Viacom v. YouTube

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IP & Business Strategy
Fisher & Oberholzer  (2014/04/14)

1. Assert a Legal Privilege
2. Develop an Alternative
3. Get Permission
4. Detente
5. Rapid Dissemination

1. Exercise Market Power
2. Sell
3. License
4. Collaborate
5. Donate

For more detail, see http://cyber.law.harvard.edu/people/tfisher/IP/IPMaps.htm
2005: YouTube formed

2006: Viacom and CBS split

2007: YouTube goes live

2008: Warner Music, NBC, and ABC license catalogues to YouTube

2008: Sequoia invests $12M

2009: Viacom negotiates with YouTube

2009: Viacom demands that YouTube remove 100K videos; YouTube complies

2009: Viacom files suit, seeks $1B

2009: Google buys YouTube for $1.65B

2010: Google invokes §512

2011: Paramount licenses 500 films to YouTube

2012: Viacom demands that YouTube remove 100K videos; YouTube complies

2013: Viacom files suit, seeks $1B

2014: YouTube has 1B visitors per month; 100 hours of video uploaded per minute

2014: YouTube adds appellate function to Content ID

2014: SDNY #1

2014: CA2

2014: SDNY #2

2014: settle
Viacom Assets in 2006

**TV**
- MTV and its subsidiaries (MTV2, mtvU, VH1, etc.);
- Logo;
- Nickelodeon;
- Nick at Nite;
- Comedy Central;
- Spike TV;
- BET;
- TV Land
- 1780 hours of new programming per week

**Film**
- Primarily Paramount
- Control of 1000 titles
- Partial interest in additional 2500 titles
- Examples:
  - *Titanic*,
  - *The Godfather* trilogy,
  - *Indiana Jones* films,
  - *Forrest Gump*
  - *Braveheart*
Viacom
Revenue Sources

Novelist
Actors
Screenwriters
Director
Composer
“Location” owners
Record Company
Music Publisher

Viacom

Distribution agreement

Producer

Derivative-work license
“Work for Hire” agreements

YouTube threatens these streams

Sales
Rentals plus performance licenses

HBO, Airlines, Cable systems, ISPs
Theatres
Video Stores
TV Networks
Cable company
Record company
Merchandise manufacturer
Advertiser

Synchronization and performance licenses
Master use license

Copyright
YouTube has described itself as the place to go for video. It is far more than the kind of passive Web host or e-mail service the DMCA protects -- it is an entertainment destination. The public at large is ... attracted to the entertainment value of what's on the site. And YouTube reaps financial benefits from that attraction through selling the traffic to advertisers. ... Does YouTube have "knowledge" of copyrighted material on its site? Does it have the "right and ability to control" the content? Yes and yes. If the public knows what's there, then YouTube's management surely does. YouTube's own terms of use give it clear rights, notably the right to take anything down. YouTube actively monitors its content. For example, its managers remove pornography and hate content and, as was recently reported, claim they can detect and remove "spam." Without knowledge and control, how could YouTube create "channels" and "featured videos" sections on its site? YouTube has even offered to find infringing content for copyright owners -- but only if they do a licensing deal first.

Is it fair to burden YouTube with finding content on its site that infringes others' copyright? Putting the burden on the owners of creative works would require every copyright owner, big and small, to patrol the Web continually on an ever-burgeoning number of sites. That's hardly a workable or equitable solution. And it would tend to disadvantage ventures such as the one recently announced by NBC Universal and News Corp. that are built on respect for copyright. Under the law, the obligation is right where it belongs: on the people who derive a benefit from the creative works and are in the position to keep infringement out of their businesses.
Content ID

**Preparation:**

- Copyright owner registers for ContentID and uploads material to the database
- Owner selects:
  - (i) takedown
  - (ii) monetize
  - (iii) track
Content ID

Phase 1:

• YouTube user uploads a video
• Content ID identifies a match between the video and some of the material
• YouTube takes down the video (or monetizes it) and notifies the uploader
• Uploader “disputes” the takedown
• YouTube reinstates the video and notifies the copyright owner
Content ID

Phase 2:

- Copyright owner reinstates claim
- YouTube takes the video down again
- Uploader “appeals” (video reinstated?*)
Content ID

DMCA §512

• Copyright owner either releases the ContentID claim or rejects the appeal & files formal DMCA notice
• YouTube takes the video down again and gives the uploader a “strike”
• Uploader files formal “counternotice”
• Within 10 days copyright owner acquiesces or files suit
“ Strikes”

How to resolve a copyright strike and restore your account’s good standing:

• You may wait six months for the strike to expire. The strike will expire as long as you complete Copyright School and receive no additional copyright strikes during those six months.

• You may ask the person who claimed your video to retract their claim of copyright infringement.

• If your video was mistakenly removed, misidentified as infringing, or qualifies as a potential fair use, you may wish to submit a counter-notification.

  – https://www.youtube.com/watch?v=InzDjH1-9Ns
• Knowledge?
  – 512(c)(1)(A) requires “knowledge of specific identifiable infringements of particular individual items”

• Right and Ability to Control?
  – “right and ability to control” under 512(c)(1)(B) also requires knowledge of specific identifiable infringements of particular individual items

• Applied:
  – YouTube is entitled to summary judgment under 512(c)
• Most of YouTube’s functions fall within 512(c)
  – “by reason of storage at the direction of a user”
  – Possible exception: syndication for Verizon etc.
• 512(c)(1)(A) requires “knowledge of specific identifiable infringements of particular individual items”
  – subjective knowledge under 512(c)(1)(A)(i)
  – objective knowledge under 512(c)(1)(A)(ii)
  – “willful blindness” may be sufficient
• “right and ability to control” under 512(c)(1)(B) requires less than knowledge of specific identifiable infringements of particular individual items but more than ability to remove or block access to infringing material
  – E.g., Grokster-style “purposeful, culpable expression and conduct” may be sufficient
• Applied: remand for reconsideration of borderline issues
“Clip-by-clip” assessment of actual knowledge is infeasible; Viacom bears burden of proof

Viacom has failed to provide evidence of “willful blindness”

Insufficient evidence of “actual control”

Transcoding video files for purposes of “syndication” are still covered by 512(c)
• “Thus, where the service provider's influence does not "take the form of prescreening content, rendering extensive advice to users regarding content and editing user content," ... or where the service provider lists items for sale by users but "is not actively involved in the listing, bidding, sale and delivery of any item," ... and "does not preview the products prior to their listing, does not edit the product descriptions, does not suggest prices, or otherwise involve itself in the sale," ... its influence on users is not participation in their infringing activity, and does not amount to the required "control" beyond the normal ability of every service provider to decide what appears on its platform.”
2015 Update

• As of March 2015, Viacom is undergoing restructuring and layoffs
• Despite revenue of $4 billion in 2014, YouTube’s bottom line is “roughly break-even”
Contributory Infringement

Vicarious Infringement

Inducement

512(c)

Insufficient knowledge

Insufficient control
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65,000 videos uploaded per day

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