

10-3270

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF *AMICUS CURIAE* PROVIDING THE COURT WITH
INFORMATION ONLY AND TAKING NO POSITION AS TO THE
MERIT OF THIS APPEAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Vobile, Inc., a nongovernmental entity which is not a party to this proceeding, by and through its counsel, hereby submits its Corporate Disclosure Statement and states as follows: Vobile, Inc., a California corporation, is a wholly-owned subsidiary of Vobile Co., Ltd., a privately-owned Cayman Islands company. No publicly held corporation holds 10% or more of its stock.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*¹

Amicus Curiae Vobile, Inc. (“Vobile”), a California corporation, has core digital content fingerprinting and identification technology which allows Vobile to provide authentication, management, tracking, and other services in order to help content owners and publishers (primarily website operators) to protect, measure, and monetize their digital content. Vobile’s services can assist owners and publishers of digital content that consists of images, music, and video. Using its patent-pending VDNA®/VideoDNA™ digital content fingerprinting technology and associated tracking, webcrawling, monetization, and other software, Vobile has performed services for content owners such as the six major studios (including Appellant Viacom) and four leading broadcast television networks, as well as for publishers such as Justin.tv,² Ustream, and several leading websites in China among others.³ Vobile also has performed services in

¹ This brief was not authored in whole or in part by any party to the action nor did any such party or its counsel contribute money that was intended to fund preparing or submitting this brief. There is no person other than the amicus curiae who contributed money that was intended to fund preparing or submitting this brief.

² See, e.g., http://www.readwriteweb.com/archives/justintv_protecting_copyrighted_media_streams_with.php (last viewed December 10, 2010).

³ See, e.g., <http://edge.networkworld.com/news/2009/032409-chinese-youtube-rival-adopts-us.html> and http://www.vobileinc.com/files/In%20The%20News/20070501_Vobile%20Announces%20Landmark%20Deployment%20of%20VideoDNA%28TM%29%20Content%20Identification%20and%20Man

connection with live sporting events; for example, China's CCTV employed Vobile to help prevent unauthorized online distribution in China of the 2008 Beijing Olympics⁴ as have several major US professional sports leagues.

Vobile is not filing this brief in support of either party in the case and takes no position on the legal issues in this case. Vobile is submitting this Brief to provide information to this Court about the availability and reliability of automated digital video content identification and the scalability and robust nature of such technology. Vobile is concurrently filing a motion for leave to file this Brief, as Appellants consented to its filing but Appellees did not.

SUMMARY OF ARGUMENT

There is currently available and in widespread commercial use automated technology which reliably identifies infringing digital audio and video content. This technology can be used by website operators acting as publishers to filter content before posting and may be used by content owners to screen content already posted on the web to identify infringing content. In both cases, the content owner can then determine what actions to take—for example, whether to

agement%20System%20-%20EETimes.pdf (both last viewed December 10, 2010).

⁴ See e.g., http://www.businessweek.com/magazine/content/08_23/b4087073685542.htm?chan=technology_technology+index+page_top+stories (last viewed December 10, 2010).

allow/remove the posting or to attempt to monetize it through advertising or other means.

ARGUMENT

Vobile has built a successful business based on automated content identification. Vobile's services were tested in 2006-2007 by MovieLabs and the Motion Picture Association and determined to be best of class.⁵ One of the key aspects of these tests was the rate of false positives (videos determined to be infringing that were not) and false negatives (videos which were infringing but were determined not be). Since then, all six major studios have become customers of Vobile along with four leading networks, among others.

Using its proprietary VDNA®/VideoDNA™ algorithm and technology, Vobile and its customers have fingerprinted a few hundred thousand titles, including movies and television programs.

Website operators acting as publishers have used Vobile's automated technology to screen tens of thousands of videos every day which users were seeking to upload. Of these screened videos, Vobile's technology and software identified infringed titles that Vobile had fingerprinted. The website owners then

⁵ See, e.g., http://www.businessweek.com/the_thread/techbeat/archives/2007/05/which_no-name_startup_is_making_a_name_for_itself_with_hollywoods_anti-piracy_police.html and <http://bits.blogs.nytimes.com/2007/09/21/one-anti-piracy-system-to-rule-them-all/> (both last viewed December 10, 2010).

took a variety of actions depending upon the rules specified by the content owner, including the decision not to post the infringing content.

Vobile's technology can also be used by content owners to search for infringing content after it has already been posted by crawling the web and reviewing the content located. In this manner, Vobile's automated technology has checked about one billion instances of video on websites for infringement and has located about ten million instances of infringement. Utilizing a special feature of Vobile's automated technology, Vobile's customers have sent out about three million take-down notices containing the requisite statements concerning good faith belief that the use is unauthorized and authorization to act on behalf of the content owner. There have been only several hundred instances where the user contested the notice, most of which were ultimately taken down. Not one of the contested cases was caused due to mis-identification stemming from Vobile's automated technology.

Vobile has built a successful business valued at tens of millions of dollars in its most recent round of venture capital financing.

Vobile does not know "the standard of reliability and verifiability required by the Ninth Circuit in order to justify terminating a user's account"⁶ but Vobile

⁶ See page 28 of the district court's opinion in this case, quoting *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1116-18 (C.D. Cal. 2009).

would submit that an automated take-down notice generated by its technology would meet such standard. Vobile cannot say whether automated technology of other companies would meet such standard.

CONCLUSION

Vobile's automated technology has been widely adapted to fingerprint videos and audios and determine matches from streaming video on websites by website operators and content owners. This technology is reliable and website operators would be remiss in not taking appropriate actions under the Digital Millennium Copyright Act against users who received automated notices generated using this technology. In deciding the issues in this case, this Court may consider whether website operators acting as publishers are remiss in not using such technology to screen videos before they allow them to be posted.

Dated: December 10, 2010

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance Pursuant to Fed. R. App. P. 32 for Case Number 10-3270

I certify that the attached brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 933 words, as recorded in the word processing program (Microsoft Word 2003) utilized by the firm. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font.

December 10, 2010

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