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Viacom v. Google: Whose Tube Is It Anyway?

by Cortney M. Arnold

Introduction

On March 13, 2007, Viacom, the owner of MTV, Nickelodeon, and Paramount Film Studios, among many other television and film companies, [filed a lawsuit](#) in federal court against mega-search engine Google and its video-sharing website, YouTube. In its [complaint](#), Viacom alleges that YouTube illegally profits from users uploading copyrighted content onto YouTube's site and the subsequent viewing of that content by users over 1.5 billion times. In addition to \$1 billion in damages, Viacom is also seeking injunctive relief to prevent what it deems "massive copyright infringement." This iBlawg post will compare Viacom's claims against Supreme Court precedent and current copyright law.

Analysis under Supreme Court Precedent

Viacom's assertions against YouTube are very similar to the record companies' assertions against Napster in 2001. In *A&M Records, Inc. v. Napster, Inc.*, the major record companies argued that Napster contributed to the infringement of their protected works by inducing and encouraging such infringing conduct by other parties. Similarly, now Viacom argues in its complaint that YouTube "enables, induces, facilitates, and materially contributes to each act of infringement by YouTube users."

In *Napster*, the Ninth Circuit agreed with the record companies and held Napster liable for contributory infringement of copyrighted musical works. The Ninth Circuit found that Napster violated the plaintiffs' [exclusive rights of reproduction and distribution](#) under U.S. copyright law. Additionally, the court found that because the owners of Napster could control the infringing behavior of its users, it therefore had a duty to do so. Similarly, in the present litigation, much of Viacom's complaint centers on the issue of YouTube's control over its


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site and the content placed on it. Viacom asserts that YouTube has “both the right and ability to supervise” its users’ conduct, and that its failure to do so makes YouTube contributorily and vicariously liable for copyright infringement.

Similarly, in *MGM Studios, Inc. v. Grokster, Ltd.*, the Supreme Court held “that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.” In this case, Grokster was held liable for inducing copyright infringement for acts taken in the course of marketing file-sharing software. In its decision the Court noted that Grokster’s intent in selling the software was to “satisfy a known source of demand for copyright infringement,” and that it did not attempt to “develop filtering tools or other mechanisms to diminish the infringing” capabilities of its software.

Though YouTube does not communicate any intention for its site to be used for illegal purposes, Viacom argues that there is no doubt the company is aware of the infringing activity occurring on it, and that it has profited handsomely as a result. Additionally, Viacom points out in its complaint that YouTube has taken very minimal efforts to deter the infringement occurring on its site, and the efforts that the company has taken do very little to deter the posting of copyrighted material.

Arguably, neither YouTube’s knowledge of infringing activity on its site nor its lack of substantial effort to deter it, by themselves, are enough to rise to the level of inducement as laid out in *Grokster* and *Napster*. However, based on the allegations presented in Viacom’s complaint, a relevant issue for the moment is whether inducement of copyright infringement can be inferred by YouTube’s knowledge and relative inaction. It should be noted here that YouTube does respond to copyright owners’ requests for copyrighted material to be taken down; however, the other side to this is that there is usually more than one posting of such material, and YouTube will only remove those posts specified by the copyright owner—thus placing the burden on the copyright holder to find all of the illegally posted materials on the site. As the case has yet to reach the discovery stages, time will only tell whether YouTube truly meets the standard given in *Grokster* and *Napster*. For the time being, Google and YouTube have claimed “safe harbor” under the Digital Millennium Copyright Act (DMCA).

Analysis under DMCA

YouTube claims it is protected under DMCA § 512 which protects online service providers from having to monitor the activities of their users—so long as they adhere to certain prescribed guidelines and promptly block access to allegedly infringing material upon receipt of a notification claiming infringement from a copyright holder. While YouTube does promptly remove copyrighted material when so requested and meets most of the other guidelines set out by the statute, it has failed on one condition, and therefore is not immune from liability.

Section 512(c)(1)(B) of the DMCA states the following:

“

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TTA Blog
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“ A service provider shall not be liable...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.”

As evidenced by Google's recent purchase of YouTube for \$1.65 billion, the argument can easily be made that the company is profiting handsomely from the infringing activity occurring on its site. Of course, YouTube's counterargument to this will be that a direct link cannot be established between the infringing activity and the site's popularity and that the bulk of its success is due to the user-created materials as opposed to the posting of copyrighted materials. Both arguments have merit and only time will tell which argument will prevail, assuming the case does not settle and is not dismissed.

Conclusion

It appears that both Viacom and YouTube have good arguments to support their positions. Nevertheless, due to the extreme difficulty in divorcing the substantial financial success of YouTube from the massive quantities of infringing content on the site, it seems unlikely that YouTube will prevail under the standard set forth in the DMCA and the inducement standard in *Grokster*.

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