UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

-against-

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

Defendants.

07 Civ. 2103(LLS)

OPINION

Defendants having renewed their motion for summary judgment, this Opinion responds to the April 5, 2012 direction of the Court of Appeals, Viacom Int'l Inc. v. YouTube, Inc., 676 F.3d 19, 42 (2d Cir. 2012), remanding to

> . . . allow the parties to brief the following issues, with a view to permitting renewed motions for summary judgment as soon as practicable:
>
> (A) Whether, on the current record, YouTube had knowledge or awareness of any specific infringements (including any clips-in-suit not expressly noted in this opinion);
>
> (B) Whether, on the current record, YouTube willfully blinded itself to specific infringements;
>
> (C) Whether YouTube had the "right and ability to control" infringing activity within the meaning of § 512(c)(1)(B); and

(D) Whether any clips-in-suit were syndicated to a third party and, if so, whether such syndication occurred "by reason of the storage at the direction of the user" within the meaning of § 512(c)(1), so that YouTube may claim the protection of the § 512(c) safe harbor.

Familiarity with the Court of Appeals opinion, and my opinion at 718 F. Supp. 2d 514 (S.D.N.Y. 2010) is assumed.

(A)

WHETHER, ON THE CURRENT RECORD, YOUTUBE HAD KNOWLEDGE OR AWARENESS OF ANY SPECIFIC INFRINGEMENTS (INCLUDING ANY CLIPS-IN-SUIT NOT EXPRESSLY NOTED IN THIS OPINION)

Pursuant to the first item, I requested the parties to report, for each clip-in-suit, "what precise information was given to or reasonably apparent to YouTube identifying the location or site of the infringing matter?" (Tr. Oct. 12, 2012, p. 29) YouTube submitted a list of 63,060 clips-in-suit, claimed it never received adequate notices of any of those infringements, and challenged plaintiffs to fill in the blanks specifying how they claim such notice was given.

In its response,[1] Viacom stated that

It has now become clear that neither side possesses the kind of evidence that would allow a clip-by-clip assessment of actual knowledge. Defendants apparently are unable to say which clips-in-suit they knew about and which they did not (which is hardly surprising

[1] Viacom's Jan. 18, 2013 Mem. Of Law in Opp. to Def.'s Renewed Mot. for Summ. J. ("Viacom Opp.").

> given the volume of material at issue) and apparently lack viewing or other records that could establish these facts. (Viacom Opp. p. 8, fns omitted)

Viacom recognizes ". . . that Viacom has failed to come forward with evidence establishing YouTube's knowledge of specific clips-in-suit." (Viacom Opp. p. 9)

That does not matter, Viacom says, because it is not Viacom's burden to prove notice. Viacom argues that YouTube claims the statutory safe harbor as a defense, and therefore has the burden of establishing each element of its affirmative defense, including lack of knowledge or awareness of Viacom's clips-in-suit, and has not done so. Plaintiffs' thesis is stated clearly and simply: "If there is no evidence allowing a jury to separate the clips-in-suit that Defendants were aware of from those they were not, there is no basis for applying the safe harbor affirmative defense to any of the clips." (Viacom Opp. p. 2)

Plaintiffs elaborate (Viacom Opp. pp. 8-9):

> The Second Circuit vacated this Court's grant of summary judgment regarding actual knowledge or awareness because "a reasonable juror could conclude that YouTube had actual knowledge of specific infringing activity, or was at least aware of facts or circumstances from which specific infringing activity was apparent." Viacom, 676 F.3d at 34. It remanded for a further assessment of the evidence relating to whether this knowledge extended to Viacom's clips-in-suit. Id. It has now become clear that neither side possesses the kind of evidence that would allow a clip-by-clip assessment of actual knowledge.

> Defendants apparently are unable to say which clips-in-suit they knew about and which they did not (which is hardly surprising given the volume of material at issue) and apparently lack viewing records that could establish these facts. It follows, given the applicable burden of proof, that they cannot claim the 512(c) safe harbor—especially in light of the voluminous evidence showing that the Defendants had considerable knowledge of the clips on their website, including Viacom-owned material.

The argument is ingenious, but its foundation is an anachronistic, pre-Digital Millennium Copyright Act (DMCA), concept. Title II of the DMCA (the Online Copyright Infringement Liability Limitation Act)[2] was enacted because service providers perform a useful function, but the great volume of works placed by outsiders on their platforms, of whose contents the service providers were generally unaware, might well contain copyright-infringing material which the service provider would mechanically "publish," thus ignorantly incurring liability under the copyright law. The problem is clearly illustrated on the record in this case, which establishes that ". . . site traffic on YouTube had soared to more than 1 billion daily video views, with more than 24 hours of new video uploaded to the site every minute", 676 F.3d at 28; 718 F. Supp. 2d at 518, and the natural consequence that no service provider could possibly be aware of the contents of each such video. To

[2] 17 U.S.C. § 512

encourage qualified service providers, Congress in the DMCA established a "safe harbor" protecting the service provider from monetary, injunctive or other equitable relief for infringement of copyright in the course of service such as YouTube's. The Act places the burden of notifying such service providers of infringements upon the copyright owner or his agent. It requires such notifications of claimed infringements to be in writing and with specified contents and directs that deficient notifications shall not be considered in determining whether a service provider has actual or constructive knowledge. Id. § (3)(B)(i). As stated in the Senate Report at pp. 46-47, House Report at 55-56 (see 718 F. Supp. 2d at 521):

> Subsection (c)(3)(A)(iii) requires that the copyright owner or its authorized agent provide the service provider with information reasonably sufficient to permit the service provider to identify and locate the allegedly infringing material. An example of such sufficient information would be a copy or description of the allegedly infringing material and the URL address of the location (web page) which is alleged to contain the infringing material. The goal of this provision is to provide the service provider with adequate information to find and address the allegedly infringing material expeditiously.

Viacom's argument that the volume of material and "the absence of record evidence that would allow a jury to decide which clips-in-suit were specifically known to senior YouTube executives" (Viacom Opp. pp. 9-10) combine to deprive YouTube of the statutory safe harbor, is extravagant. If, as plaintiffs'

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