10-3270-cv
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IN THE
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.

(Additional Caption On the Reverse)

On Appeal from the United States District Court
for the Southern District of New York (New York City)

BRIEF OF *AMICUS CURIAE* PROFESSOR MICHAEL CARRIER IN SUPPORT OF DEFENDANTS-APPELLEES AND URGING AFFIRMANCE

Seth D. Greenstein
CONSTANTINE CANNON LLP
1301 K Street, NW
Suite 1050 East Tower
Washington, D.C. 20005
(202) 204-3500

Counsel for Amicus Professor Carrier

THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED, on behalf of themselves and all others similarly situated, 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, dba Bienstock Publishing Company, ALLEY MUSIC CORPORATION, X-RAY DOG MUSIC, INC., FEDERATION FRANCAISE DE TENNIS, THE MUSIC FORCE MEDIA GROUP LLC, SIN-DROME RECORDS, LTD., on behalf of themselves and all others similarly situated, MURBO MUSIC PUBLISHING, INC., STAGE THREE MUSIC (US), INC., THE MUSIC FORCE LLC,

Plaintiffs-Appellants,

and

ROBERT TUR, dba Los Angeles News Service,
THE SCOTTISH PREMIER LEAGUE LIMITED,

Plaintiffs,

v.

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

Defendants-Appellees.

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INTEREST OF AMICUS CURIAE

Amicus curiae Michael Carrier is a law professor who teaches and writes in the areas of copyright, patent, antitrust, and innovation law. Carrier is the author of *Innovation for the 21st Century: Harnessing the Power of Intellectual Property and Antitrust Law* (Oxford 2009, paperback 2011), the editor of *Critical Concepts in Intellectual Property Law: Competition* (Edward Elgar Publishing 2011), and the author of 35 book chapters and articles in journals that include the *Stanford Law Review*, *Michigan Law Review*, *University of Pennsylvania Law Review*, *Duke Law Journal*, *Vanderbilt Law Review*, *Minnesota Law Review*, *Iowa Law Review*, and *Yale Law Journal Pocket Part*.[1]

Professor Carrier has no personal stake in the outcome of this case. Carrier teaches at Rutgers Law School-Camden, but institutional affiliations are provided for identification purposes only, and imply no endorsement of the views expressed herein. Counsel for all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Tort law sometimes puts the burden of avoiding accidents on the party that is most cheaply able to avoid them. Several commentators have suggested that courts

[1] Pursuant to Local Rule 29.1 of the United States Court of Appeals for the Second Circuit, *amicus* hereby certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person other than amici contributed money intended to fund preparing or submitting the brief.

apply this "least-cost-avoider" principle to determine the party that has the responsibility of reducing copyright infringement. Such an approach, however, risks collateral consequences for innovation that range far beyond the effects that occur in tort law. The analysis especially threatens the disruptive innovation that is so crucial to the American economy and to citizens' lives (albeit not appreciated by copyright owners). YouTube in particular is an innovation that plays a critical role in fostering unique possibilities for communication and democracy.

The least-cost-avoider analysis also is not appropriate in this setting because it conflicts with the text and legislative history of the Digital Millennium Copyright Act (DMCA). This statute sets forth a complex equilibrium that envisions copyright holders and service providers acting together to avoid the costs of infringement. Shifting the burden exclusively to YouTube would make Viacom's life easier, but only at the cost of ignoring the DMCA and destroying a current technology (and untold future ones) that improves the lives of consumers and citizens.

ARGUMENT

The least-cost-avoider analysis is simple. It is alluring. But it is incomplete. And it is inconsistent with the DMCA.

Amici Stuart N. Brotman, *et al.*, trot out the least-cost-avoider standard as the easy answer to the difficult question of which party should be responsible for reducing copyright infringement.

This brief debunks the importance of this issue.

The least-cost-avoider argument provides that "legal responsibility generally rests on the party best able to prevent, limit, or eliminate harm." Brief of *Amici Curiae* Stuart N. Brotman, Ronald A. Cass, and Raymond T. Nimmer In Support Of Plaintiffs-Appellants, at 3. As applied to this case, the argument would punish YouTube, who was "in the best position to avoid or limit harm from massive copyright infringements," and who was "*uniquely* positioned to limit harm from infringement." *Id.* at 3. Only YouTube could "efficiently and effectively address copyright violations," "limit and avoid infringing material," "us[e] technical measures that function well at low cost," and "focus[] its filtering efforts on new uploads." *Id.* at 21.

As a factual matter, it is far from clear that YouTube in fact is the least cost avoider. As another brief in this case makes clear: (1) only copyright holders know if they have authorized the use of the work, (2) only copyright holders (who are familiar with the work as a whole) can determine if the fair use defense applies, and (3) even copyright holders' superior information has not prevented them from making numerous mistakes, as Viacom did in this case, when its legal department

submitted takedown notices of copyright-protected content *uploaded by its own marketing department*. Brief of Amici Curiae Intellectual Property and Internet Law Professors in Support of Defendant-Appellee and Urging Affirmance, at 14-19 ["Law Professors' Amicus Brief"].

But even more important, this entire line of analysis offers a distorted and incomplete inquiry that has been wrenched from tort law to be shoehorned into copyright law.

I. COURTS HAVE APPLIED THE LEAST-COST-AVOIDER PRINCIPLE IN TORT LAW.

Tort law is designed to deter wrongdoers from and compensate victims for tortious activity. *E.g.*, John C.P. Goldberg, *Twentieth-Century Tort Theory*, 9 Geo. J. 513, 521-37 (2003). In this context, the least-cost-avoider inquiry helps deter tortious activity by ensuring that the party best able to avoid the unwanted conduct takes measures to do just that.

The analysis has most often been applied in seeking to prevent accidents. In this setting, the analysis asks which of two relevant parties can avoid the harm at the lowest cost. Courts have found that least cost avoiders include:

- A tank barge that collided with a steel piling and discharged 1600 gallons of gasoline into a river. *U.S. v. Tex-Tow, Inc.*, 589 F.2d 1310, 1314 n.10 (7th Cir. 1978).

- A driller that released "vast quantities of raw crude oil" that harmed commercial fishermen by destroying aquatic life. *Union Oil Co. v. Oppen*, 501 F.2d 558, 568-70 (9th Cir. 1974).

- A manufacturer of a faulty valve in a machine that caused an employee to suffer permanent injuries to the head. *Beauchamp v. Russell*, 547 F. Supp. 1191, 1197 (N.D. Ga. 1982).

- Homeowners whose furnaces explode, as opposed to providers of fire alarm services. *Edwards v. Honeywell, Inc.*, 50 F.3d 484, 490-91 (7th Cir. 1995).

- Manufacturers of asbestos-containing products, rather than naval shipyard workers exposed to them. *In re Hawaii Federal Asbestos Cases*, 699 F. Supp. 233, 237 (D. Hawaii 1988).

In these settings, lowering the costs of preventing accidents makes sense. Accidents do not offer any benefits for society. And the only downside to requiring actors to prevent accidents is that their costs will increase.

More important, requiring parties to take measures to reduce accidents will not have detrimental effects on third parties. No third parties will suffer collateral consequences if a driver is forced to slow down to the speed limit. Or if a barge fortifies its hull to prevent oil spills. Or if a manufacturer reduces the use of

asbestos in its products. In short, the harms from the application of the least-cost-avoider principle in tort law are observable and do not threaten adverse unanticipated effects across other sectors of the economy.

II. THE LEAST-COST-AVOIDER PRINCIPLE WOULD LEAD TO CALAMITOUS CONSEQUENCES IN COPYRIGHT LAW.

Extricating the least-cost-avoider principle from tort law and implanting it into the very different setting of copyright law would lead to catastrophic harms. Internet service providers such as YouTube would be required to reengineer their entire service to focus first and foremost on stopping copyright infringement.

A. The principle would result in unworkable technologies.

The least-cost-avoider standard would result in innovative technologies becoming less useful and more cumbersome. Application of such a standard would have made some of today's leading technologies just a shadow of the invaluable innovation they ultimately became. For example, courts could have required photocopier manufacturers to modify their copiers to prevent the copying, absent a copyright owner's approval, of "any document displaying a ©." Brief Amici Curiae Of Innovation Scholars And Economists In Support Of Affirmance at 16, *MGM v. Grokster*, 125 S. Ct. 2764 (2003).

For another example, think back to the onset of the World Wide Web in the mid-1990s. Imagine if the creators of browsers and servers were required, before posting content on a publicly available website, to quarantine that content "for 48

or 72 hours at a special Web site accessible only to copyright owners, who could screen the content before it went online . . . and object to content that they alleged to be infringing." R. Anthony Reese, *The Problems of Judging Young Technologies: A Comment on Sony, Tort Doctrines, and the Puzzle of Peer-to-Peer*, 55 Case W. Res. L. Rev. 877, 894 (2005).

In either of these cases (and many others), courts could have applied the least-cost-avoider analysis to conclude that the new technologies were the cheapest cost avoiders in reducing infringement. But the result would have been far less useful innovations for consumers and society.

In this case, a requirement that YouTube remove all copyrighted videos from the site would be an impossible task. Thirty-five hours of video are posted to YouTube *every minute*. "No video camera? No problem! Create original videos with your own photos, clips or just an idea," YouTube, Mar. 24, 2011, *available at* http://youtube-global.blogspot.com/2011/03/no-video-camera-no-problem-create.html.

It goes without saying that it is not possible to monitor this avalanche to uncover every instance of copyright infringement. How could humans (for the task cannot reliably be undertaken by filters) wade through this deluge to determine if use of a copyrighted work constitutes fair use or if the copyright holder authorized the use of the work?

Saddling YouTube with this impossible task would only result in the evisceration of the technology. In one scenario, YouTube would accept only material that is accompanied by a permission slip in which, say, Prince agrees to the use of 29 seconds of his song "Let's Go Crazy" in the background of a 13-month old dancing. Such a gated model, however, bears no resemblance to the transformative tool that YouTube has become. And it goes without saying that if Google, with more resources than most, cannot do this, there is literally no way that a small, entrepreneurial startup could.

B. The principle would reduce disruptive innovation.

Making new technologies less useful is particularly dangerous for disruptive innovation. Such innovation displaces existing business models by creating simpler, more convenient, and cheaper products that appeal to new customers. Clayton M. Christensen & Michael E. Raynor, *The Innovator's Solution: Creating and Sustaining Successful Growth* 32 (2003). Leading companies, in servicing their existing customers, have been notoriously slow to embrace these radical innovations. Clayton M. Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* 42 (1997).

The briefest listing of disruptive technologies—telephone, photocopier, TV, VCR, Internet, iPod, Amazon, eBay, YouTube—is revealing. The technologies on the firing line, the ones subject to the least-cost-avoider requirement, would consist

of some of the most crucial innovations that have been assimilated into the American fabric of life. The reason can be traced to the prevalence of new technologies that can be used not only for infringement but also for noninfringing uses.

Copyright owners have greeted every new technology with panic. At the turn of the 20th century, sheet music publishers viewed the player piano, which used copyrighted sheet music in the pianos (and threatened to reduce revenue) with great alarm. *Sony v. Universal Symposium (Panel 3): A New World Order?*, 34 Sw. U. L. Rev. 211, 218 (2004). John Philip Sousa bemoaned the introduction of the technology, predicting "a marked deterioration in American music and musical taste, an interruption in the musical development of the country, and a host of other injuries to music in its artistic manifestation." John Philip Sousa, *The Menace of Mechanical Music*, 8 Appleton's Magazine, 278-84 (1906).

Eight decades later, Jack Valenti, then the head of the Motion Picture Association of America (MPAA), warned that the market for copyrighted movies would be "decimated, shrunken [and] collapsed" by the VCR, and that "the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone." *Home Recording Of Copyrighted Works: Hearings on H.R. 4783 et al before Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. 4, 8 (1982), *available at*

http://cryptome.org/hrcw-hear.htm. *See generally* Michael A. Carrier, *Innovation for the 21st Century: Harnessing the Power of Intellectual Property and Antitrust Law* 106-08 (2009); Mark A. Lemley, *Is the Sky Falling on the Content Industries?*, 9 J. on Telecomm. & High Tech. L. 125 (2011).

As a final example, in 2000, the record labels rebuffed Napster's attempt to be the "online distribution channel for the record labels," like iTunes would eventually become. Carrier, at 127. Napster offered revenues and markets for new artists without the cost of manufacturing and promotion expenses. *Id.* The record labels responded not by embracing the new technology but by suing Napster for secondary copyright infringement and watching its customers migrate to other peer-to-peer networks. *Id.*

It is understandable—if short-sighted—to not recognize the benefits of disruption. But it is not appropriate to reengineer the law to block disruptive innovation. The Constitution promotes the "Progress of Science and useful Arts." It does not guarantee that copyright owners are entitled to protect their existing business models against the onslaught of innovation.

The disruptive innovation unleashed by new technologies reveals the difference between tort law and copyright law in the application of the least-cost-avoider standard. There is no legitimate fear in tort law about eliminating valuable activity from society by overdeterring fast drivers or brittle boat hulls filled with

gasoline. In contrast, there is monumental concern with stifling disruptive innovations by saddling them with the burdens of copyright owners.

III. YOUTUBE IS A PARTICULARLY VALUABLE TECHNOLOGY WHOSE BENEFITS ARE CONTINUALLY BEING DISCOVERED.

Even though YouTube has already proven to be an extremely valuable technology, we are discovering new benefits with each passing day.

If the history of innovation tells us anything, it is that we do not know all the beneficial uses of an invention upon its introduction into society. Because of the "initial primitive understanding of innovations" and "limited capacity . . . to envision entirely new technological systems," inventors themselves do not know how their inventions will be used. Carol Haber, *Electronic Breakthroughs: Big Picture Eludes Many*, Electronic News, June 13, 1994, at 46, *available at* http://findarticles.com/p/articles/mi_m0EKF/is_n2018_v40/ai_15516743. To give just a few examples:

- Alexander Graham Bell thought the telephone would be used primarily to broadcast the daily news.

- Thomas Edison thought the phonograph would be used "to record the wishes of old men on their death beds."

- Railroads were originally considered to be feeders to canals.

See Carrier, at 129-30 (offering these and many other examples).

In addition, at the onset of a technology, it is natural for short-term copyright infringement to take precedence over long-term noninfringing uses. Infringing uses of digital music forced copyright owners to create legitimate digital music markets. And consumers initially used the VCR to record TV programs before turning to prerecorded videotapes and DVDs. Reese, at 891, 893.

Despite this arc of technology development, YouTube already has revealed numerous profound benefits for society.

For starters, it has allowed the widespread distribution of amateur videos. Its easy-to-use interface has allowed users to post videos that can be seen across the world. *YouTube*, Wikipedia, *available at* http://en.wikipedia.org/wiki/YouTube (last visited Mar. 31, 2011).

YouTube has also allowed revenue sharing. Some of the users whose videos are most frequently viewed are invited to become "YouTube Partners" who can earn revenue from advertisements that appear next to the videos. More than 10,000 YouTube channels are now part of this program. *Id.*; *Partner with YouTube*, YouTube, *available at* http://www.youtube.com/partners (last visited Mar. 31, 2011).

Even more important, YouTube has allowed individuals to express themselves and interact with one another. The comment sections that accompany

many videos involve a type of communication that might not take place outside the website. Along these lines, YouTube received a prestigious Peabody Award in 2008, being deemed a "Speakers' Corner" with "an ever-expanding archive-cum-bulletin board that both embodies and promotes democracy." *Complete List of 2008 Peabody Award Winners*, Peabody, *available at* *http*://www.peabody.uga.edu/news/event.php?id=59 (last visited Mar. 31. 2011).

And speaking of democracy, political candidates themselves have migrated to the site. Politicians such as President Obama can speak directly to the American people. And others—such as Virginia Senator George Allen—witnessed the opposite end of the spectrum as their gaffes are broadcast for the world to see. No matter how you examine it, YouTube is carving out an essential role in our 21st-century democracy.

Are we really willing to abandon these crucial forms of communication, interaction, and democracy because YouTube is conscripted to do Viacom's work for it? Application of a least-cost-avoider standard would lead to the loss of a technology that is more central to our lives with each passing day.

IV. THE DMCA ALLOCATES RESPONSIBILITY IN REDUCING COPYRIGHT INFRINGEMENT.

Whatever arguments amici make about the benefits of a least-cost-avoider system, they are foreclosed by the DMCA. In adopting the statute, Congress

constructed a careful equilibrium based on notice-and-takedown provisions that enlisted *both* copyright owners and service providers to reduce infringement.

According to the DMCA, copyright owners must monitor websites for works that are infringing. As discussed above, copyright owners are uniquely able to determine if the posted works are authorized or constitute fair use. Upon finding infringement, they notify the service providers of the infringing content and request its removal. These providers, in turn, are to "respond[] expeditiously to remove, or disable access to, the material that is claimed to be infringing." 17 U.S.C. § 512(c)(1)(C). But under the statute, the providers have no obligation to "monitor[] its service or affirmatively seek[] facts indicating infringing activity." 17 U.S.C. § 512(m)(1).

Congress, then, has deemed *both* parties to be "cost avoiders" to work together to reduce infringement. The legislature never put the entire burden on service providers. Instead, it envisioned that the statute would "preserve[] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment." Report of the House Commerce Comm., H.R. Rep. No.105-551, Part 2, at 49 (2d Sess. 1998). In fact, the safe harbor Congress created for service providers that rely on user-generated content has provided the breathing room for

the flourishing of numerous technologies—Facebook, Twitter, Craigslist, Flickr—increasingly central to our lives today. Law Professors' Amicus Brief at 4.

In tort law, some courts seeking to lower the incidence of accidents have put the burden on one party. In many cases, in fact, it will be easier for that party (say, the manufacturer of products containing asbestos) to alter its activity to significantly reduce the risk of accident. But that was not the balance Congress struck when it enacted the DMCA.

A least-cost-avoider scheme is not what Congress envisioned. Viacom cannot unload its burden onto YouTube and every other site with user-generated content. Such a reassignment would come at the cost of YouTube itself, which could not monitor the 35 hours of video posted every minute. And the effects would be even more devastating for small startups that have a fraction of Google's resources.

CONCLUSION

For the reasons discussed herein, amicus respectfully requests that this Court not punish YouTube by labeling it a "least cost avoider" and requiring it to take on responsibilities nowhere envisioned in the DMCA. For such actions would make Viacom's life easier, but only at the cost of innovation and the evisceration of the statute. Amicus requests that this Court affirm the judgment of the court below.

Respectfully submitted,

s/ Seth D. Greenstein
CONSTANTINE CANNON LLP
1301 K Street, NW
Suite 1050 East Tower
Washington, D.C. 20005
(202) 204-3500
sgreenstein@constantinecannon.com

Counsel for Amicus Curiae
Professor Michael Carrier

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Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of *Amicus Curiae* Professor Michael Carrier in Support of Defendants-Appellees and Urging Affirmance complies with the type limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,200 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

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 proportionally spaced typeface using Microsoft Word 2003, the word processing system used to prepare the brief, in 14 point font in Times New Roman Font.

DATED: April 7, 2011

s/ Seth D. Greenstein
CONSTANTINE CANNON LLP
1301 K Street, NW
Suite 1050 East Tower
Washington, D.C. 20005
(202) 204-3500
sgreenstein@constantinecannon.com

Counsel for Amicus Curiae
Professor Michael Carrier

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2011, a true and correct copy of the foregoing Brief of *Amicus Curiae* Professor Michael Carrier in Support of Defendants-Appellees and Urging Affirmance was served on all counsel of record in this appeal via CM/ECF pursuant to Second Circuit Rule 25.1(h)(1)-(2).

DATED: April 7, 2011

s/ Seth D. Greenstein
CONSTANTINE CANNON LLP
1301 K Street, NW
Suite 1050 East Tower
Washington, D.C. 20005
(202) 204-3500
sgreenstein@constantinecannon.com

Counsel for Amicus Curiae
Professor Michael Carrier