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Viacom vs. YouTube/Google: A Piracy Case in Their Own Words

AOL News Abigail Field March 21, 2010

Just as the three-year-long Viacom (VIA) lawsuit against YouTube/Google (GOOG) has reached a crucial decision moment, the case has burst into public view with the public release of the briefs each side filed earlier this month. If Google wins, the case ends; if Viacom does, the next stage is a trial on damages.

While I am a lawyer, I'm not a copyright lawyer, and this is a highly specialized area of law. Still, I'm guessing that Viacom will get its damages trial: YouTube's early days involved a lot of knowing exploitation of copyrighted work without permission, according to emails filed with the briefs. If Viacom wins, I'll be curious to see how much "damage" it's found to have suffered, given Viacom's own use of YouTube. Indeed, it embraced YouTube as an essential marketing medium.

For Viacom to win, the judge must find one of two things to be true: Either that YouTube, at any time prior to May 2008, was behaving sufficiently like Grokster (a "pirate" file-sharing service the U.S. Supreme Court ruled illegal in 2005) to be liable for its users' uploads of proprietary content; or that prior to May 2008, YouTube did not always meet the requirements of the Digital Millennium Copyright Act's "safe harbor" clause, meaning that it didn't have statutory protection. (If YouTube was like Grokster, it cannot claim safe harbor, no analysis needed.)

One of the more contentious issues in this case is precisely what is necessary to claim the safe harbor. YouTube's position is essentially that willful blindness to infringement is OK, while Viacom argues that it's specifically prohibited.

May 2008 is important in the case because that's when YouTube started using its proprietary digital fingerprinting program to proactively screen out works infringing on Viacom's rights, and Viacom's brief states it will seek damages only up until that date. It also highlights part of why reading the legal briefs in this case is a bit of a *Through the Looking Glass* experience: By focusing on the YouTube of today, in terms of its size, content and procedures, Google makes Viacom's claims seem hollow. But present-day YouTube is irrelevant to the case. Viacom's focus is on the early days of YouTube, prior to Google's acquisition -- and including Google's own view of YouTube as a pirate site at the time -- makes Viacom's case seem very compelling.

Note: All quotes in this article not otherwise cited come from Viacom's brief, Google's brief or Viacom's "Statement of Undisputed Facts."

When YouTube Was Young: Lots of Copyrighted Material to Grow User Base

YouTube was developed in February, 2005, by the three founders of PayPal: Chad Hurley, Steve Chen and Jawed Karim. The beta version launched April 23. Emails cited by Viacom and Google show that almost from the beginning, despite YouTube's often-stated focus on personal videos, and despite terms of service that forbade uploading unauthorized copyrighted material, the founders were aware that most of the site's traffic came from copyrighted material, which they apparently assumed was all illegitimately loaded.

Tension among the founders developed. Chen and Karim wanted to leave up as much copyrighted material as possible -- Karim even stole and posted some himself -- while Hurley fretted over the

potential liability. Some of the sample emails:

• On June 15, 2005, Chen emailed the other founders that YouTube's Internet service provider was complaining that YouTube was violating the service agreement, and Chen thought YouTube's hosting of copyrighted material might be the problem. Noting "i'm not about to take down content because our ISP is giving us shit," Chen proposed YouTube consider changing ISPs.

• A July 4 email from Hurley noted Bud Light commercials on YouTube, saying "we need to reject these too." The other founders pushed back, suggesting they leave them up for "a couple more weeks." A July 10 email discussion of leaving some copyrighted material up while rejecting other copyrighted material included Hurley's comment: "ok man, save your meal money for lawsuits! ;) no really, I guess we'll just see what happens." Another July 10 email among the three included Hurley's admission that, "Yup, we need views. I'm a little concerned with the recent Supreme Court decision on copyrighted material though," referring to the Grokster case.

• On July 19, Chen wrote to Hurley and Karim: "Jawed, please stop putting stolen videos on the site. We're going to have a tough time defending the fact that we're not liable for the copyrighted material on the site because we didn't put it up when one of the co-founders is blatantly stealing content from from other sites and trying to get everyone to see it." Four days later, Karim sent a link to the other founders, and Hurley told him that if they rejected it, they needed to reject all copyrighted material. Karim's reply: "I say we reject this one but not the others. This one is totally blatant."

• A July 29 email conversation about competing video sites laid out the importance to YouTube of continuing to use the copyrighted material. "Steal it!" Chen said , and got a reply from Hurley, "hmmm, steal the movies?" Chen's answer: "we have to keep in mind that we need to attract traffic. how much traffic will we get from personal videos? remember, the only reason our traffic surged was due to a video of this type."

• In early August, Hurley sent a couple of emails pushing to get the copyrighted material off the site, explaining that the risk in copyright infringement was that it might anger potential suitors, scuttling a deal to buy YouTube. (The founders wanted to sell out as quickly as possible.) Hurley used the example of a CNN clip of the Space Shuttle. Chen said the copyrighted material should stay: "I really don't see what will happen. what? someone from cnn sees it? he happens to be someone with power? he happens to want to take it down right away, he get in touch with cnn legal. 2 weeks later, we get a cease & desist letter. we take the video down." Karim chimes in the next day, "lets remove stuff like movies/tv shows. lets keep short news clips for now. we can get stricter over time, just not overnight."

• On Sept. 3, Hurley emailed the other two founders re: "copyright material!!! "aaahhh, the site is starting to get out of control with copyrighted material." During the course of the email conversation, Karim reiterated his suggestion of taking down movies and TV, and leaving the rest; Chen replied that if it did so, YouTube would go from about 100,000 views a day to 20,000; Jawed disagreed, saying his proposed policy was so lax he didn't think the site's traffic would decrease at all. On Sept. 4, a user emailed Karim and others at YouTube, pointing out clips from *Chappelle's Show*, and asking if they were worried about getting sued like Napster; Karim replied "ahaha."

• On Sept. 7, YouTube launched a community flagging system that enabled users to flag copyrighted content for YouTube to take down. The goal was to create "the perception" that YouTube was concerned about copyright, but the "actual removal will be in varying degrees." A couple of weeks later, YouTube discontinued the community flagging system for copyright. YouTube said the effort was flawed, and following outside counsel's advice, started using a take down-upon notice system as envisioned by the Digital Millennium Copyright Act. Viacom notes an email from Hurley asking for the

flagging system to stop because YouTube was being put on notice of problems, and it was better if YouTube just let copyright owners notify it directly.

Over the remainder of 2005, emails among YouTube executives discussed copyrighted material on the site -- what to keep versus what to block -- and users sent in queries trying to understand why some things were being rejected and others allowed.

YouTube Launches in Final Form

YouTube ended its beta phase with the final site launch on Dec. 14, 2005. At that point, 6,000 videos were being uploaded each day, the site was getting 2.5 million page views daily and YouTube's public statements focused on user-generated content. By July 2006, approximately 68,000 videos were being uploaded each day, and 97 million pages were being viewed daily.

In January 2006, YouTube met with its much smaller rival, GoogleVideo. According to an email among the GoogleVideo executives afterward, the YouTube founders deliberately had a lax copyright enforcement policy "in order to get more and more traffic." And indeed, by February, uploads had more than tripled from December 2005's rate to 20,000 a day, with 18 million page views daily. According to a YouTube employee's "little exercise," over "70%" of the "most viewed/most discussed/top favorites/top rated" videos was or contained copyrighted material.

In early 2006, YouTube introduced an easy-to-use tool for copyright owners to send a take-down request, introduced "hashing" technology that blocked identical uploads of previously removed material, and began negotiating with Viacom for a licensing agreement.

In March, a news article noted that Fox (NWS) was uploading material to YouTube. The article was circulated within YouTube with the comment "this is why we don't know who is uploading the content." Also in March, while an employee noted that YouTube had some good original content, "it's just such a small percentage," and "the truth of the matter is probably some 75-80% of our views come from copyrighted material." Nonetheless, that same month the Motion Picture Association of America praised YouTube as "a good corporate citizen."

In April, the CEO of Fox's parent, News America, announced that based on its own survey, 80% of the material on YouTube was copyrighted. It's not clear if he noted that Fox itself had uploaded some copyrighted material and thus not all of 80% was infringing.

Google Calls YouTube a Pirate Site

In May, Google had an internal meeting on competing with YouTube, and its executives were highly critical of YouTube: "A large part of their traffic is pirated content." YouTube is a "rogue enabler of content theft." "YouTube's business model is completely sustained by pirated content." "... it's a video Grokster." "I can't believe you're recommending buying YouTube . . . they're 80% illegal pirated content." A heated discussion among Google executives ensued, with some arguing for a YouTube-type copyright policy, and others arguing it would be wrong: "it crosses the threshold of Don't be Evil to facilitate distribution of other people's intellectual property." Ironically, Google's criticisms of YouTube are precisely the kinds of claims it's being forced to defend against now.

In July, Viacom tried to buy YouTube, but it ultimately failed. Meanwhile, Google was conducting due diligence on YouTube in contemplation of buying it, Through that process, it learned that approximately 54% of page views were of copyrighted material for which YouTube didn't have a license.

In October 2006, Google announced it was purchasing YouTube. According to Viacom, a big fight during the negotiations was who would be liable for future copyright claims: Google or the YouTube founders. Given Google's view of YouTube as a "video Grokster" and the founders' knowledge of their conscious use of copyrighted material to grow the site, it's not surprising that would be an issue. In the end, Google assumed liability for potential claims, and the founders agreed to indemnify Google up to a certain amount. In November, Google announced it had completed its purchase of YouTube.

100,000 Viacom Videos Get Removed

From November through February 2007, Google and Viacom negotiated for a licensing agreement. Viacom tried "a strong arm approach" to "push for significantly better terms." Negotiations weren't making progress, so Viacom decided to accumulate a list of infringing videos and send Google one massive take-down request as a tactical matter, to "gain leverage and 'provide [Viacom] the economics' it had requested." Apparently, Viacom was expecting YouTube traffic to fall once its videos were removed, and that traffic to Viacom's own site would increase. On Feb. 2, Viacom sent Google the take-down request for more than 100,000 videos. Google removed almost all of them by the next business day, and no impact on traffic on either site was discerned.

Meanwhile, in January, Google stopped running ads on videos that Google didn't have a license for, although it continued to run "house ads" that would send users to "related" videos that Google did run ads on. This move strengthened Google's claim that it was not profiting specifically from pirated material. The validity of that claim will factor heavily into the question of whether the Digital Millennium Copyright Act's "safe harbor" defense is available to Google.

In February, Google started using digital fingerprinting technology to screen out infringing material belonging to anyone that Google had a licensing agreement with, but it didn't screen for Viacom's material. In March, Viacom filed the lawsuit that's now approaching a climax.

In October, Google launched its proprietary digital fingerprinting technology to protect companies it had licensing agreements with. By December, users were uploading more than 300,000 videos a day and were viewing 800 million pages a day. In May 2008, Google began using its digital fingerprinting technology to protect everyone's content, including Viacom's. Today, four hours of extraordinarily diverse video are uploaded each minute. The briefs don't contain any hard numbers, but it's hard to believe that unlicensed copyright content draws anywhere near a majority of page views now.

Hints of Google/YouTube's Guilty Conscience

Google's own actions may prove problematic for its defense in the lawsuit. First, prior to buying YouTube, Google described it as a site that facilitated the theft of intellectual property. Further, one of Google's requests during licensing negotiations is notable: Google demanded a release from prior infringement claims, including claims based on the way YouTube copied and distributes the videos that users upload. That suggests Google wasn't sure the DMCA safe harbor really applied.

Also, there have been discovery issues on Google's side. Google CEO Eric Schmidt found almost no documents to produce from June 2006, when Viacom's effort to acquire YouTube really took off, to February 2007, when licensing negotiations between YouTube/Google and Viacom failed. Schmidt asserts that for the last 30 years, he has deleted emails, or arranged for their destruction, as soon as he read them, unless he was told to hang on to them. Schmidt also asserted he didn't remember receiving one of the pre-acquisition emails about YouTube's pirate-esque behavior. Similarly, Larry Page, Google co-founder, says he doesn't remember anything about the deal, not even if he was for or against it.

Viacom had more discovery trouble with YouTube founders Chen and Hurley: They claimed to have almost no documents from the key time periods. The emails discussed above all came from Karim, who left the company before Google bought it. When Hurley was shown Karim's emails, Hurley developed "serial amnesia." To show that his description isn't an exaggeration, Viacom cites 140 pages of Hurley's deposition.

Calculating Damages -- But Was Viacom Damaged at All?

If Viacom wins, it can either seek actual damages and Google/YouTube profits tied to the infringed works, or statutory damages for each work infringed, in which case the amount due for each infringement depends on the court's view of the willfulness of the infringement. In this case, assuming there is liability, the infringement will almost certainly be seen as willful, meaning that the judge could levy up to $150,000 per violation.

Let's consider actual damages and Google profits first. Google's brief recites in great detail Viacom's use of YouTube as a promotional engine for its products, explaining how Viacom hired at least 18 marketing firms to upload video on its behalf in order to distance itself from the uploading and make it appear that the videos were genuine, grassroots uploads. Viacom would "rough up" the video to make it look pirated, and would even send its employees off-site to places like Kinko's so that uploading would occur from computers untraceable to Viacom.

Viacom also had blanket policies to leave up material, regardless of who uploaded it, up to a certain length of time, or related to certain programs. Viacom kept changing its policies so often that the company it hired to monitor YouTube had a lot of difficulty complying with Viacom's directions.

Viacom chose to do viral marketing on YouTube and to leave up a lot of otherwise infringing material posted by others (thus implicitly authorizing its presence on YouTube) because, as various executives from Viacom and its subdivisions explained: "you almost can't find a better place than YouTube to promote your movie." Other Viacom execs noted that posting clips is a "no brainer," and the "benefits of placing content on YouTube were 'overwhelming.'"

Important for the Ratings

Among the programs that Viacom specifically chose to allow include *South Park, The Daily Show* and *The Colbert Report.* "Viacom's executives felt 'very strongly that they didn't want to stop the daily and colbert clips" because they "were concerned that Jon Stewart and Stephen Colbert believed that their presence on YouTube was important for their ratings and their relationship with their audience."

Because of this behavior by Viacom, it's hard to justify calling the presence of its content on YouTube "actually damaging." Moreover, identifying which individual clips were infringed will be exceptionally hard. As Google has gleefully noted, Viacom had great difficulty excluding authorized material from the lawsuit, much less material that Viacom had tacitly allowed to stay up on YouTube.

Again, I'm no copyright lawyer, but surely Google can't be liable for infringement for an "unauthorized" video that Viacom knew had been posted on YouTube that, for its own corporate purposes, it chose to leave up.

Troubling Questions

A similar problem arises for calculating the amount of profit derived by YouTube from the infringing material. The method of calculation is to take the gross profit and subtract everything that's not due to

infringing material. But making that calculation requires knowing what the infringing material in fact was. And what does it mean that when YouTube took down over 100,000 of Viacom's videos within one business day of receiving notice, traffic at YouTube didn't budge? One could say it suggests that, as of February 2007, a de minimis amount of YouTube's traffic -- and thus profit -- was tied to Viacom's infringed material.

Statutory damages would surely be easier to calculate in that the amount of damage per violation can be arbitrarily assigned up to the cap. However, the number of violations would still have to be determined, which runs back into all of the problems just mentioned.

A final complication is that Google/YouTube's behavior changed over time. If Viacom wins, it's possible the judge will find that the infringement continued until May 2008. But it's also possible the judge will focus more narrowly on the time period when YouTube was much smaller and seemingly depended on copyrighted materials.

Finally, does it really comport with good public policy to award damages for infringement of Viacom's property, given Viacom's use of YouTube before and throughout the lawsuit, and its tacit approval of infringed works' presence? Seems a little like Viacom has been taking a "heads I win, tails you lose" approach to its content on YouTube.

In the end, the most amazing thing is that Google and Viacom haven't settled this mess yet.

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Signed: /s/ Michelle Shocked