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Taking the Ostrich's Head Out of the Sand

Class Action Lawsuit Addresses Rampant YouTube Copyright Infringement

A recent spate of copyright cases filed against YouTube and its parent, Google—chief among them a class action suit brought by the Premier League and Bourne Music on behalf of copyright owners whose works have been infringed on YouTube[1]—promises to shed light on the inner workings of a technology giant whose business practices have often been called into question by authors and publishers.[2] Although reminiscent, in some ways, of earlier music file sharing cases like Napster[3] and Grokster[4], this latest round of litigation has even more far-reaching implications in defining the role that technology plays to prevent, not just foster, infringement.

There seems to be little question that user-posted content consisting of movies, sports programming, and music videos infringes the copyrights held in those works by their producers.[5] When that content is posted to the Internet for other users to copy, view, and retransmit without authorization by the copyright owner, the work's value approaches zero and effectively becomes "free" for the taking by millions. This not only deprives the copyright owner of any control over the dissemination of its work; it has the potential to wreak havoc with authorized licensing of the work—what business would pay for the rights to electronically distribute a work that can be obtained elsewhere, on sites like YouTube, for nothing? Of course, there is huge value to YouTube in making such material available for free since value on the Internet is determined by traffic. YouTube has made it plain that it intends to be the number one video "sharing" site on the Internet.[6] Being the "go-to" site for valuable copyrighted television, sports, and other entertainment programming is the real attraction. When Google purchased YouTube last year, it did not pay $1.65 billion based on the potential value of amateur videos and home movies. As content owners such as networks struggle to launch viable Internet locations of their own and try to realize the potential of licensing their content for viewing on handheld devices like telephones and iPods, YouTube and Google have successfully positioned themselves as an established brand name location for access to such material now. How have YouTube and Google been able to do this, without authorization from the content owners?

Much depends on a statutory provision of the U.S. Copyright Act known as Section 512.[7] That section contains the now familiar "notice and takedown" framework[8] that Internet users are often made aware of in the terms and conditions of most websites—post infringing matter to a website and, upon complaint by the copyright owner, the site will remove the posting to minimize its liability. We believe the statute is being misapplied. The statutory provision contains much more; it offers qualifying Internet intermediaries a "safe harbor" from

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1 *The Football Assoc. Premier League Ltd and Bourne Co. et al v. YouTube, Inc. et al*, 07-CV-3582, filed in Southern District of New York, May 4, 2007.

2 *See The Author's Guild v. Google Inc.,* 05-CV-8136 and *McGraw-Hill Cos. v Google Inc.,* 05-CV-8881, filed in the Southern District of New York.

3 *A&M Records v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002).

4 *MGM Studios Inc. v. Grokster, Ltd.,* 545 U.S. 913 (2005).

5 *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003). Regarding non-user posted content, *see Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191(3d Cir. 2003). Amicus Brief filed by Proskauer Rose LLP, 2002 U.S. 3rd Cir. Briefs 2497A (U.S. 3rd Cir. Briefs 2002).

6 Donna Bogatin, *YouTube: What Google CEO Eric Schmidt Really Thinks*, March 6, 2007, *available at* http://blogs.zdnet.com/micro-markets/?p=1074 ("Number one search engine Google does not envisage being a video contender among many, however. Schmidt states unequivocally: "We want to be number one, in video too.").

7 17 U.S.C. §512 (2007).

8 17 U.S.C. §512(c) (2007).

potential liability for copyright infringement in very specific circumstances, i.e., when the intermediary is essentially "passive" and hosts and stores infringing content solely at the instance of a user, and only if the intermediary has no knowledge of the infringing activities.[9] Alternatively, if the intermediary has control over the infringing acts on its site—say, by failing to employ technology that would block or prevent the posting of infringing content and derives a direct financial benefit from the infringing activities, it is disqualified from "safe harbor" treatment under this Section.[10]

The Premier class action case directly confronts these issues, claiming that YouTube and Google have engaged in a deliberate scheme to capitalize on the presence of vast amounts of infringing matter on their site. The suit alleges that YouTube/Google are disqualified from "safe harbor" treatment under Section 512, including by virtue of their knowledge of the infringing acts, as well as their refusal to mitigate them through so-called "filtering" technologies—all precisely because the continued presence of such infringing material on YouTube creates enormous financial benefits for them, at the expense of thousands of copyright owners.

Why is this likely to be a key issue in the class action case? Because YouTube's answer to charges of infringement depends almost entirely on its alleged compliance with the "notice and takedown" provisions of Section 512. Send us a notice, says YouTube/Google, and we will remove your content. Leaving aside the insane burdens placed on copyright owners to constantly police and notify YouTube of infringements—some copyright owners are now spending upwards of $100,000 a month to do so[11]—sending YouTube a notice does not accomplish very much, says the Premier League complaint, since the material gets reposted to YouTube again, and the whole cycle starts over. Absent a formal notice of infringement under Section 512, YouTube feigns ignorance over the content of its site.[12] In an interesting exchange on Capitol Hill, YouTube co-founder and CEO Chad Hurley seemed to have little to say when Rep. Mike Ferguson, a New Jersey Republican, said that he could search on YouTube at that very moment and find thousands of clips posted by users who clearly do not own the rights to the material. "Why don't you take that stuff down?" he asked. Hurley's answer seemed to be "send me a notice."[13]

Other sites, like MySpace, are already filtering content for copyright owners to prevent its appearance or reappearance on a site once digitally marked by the copyright owner using an electronic "fingerprint" to block its trafficking on the Internet.[14] YouTube and Google appear to acknowledge the existence of such technology, but have done virtually nothing to implement such preventative measures. Indeed, as will be explored in the class action litigation, YouTube and Google appear to be offering to deploy such filtering or fingerprinting technologies for those parties who enter into "strategic partnerships" with YouTube and agree to license their content to YouTube on the latter's terms. Nothing has been said about the availability of that same technology to the many other copyright owners who are not prepared to license their content to YouTube or are otherwise not able to get a seat at the "strategic partnership" table.

So, it seems that technology, which spawned the "viral" distribution of copyrighted content to the chagrin of copyright owners everywhere, may now be one of the lynchpins for preventing infringement. And, YouTube/Google's claims of ignorance about what is being exploited on its site are being treated with deserved skepticism. The Premier League case promises to take the lid off the inner workings of the YouTube machine and test these protestations of ignorance.

Special thank you to associate Dolores F. DiBella for her contribution to this article.

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9 17 U.S.C. §512 (a)-(d) (2007).

10 *See*, *e.g.* 17 U.S.C. §512(c) (2007).

11 *The YouTube Police: Big Media is spending millions on monitors*, Business Week, May 21, 2007, *available at* http://www.businessweek.com/magazine/content/07_21/b4035060.htm?campaign_id=rss_topStories ("For each clip deemed stolen, Viacom's team sends out a "takedown" notice requiring YouTube to remove it immediately…Naturally, Viacom is deeply displeased that it is spending upwards of $100,000 a month to scan someone else's site for its own content.").

12 *In re Aimster Copyright Litig.*, 334 F.3d at 654-655 (where defendant was swapping digital copies of popular music, the court noted that "[b]y eliminating the encryption feature and monitoring the use being made of its system, [defendant] could…have limited the amount of infringement. Whether failure to do so made it a vicarious infringer…is academic, however; its ostrich-like refusal to discover the extent to which its system was being used to infringe copyright is merely another piece of evidence that it was a contributory infringer.").

13 Anne Broache, *Politicos Take on YouTube, Video's future*, CNETNews.com, May 10, 2007, *available at* http://news.com.com/Politicos+take+on+YouTube%2C+videos+future/2100-1028_3-6182900.html?tag=news.1 ("Rep. Mike Ferguson (R-N.J.) told Hurley he could go on to YouTube right now and pull up dozens, even hundreds more clips that are obviously copyrighted work. "Why don't you take that stuff down?" he asked.Hurley defended the site's practices as in compliance with the Digital Millennium Copyright Act, a federal law designed to shield Internet hosts from liability provided that they meet certain requirements and respond to notices from copyright holders to remove offending content.").

14 Andy Greenberg, *MySpace Cracks Down on Copyright*, Forbes.com, May 11, 2007, *available at* http://www.forbes.com/technology/2007/05/11/video-youtube-myspace-tech-internet_cx_ag_0511myspace.html.

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