of businesses that rely on user-provided content. It merely encourages the development of legitimate strategies for managing potential liabilities, such as through licensing arrangements or preventative cooperation. All parties come out ahead under these arrangements: the authors regain an element of control over their works, the companies that license the works share in the profits, and the public is enriched by the authors' creativity.

ARGUMENT

I. The Text and History of the DMCA Show that Congress Intended to Protect Companies From Liability Only When Those Companies Develop the Internet's Infrastructure or Provide Other Fundamental Functions

The district court placed heavy emphasis on the history of the DMCA. In fact, the court's holding depends almost entirely upon the court "[r]easoning from the 'tenor' of the legislative history." Opening Brief for the Plaintiffs-Appellant at 17, Viacom International Inc. v. Youtube, Inc., No. 10-3270 (2nd Cir. Dec. 3, 2010) (quoting *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010)) (citations omitted). It is proper to use the DMCA's history given the imprecision of the terms within the safe harbor provision. However, the district court misread the "tenor" and therefore came to the wrong conclusions.

The DMCA's safe harbor provision defines an online "service provider" of hosted material as a "provider of online services." [2] 17 U.S.C. § 512(k). This definition is circular, imprecise and unhelpful. Therefore, to determine who Congress intended to include in the safe harbor's protected class, the term "service provider" must be considered within its context.

[2] "Hosting" is the act of "storing at the direction of a user . . . material that resides on a system or network controlled or operated by or for the service provider." 17 U.S.C. § 512(c).

The DMCA originated from *The Report of the Working Group on Intellectual Property Rights*, which included the first draft of the Act. COMMERCE DEPARTMENT, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995) (hereinafter "White Paper"). In 1993, President Clinton established the Working Group on Intellectual Property Rights to "examine the intellectual property implications of the [Internet] and make recommendations on any appropriate changes to U.S. intellectual property law and policy." *Id.* at 2.

The White Paper did not include a safe harbor provision. In fact, the report adamantly opposed providing service providers with special exemptions from liability. It noted that "[s]ervice providers reap rewards for infringing activity. It is difficult to argue that they should not bear the responsibilities." *Id.* at 117. The White Paper also found that "[t]he full potential" of the Internet "[would] not be realized if the education, information and entertainment products protected by intellectual property laws are not protected effectively when disseminated" through the Internet. *Id.* at 10. The White Paper establishes that the DMCA first and foremost intended to protect the rights holders and not to create exemptions from traditional theories of liability for infringement.

The safe harbor provision was added to the DMCA as a legislative compromise as a result of lobbying by the telecommunications industry, which sought clarity and assurances that their investments in the Internet's infrastructure would not open them up to excessive liability. Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 351-52 (2005). Rapidly developing but conflicting caselaw made important industry players—such as Bell Atlantic and AT&T—nervous regarding their potential liabilities, which potentially included billions in statutory damages. *Id.* Noting that "without clarification of their liability" these companies "may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet," Congress included the narrow safe harbor exemption, which was meant to encourage the continued growth of the Internet's infrastructure. SENATE COMMITTEE ON THE JUDICIARY REPORT, S. REP. No. 105-190 at 8 (1998) (hereinafter "Senate Report").

Congress did not intend to include content-oriented companies like the defendant in the safe harbor. In fact, Congress specifically stated that if "the value of the service lies in providing access to infringing material," the DMCA would exclude the provider from the safe harbor. HOUSE COMMITTEE ON COMMERCE REPORT, H.R. REP. No. 105-551, pt. 2, at 54 (1998). The plain text of the DMCA is unequivocal: a service provider is not liable for hosting information at the direction of a user only if the service provider "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." 17 U.S.C. § 512(c). Protecting content providers that benefit financially from the infringing acts of its users is not in line with the safe harbor's purpose of encouraging the growth of the Internet.

II. THE DEFENDANT PROFITS FROM BROADCASTING INFRINGING CONTENT AND THEREFORE IS NOT WITHIN THE SAFE HARBOR'S PROTECTED CLASS

The defendant is a self-described "consumer media company." Viacom's Statement of Undisputed Facts in Support of its Motion for Partial Summary Judgment on Liability and Inapplicability of the Digitical Millennium Copyright Act Safe Harbor Defense at 3, *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (hereinafter "Statement of Facts"). It operates by providing user access to its servers to upload video files. In exchange, the defendant requires that its users grant it a "worldwide . . . license to use, reproduce, prepare derivative works of, display, and perform the [video] . . . in any media formats and through any media channels." *Id. at 81*. Enabled by these licenses, the defendant reformats the videos and broadcasts them over its website for its customers. According to the defendant's executives, the company sought to create a business model which was "just like TV." *Id.* at 8.

As a media company, the defendant receives revenue from advertisements that it displays along with its videos. Advertisements are displayed "with no discrimination" between "infringing and non-infringing content." *Viacom*, 718 F. Supp. 2d at 518. This means that the defendant's revenue depends on attracting the greatest possible viewership in order to maximize the value of the ad space it sells, whether or not the videos are infringing. This content-based business model makes high-value, infringing content attractive to the defendant and is the primary reason why it should not be treated the same as an Internet Service Provider.

The defendant actively chose to broadcast infringing material due to its high commercial value. When one company executive expressed concern about "steal[ing] the movies," another responded that the company "need[ed] to attract traffic." Statement of Facts at 10. The defendant's dependence on infringing material was so pervasive that internal company estimates concluded that "if you remove the potential copyright infringements . . . site traffic and virality will drop to maybe 20% of what it is." *Id.* at 13. These statements, made by the defendant's executives, show that the value of the company's "service" depended on providing access to infringing content—meaning that the defendant was not a service but a content provider.

Recent caselaw supports distinguishing content providers from service providers due to the fact that content providers receive a financial benefit from their users' infringing activities. In *Grokster* the Supreme Court held that "one who distributes a device with the object of promoting its use to infringe copyright . . . is liable for the resulting acts of infringement by third parties," *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005). The Court inferred the defendants' intent to promote infringement in part from the fact that the "business models employed by [the defendants]" depended not on the defendant's users but on it "generat[ing] income by selling advertising space. . . . As the number of users [of the defendants' product] increase[d], advertising revenue [became] worth more. *Id.* at 926. The Court's reasoning clearly shows that the law does not and should not protect companies from liability when they receive a financial benefit from infringing activity or when their value lies in providing access to infringing material.

III. EXTENDING THE SAFE HARBOR TO INCLUDE COMPANIES THAT HAVE A FINANCIAL INCENTIVE TO BROADCAST INFRINGING CONTENT ENCOURAGES INFRINGEMENT AND UNDERMINES AUTHORS' INCENTIVE TO CREATE

In order to "promote the progress of science and the useful arts," the U.S. Constitution "secur[es] for limited times to authors . . . the exclusive right to their respective [works]" by providing them with copyright protections. U.S. CONST. Art. I § 8, cl. 8. This is necessary because, as stated in the White Paper,

> Protection of works of authorship provides the stimulus for creativity, thus leading to the availability of works of literature, culture, art and entertainment that the public desires and that form the backbone of our economy and political discourse. If these works are not protected, then the marketplace will not support their creation and dissemination, and the public will not receive the benefit of their existence or be able to have unrestricted use of the ideas and information they convey.

White Paper at 14. Any limit on authors' ability to enforce their copyrights must be carefully scrutinized to insure that it will not undermine their incentive to create, and any exemption should be construed narrowly in light of the author's constitutional rights and underlying public policy.

Expanding the DMCA's safe harbor provision to include companies that have a have a financial motivation to broadcast copyright-infringing materials would seriously undermine authors' incentive to create new works in the digital age. As Congress noted, "[d]ue to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected." Senate Report at 8.

It will be impossible to provide authors with "reasonable assurances" if content providers are not held accountable for intentionally facilitating infringement as a business strategy. The defendant knowingly gained a competitive advantage by choosing not to observe copyrights. If the safe harbor is extended to content providers, it will result in a race to the bottom and the company that protects copyrights least will profit most and become the industry leader. For example, the defendant's executives concentrated on building up the company's numbers as aggressively as they could "through whatever tactics, however evil." Statement of Facts at 20. Such tactics contributed to the defendant becoming the most successful user-posted video website. Extending the safe harbor will protect "evil" tactics and make it impossible for other businesses that respect intellectual property rights to compete.

IV. HOLDING THE DEFENDANT RESPONSIBLE FOR ITS ACTIONS ENCOURAGES THE DEVELOPMENT OF LEGITIMATE BUSINESS MODELS FOR HOSTING USER-POSTED CONTENT

Respecting copyright law does not mean having to stare at a blank computer screen. It does not mean the death of Web 2.0 user-generated content. Rather, the defendant simply could have provided a mechanism for its users to license any pre-existing copyrighted content they wished to incorporate into the audiovisual works they created and made available using the defendant's service.

Historically, such licensing mechanisms have accompanied virtually all uses of copyrighted works made possible by evolving technologies. An example which has long accommodated the needs of live and broadcast performances of copyrighted music is the authors' collecting society. For over a century the American Society of Authors Composers and Publishers has provided such licenses for the authorized public performance of musical compositions. More recently, Broadcast Music, Inc. (BMI) and SESAC have offered similar music licensing options. In the context of cable television retransmission of copyrighted works, blanket licenses are negotiated regularly among motion picture and television studios, professional sports leagues and the like for authorized use of signals. Although such licensing is supported by the availability of a statutory license as a fall back, in practice such licenses are regularly negotiated on a voluntary basis among affected parties.

The defendant's business has proven to be both popular and profitable. Certainly it is within the defendant's ability to directly negotiate licenses that would cover its users. Similarly, it could facilitate access to such licenses by its users that would give them authorization to use vast amounts of pre-existing works in creating audiovisual content they wish post to the Internet using the defendants' service.

CONCLUSION

Companies who receive their value from hosting or otherwise enabling the spread of infringing content are not service providers—and they certainly are not proving a service that contributes to the "speed and capacity of the internet." Senate Report at 8. These companies provide content.

The defendant's stated goal was to create a media business "just like TV." Statement of Facts at 8. It succeeded: users who upload media provided programming which the defendant licensed, controlled, and broadcasted in order to receive ad revenue. This business model is not new, unique, or worthy of a special status under the law simply because it disseminates its media over the Internet.

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December 10, 2010

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1. As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 3,184 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I relied on my word processor, Microsoft Office Word 2007, to obtain this count.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Office Word 2007 in Time New Roman Style, 14 point font.

I certify that the foregoing information is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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December 10, 2010

STATE OF NEW YORK	)		
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I, Natasha S. Johnson, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

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