10-3270

10-3342

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,

(*caption continued on inside cover*)

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

BRIEF OF *AMICI CURIAE* MATTHEW L. SPITZER, JOHN R. ALLISON, ROBERT G. BONE, HUGH C. HANSEN, MICHAEL S. KNOLL, REINIER H. KRAAKMAN, ALAN SCHWARTZ, AND ROBERT E. SCOTT IN SUPPORT OF PLAINTIFFS-APPELLANTS

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v.

YOUTUBE, INC., YOUTUBE, LLC, GOOGLE, INC.,
Defendants-Appellees.

THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED, on behalf of themselves and all others similarly situated, BOURNE CO., CAL IV ENTERTAINMENT, LLC, CHERRY LANE MUSIC PUBLISHING COMPANY, INC., NATIONAL MUSIC PUBLISHERS' ASSOCIATION, THE RODGERS & HAMMERSTEIN ORGANIZATION, EDWARD B. MARKS MUSIC COMPANY, FREDDY BIENSTOCK MUSIC COMPANY, dba Bienstock Publishing Company, ALLEY MUSIC CORPORATION, X-RAY DOG MUSIC, INC., FEDERATION FRANCAISE DE TENNIS, THE MUSIC FORCE MEDIA GROUP LLC, SIN-DROME RECORDS, LTD., on behalf of themselves and all others similarly situated, MURBO MUSIC PUBLISHING, INC., STAGE THREE MUSIC (US), INC., THE MUSIC FORCE, LLC,
Plaintiffs-Appellants,

ROBERT TUR, dba Los Angeles News Service,
THE SCOTTISH PREMIER LEAGUE LIMITED,
Plaintiffs,

v.

YOUTUBE, INC., YOUTUBE, LLC, GOOGLE, INC.,
Defendants-Appellees.

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are professors and scholars who, from various perspectives, focus their work on the economic incentives of legal liability rules, including questions about efficiency and deterrence. They are Matthew L. Spitzer, John R. Allison, Robert G. Bone, Hugh C. Hansen, Michael S. Knoll, Reinier H. Kraakman, Alan Schwartz, and Robert E. Scott. A summary of the qualifications and affiliations of the individual *amici* is provided at the end of this brief. *Amici* file solely as individuals and not on behalf of the institutions with which they are affiliated. *Amici* represent neither party in this action, and write because this appeal raises what they understand to be a very basic and important economic question: whether a defendant ought to be permitted to escape liability under a statute that proscribes knowing misconduct by remaining intentionally ignorant or willfully blind. From an economic perspective, the answer is clearly no; *amici* write here to succinctly explain why.[2]

[1] This brief was not written in whole or in part by counsel for a party. No person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief. *Amici* and their counsel were not compensated in any way.

[2] All parties have consented to the filing of this *amicus* brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Many legal rules turn at least in part on the question of whether the alleged bad actor had knowledge of certain facts. The Lanham Act, for example, authorizes treble damages in instances where the seller of counterfeit goods knew that the goods were in fact counterfeit.[3] The Civil Asset Forfeiture Act of 2000 prevents an owner's property interest from being forfeited if that owner lacked knowledge of the conduct giving rise to forfeiture.[4] Federal prohibitions on drug trafficking require that the accused trafficker knew that he was peddling a controlled substance, like cocaine, and not merely selling some harmless look-alike substance, like sugar.[5]

Knowledge is a central consideration in these and many other statutes that proscribe socially undesirable acts, for a simple and practical reason: The law can encourage an actor who knows he is committing or contributing to a bad act to refrain from doing so or at least to mitigate the bad act's detrimental consequences, whereas an unknowing actor is immune to the law's incentives. The overall goal is an obvious one, namely creating an incentive for informed parties to act well, and to avoid acting badly.

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[3] 15 U.S.C. § 1117(b).

[4] 18 U.S.C. § 983(d).

[5] 21 U.S.C. § 841(a).

To achieve this goal, it is necessary that a bad actor not be permitted to avoid liability merely by choosing to be willfully blind to the knowledge on which the law depends. If the law were otherwise, bad actors would readily and actively embrace ignorance and thereby exacerbate harm. Willful blindness – whether called "intentional ignorance," "conscious avoidance," or any other talismanic phrase – is thus in obvious tension with the law's underlying purpose. In order to incentivize the proper behavior the law is seeking, those who choose willful blindness over knowledge must still face liability of equal consequence.

This thesis is uncontroversial. Willful blindness is widely understood to be tantamount to specific, culpable knowledge, as our law-and-economics colleague Judge Richard Posner has said explicitly from the bench. We write only to add that this pervasive body of law gets the analysis exactly right: When a legal rule is keyed to knowledge, the goal is not to promote taking active steps to ensure ignorance and discourage knowledge. Rather, the law underscores the fact that knowledge should be used to reduce harm and that one who acts wrongfully in the face of knowledge is especially culpable.

In short, from an economic perspective, the law should deem an actor to have culpable knowledge of specific facts when that actor has taken active steps to avoid knowledge simply as a ploy toward avoiding legal liability. Applied here, therefore, if Defendants-Appellees ("YouTube") took active steps to avoid learning

the details of infringement on the YouTube site, Defendants-Appellees should be deemed to have the knowledge that they purposefully avoided learning.[6]

ARGUMENT

I. The Language Of The DMCA's Safe Harbor Reflects More Than A Century Of Jurisprudence That Equates Willful Blindness With Knowledge

"Willful blindness is knowledge, in copyright law . . . as it is in the law generally."[7] With this singular sentence, Judge Richard Posner summarizes the core principle of this amicus brief: Willful blindness, in both civil and criminal law, has long been held to be the equivalent of knowledge. When the law proscribes actions taken with the mental state of knowledge, an actor generally cannot escape liability by purposely avoiding such knowledge. Instead, the law

[6] For purposes of this brief, *amici* assume that Plaintiffs-Appellants have put forth evidence (1) that Defendants-Appellees knew that YouTube had very high levels of infringing material on its site, and (2) that they adopted a deliberate strategy to seek to blind themselves to specific acts of infringement in order to remain eligible for the DMCA's safe harbor under 17 U.S.C. § 512(c). This *amicus* brief does not address the separate question of whether there was sufficient evidence in the record from which a jury could infer that YouTube had actual knowledge of specific acts of infringement, or whether YouTube was aware of "facts or circumstances" from which infringing activity was apparent. This brief solely addresses the implications of YouTube's assumed willful blindness to infringing activity on its website.

[7] *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003) (Posner, J.) ("One who, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings is held to have a criminal intent, because a deliberate effort to avoid guilty knowledge is all that the law requires to establish a guilty state of mind." (internal citations omitted)).

imputes to the willfully ignorant the knowledge they contrive to avoid.[8] There is no shortage of cases and academic works acknowledging this principle.[9]

The Digital Millennium Copyright Act, like numerous other laws and statutes, makes knowledge relevant to the imposition of legal liability. Section 512(c) of the DMCA provides that internet service providers ("ISPs") are not liable for monetary relief for infringement of copyrights, by reason of storage at the direction of a user, of material residing on its system or network, if the service provider, among other things:

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[8] Rollin M. Perkins, *"Knowledge" as a Mens Rea Requirement*, 29 Hastings L. J. 953, 956-58 (1977-78); *see also* Robin Charlow, *Wil[l]ful Ignorance and Criminal Culpability*, 70 Tex. L. Rev. 1351, 1412 n. 250 (1992) (Willful ignorance "'requires in effect a finding that the defendant intended to cheat the administration of justice.'" (*quoting* Glanville Williams, Criminal Law: The General Part, § 57, at 159 (2d ed. 1961)).

[9] Civil cases have long equated willful blindness with knowledge. *E.g.*, *Mackey v. Fullerton*, 7 Colo. 556, 560 (1884) ("Willful ignorance is equivalent, in law, to actual knowledge. A man who abstains from inquiry when inquiry ought to be made, cannot be heard to say so, and to reply upon his ignorance."). The history of criminal law is no different. Edwards, *The Criminal Degrees of Knowledge*, 17 Mod. L. Rev. 294, 298 (1954) ("For well-neigh a hundred years, it has been clear from the authorities that a person who deliberately shuts his eyes to an obvious means of knowledge has sufficient *mens rea* for an offense based on such words as 'permitting,' 'allowing,' 'suffering,' and 'knowingly.'"); *see also* Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. Crim. L. & Criminology 191, 192 n. 4 (1990) ("'Men readily regard their suspicions as unworthy of them when it is to their advantage to do so. To meet this, the rule is that if a party has his suspicion aroused but he deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge.'" (quoting Williams, *supra* note 8, § 57, at 157)).

> (A)(i) does not have actual knowledge that the material or activity using the material on the system or network is infringing;
>
> (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
>
> (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material.[10]

Congress, through this provision, has proclaimed that an ISP is not entitled to invoke the safe harbor, and must instead face the potential for legal liability, when it has actual knowledge of infringing activity on its network or has awareness of facts or circumstances from which infringing activity is apparent and elects to sit on its hands rather than to remove or disable access to the infringing materials. The question, then, is whether the DMCA should be interpreted nonetheless to allow an ISP to escape liability by taking active steps to deliberately avoid actual knowledge of infringement on its system or network, such that the willfully blind would be entitled to invoke the DMCA's safe harbor. From a law and economics perspective, the answer is clearly no; any rule that would give ISPs the shelter of the safe harbor as a reward for taking active steps as a ploy to remain willfully blind is simply illogical.

[10] 17 U.S.C. § 512(c)(1)(A).

II. From An Economic Perspective, One Who Acts Willfully To Maintain Ignorance Should Be Held To Have The Knowledge He Sought To Avoid

A. Liability Rules That Punish A Knowing Bad Actor Without Punishing A Willfully Blind Bad Actor Create Incentives To Avoid Knowledge Instead Of Creating Incentives To Reduce Harm

The economic analysis of law, also known as the "law and economics" approach to law, "seeks to identify the effects of legal rules on the behavior of relevant actors and to determine whether these effects are socially desirable."[11] This approach analyzes liability rules in both tort and criminal law through the prism of optimizing social welfare and encouraging efficient prevention of accidents and intentional harms.[12] Liability rules deter bad actors by creating incentives to reduce harm.[13] Economically efficient liability rules create the appropriate incentives for socially desirable outcomes and, conversely, create the appropriate deterrents to undesirable behavior. In doing so, such rules enhance

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[11] A. Mitchell Polinsky & Steven Shavell, *law, economic analysis of, in* The New Palgrave Dictionary of Economics (Steven N. Durlauf & Lawrence E. Blume eds., Palgrave Macmillan 2008), *available at* http://www.dictionaryofeconomics.com/article?id=pde2008_L000038.

[12] *See, e.g.*, Steven Shavell, Foundations of Economic Analysis of Law (Harvard University Press 2004); Stacey Neumann Vu, Note, *Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent*, 104 Colum. L. Rev. 459, 487-88 (2004).

[13] Steven Shavell, *liability for accidents, in* The New Palgrave Dictionary of Economics, *supra* note 11, *available at* http://www.dictionaryofeconomics.com/article?id=pde2008_E000215.

social welfare "by minimizing the net social costs of wrongdoing and its prevention."[14]

Congress, in denying the benefits of the DMCA's safe harbor when a company fails to stop copyright infringement despite knowledge of infringing material or activity on its network, or when it has awareness of facts or circumstances from which infringing activity is apparent, has clearly indicated that stopping copyright infringement in such circumstances is socially desirable and that failing to do so is the opposite. To incentivize ISPs to take appropriate action, Congress made ISPs that refuse to take action liable for the full gamut of copyright damages.[15] By making knowing actors ineligible for the safe harbor, Congress attempted to deter such actors from sitting on their hands while their services are used to infringe copyrights.

From an economic perspective, the question arises of what would happen to the deterrent effects of copyright protection, and the narrow scope of the DMCA's safe harbor exemption, if willful blindness – defined as taking active steps to avoid knowledge as a ploy – was not considered tantamount to knowledge. Specifically, we ask what would happen if ISPs that have general knowledge of widespread copyright infringement on their networks but actively and consciously avoid

[14] Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. Rev. 687, 691 (1997).

[15] *See* 17 U.S.C. § 504 ("Remedies for infringement: Damages and profits").

specific knowledge of the individual infringing videos in question were to be found to nonetheless be eligible for the safe harbor when they fail to remove or disable access to the infringing materials.

Under such a rule, the deterrent effects of copyright law would suffer so severely that it is implausible to conclude that this was Congress' intent. In such a scenario, the economic incentives on ISPs are twisted. Despite knowing that its site is being used for rampant copyright infringement, the ISP would have no incentive to detect infringing content before or after it is posted and to remove infringing material upon detection. Nor would the ISP have an incentive merely to allow itself to gain knowledge in the normal course of business.

Indeed, instead of spending resources gaining and responding to such knowledge in order to *avoid infringement*, the ISP is incentivized to spend resources *avoiding knowledge* and the associated obligations. For example, the ISP in such a regime would have a strong incentive to spend resources (1) training employees on how to "look the other way" in response to potential acts of infringement, (2) implementing technologies to make reporting of infringement more burdensome, (3) developing a cynical corporate culture that belittles the interests of copyright owners, and (4) exploiting infringement for financial gain.[16]

[16] Such conduct is comparable to the facts of *In re Aimster*, where defendant encrypted the copyrighted files being transferred through its service in order to shield itself from actual knowledge. 334 F.3d at 650-51. Judge Posner refused to

Condoning willful blindness not only results in misdirecting the ISP's resources, it also results in inefficient expenditures by copyright owners, because every copyright creator has to develop its own means to search for infringing material. Those efforts are also far less effective than comparable measures by the ISP because they necessarily can result in the removal of infringing material only after infringement and the resulting damage has already occurred. This shifting of costs – when the ISP has intentionally taken active steps to avoid knowledge – yields no social benefit and is clearly economically inefficient.[17]

The goal of the DMCA is not to penalize ISPs for having knowledge of infringement on their networks; having such knowledge, by itself, is not blameworthy. Instead, the DMCA targets knowing ISPs because such ISPs have the ability to act efficiently on such knowledge and to prevent the harms that result from copyright infringement. Immunizing ISPs that actively and consciously avoid this knowledge as a ploy turns the DMCA's goal on its head by encouraging

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countenance such tactics. *Id*. ("[A] service provider that would otherwise be a contributory infringer does not obtain immunity by using encryption to shield itself from actual knowledge of the unlawful purposes for which the service is being used.").

[17] *See* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 Colum. L. Rev. 1193, 1195-96 (1985) (noting that "if I am allowed to [steal a] car [without being punished] I will have an incentive to expend resources on taking it and my neighbor will have an incentive to expend resources on preventing it from being taken, and these expenditures considered as a whole, yield no social product").

those who would otherwise have the ability to prevent copyright infringement efficiently to invest in tools to avoid that ability and perpetuate the harm.

ISPs should thus be incentivized to gain this knowledge, not to avoid it. The only way to accomplish this goal is to hold that willfully blind actors have the knowledge they seek to avoid. Under this rule, ISPs would, as the law hopes, choose knowledge over willful blindness, because only then will they be able to disable infringing materials and activities on their networks and thus qualify for the safe harbor. Consequently, it would then be unprofitable for the ISP to choose willful blindness, because such a decision, and the resources needed to implement it, would lead to liability for copyright infringement; such ISPs would be held to have specific knowledge and as such they would not qualify for the safe harbor. In short, a rule that deems the willfully blind to have the knowledge they seek to avoid deters willful blindness and incentivizes the use of resources to obtain knowledge and prevent copyright infringement. This is the efficient result of the DMCA's safe harbor scheme. Any rule excusing the willfully blind is detrimental and inefficient.

CONCLUSION

Economic analysis of the deterrent effects of the Digital Millennium Copyright Act's safe harbor for internet service providers leads to one conclusion: An internet service provider should not be able to invoke the safe harbor of the

Digital Millennium Copyright Act after hiding its head in the sand to avoid the knowledge which triggers an affirmative duty to remove or disable access to copyrighted materials. When the law penalizes actors who cause harm while acting with willful blindness to the same degree as it penalizes actors who knowingly harm, the result is that the willfully ignorant forego expenditures they would otherwise make to avoid knowledge and instead spend resources to acquire the knowledge needed to eliminate future harm. Any rule that excuses willfully blind actors encourages ignorance over knowledge, and perpetuates the harm the law seeks to stop.

As a result, if YouTube engaged in such willful blindness, it should be held to have the knowledge it purposely sought to avoid.

Respectfully submitted,

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Dated: December 10, 2010

CERTIFICATE OF SERVICE & CM/ECF FILING

I HEREBY CERTIFY that on this 10th day of December, 2010, I caused the foregoing Brief of *Amici Curiae* to be served on all counsel of record in this appeal via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1(h)(1) & (2):

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