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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT TUR d/b/a LOS ANGELES
NEWS SERVICE,

Plaintiff,

v.

YOUTUBE, INC.,

Defendant.

CASE NO. CV06-4436 FMC (AJWx)
The Honorable Florence-Marie Cooper

**BRIEF OF AMICUS CURIAE NBC
UNIVERSAL, INC., IN SUPPORT OF
PLAINTIFF ROBERT TUR'S
OPPOSITION TO MOTION OF
YOUTUBE, INC. FOR SUMMARY
JUDGMENT**

Date: May 21, 2007
Time: 10:00 a.m.
Ct. No.: 750

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MISCELLANEOUS

H. Salow, *Liability Immunity for Internet Service Providers*
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YouTube and the Law,
The Fort Wayne Journal Gazette (April 8, 2007) 16

1 which infringing activity is apparent; that upon notice it expeditiously removes
2 infringing material²; and that it has and implements a “repeat infringer” policy.

3 Thus, applying Section 512(c) as Congress wrote it -- and not as YouTube’s
4 lawyers rewrite it -- YouTube must prove that it meets each of the statutory
5 prerequisites listed above on the basis of undisputed record evidence. YouTube’s
6 failure to do so with respect to any of the requirements dooms its summary
7 judgment motion. The issue before this Court, therefore, is whether there exists any
8 triable issue of material fact with respect to whether YouTube has met *any one* of
9 the Section 512(c) requirements that Congress included to protect copyright owners
10 -- and not merely whether YouTube responds promptly to takedown notices.

11 In view of the foregoing, *Amicus* respectfully urges the Court to decide the
12 case on narrow grounds that focus on the particular record before the Court. There
13 are numerous unsettled questions as to how Section 512(c) of the DMCA applies to
14 consumer media websites such as YouTube. The answers to those questions will
15 differ depending on what a particular record shows about the nature of YouTube’s
16 business model, the extent of YouTube’s knowledge of infringement (including its
17 intention to infringe or willful blindness to obvious evidence of infringement),
18 YouTube’s ability to take active steps to prevent infringement from which it obtains
19
20

21 ² A copyright holder need not serve DMCA notice before suit. The burden always
22 remains on the ISP to prove that it meets each of the other safe harbor requirements.
23 In fact, DMCA notice alone is far from sufficient protection for copyright holders,
24 as illustrated by the facts here. YouTube claims (which *Amicus* does not concede)
25 that it removes infringing material *after* receiving DMCA notice. However,
26 YouTube omits to state that first the copyright holder must locate the infringing
27 material, which is indexed by YouTube and located *on YouTube’s own server*,
28 provide notice, and then wait for YouTube to process the notice and remove the
infringing material. During this time, the infringing material remains available on
YouTube. Moreover, as soon as it is removed, the identical infringing material can
be and, as here, has been replaced by the same or other users, requiring that the
process start over again. The DMCA recognized these realities by providing the
separate requirements for safe harbor protection in addition to, and not in place of,
notice.

1 a direct financial benefit, and YouTube’s willingness to implement a policy that
2 prevents repeat infringers among its users from continuing to infringe.

3 *Amicus* believes that thorough discovery of YouTube’s operations likely
4 would reveal that it has extensive knowledge of massive infringement on its
5 website, that this infringement is a key driver of its financial success, that it readily
6 can control that infringement, and that it takes wholly inadequate steps to prevent
7 repeat infringement on its website. Because no such discovery has occurred in this
8 case, however, the record does not provide clear answers. Although even the
9 limited record before this Court should preclude summary judgment for YouTube,
10 *Amicus* submits that at a bare minimum any disposition against Tur should be based
11 on his failure to develop adequate record evidence and not on YouTube’s
12 misreading of Section 512(c).

13 **III. YOUTUBE HAS NOT CARRIED ITS BURDEN OF PROVING THAT**
14 **IT MEETS THE REQUIREMENTS OF SECTION 512(c).**

15 **A. Qualification For The Section 512(c) Safe Harbor Is An**
16 **Affirmative Defense On Which YouTube Bears The Burden.**

17 Contrary to YouTube’s contention, DMCA safe harbor is an affirmative
18 defense on which the defendant bears the burden on summary judgment.

19 Hendrickson v. Amazon.com, Inc., 298 F. Supp. 2d 914, 915 (C.D. Cal. 2003)

20 (“[B]ecause Amazon is asserting an affirmative defense on the vicarious liability
21 claim, it must establish all elements of the safe harbor rule under the DMCA.”). The

22 same legislative history on which YouTube relies confirms this fact. See H.R. Rep.

23 No. 551, pt. I, 105th Cong., 2d Sess. at 26 (1998) (“The exemption and limitations
24 provided in this subsection are affirmative defenses, like the exceptions and

25 limitations established elsewhere in title 17.... [A] defendant asserting this

26 exemption or limitation as an affirmative defense in such a suit bears the burden of
27 establishing its entitlement.”). Accordingly, YouTube “must establish beyond

peradventure all of the essential elements of the ... defense to warrant judgment in

28 [its] favor.” Martin v. Alamo Cmty. College Dist., 353 F.3d 409, 412 (5th Cir.

1 2003). YouTube has not met that burden on this record and therefore there remain
2 triable issues of fact that preclude summary judgment. See Ellison, 357 F.3d at
3 1080.

4 YouTube's motion for summary judgment must be denied if there is a
5 disputed issue of fact as to any one of the Section 512(c) requirements described
6 above. There certainly is, at a minimum, a disputed issue of fact regarding the issue
7 raised in Tur's motion for summary judgment -- whether YouTube is receiving a
8 direct financial benefit from infringement on its website and has the right and ability
9 to control that infringement. Summary judgment for YouTube should be denied on
10 that basis alone. If the Court goes further, however, YouTube's motion should be
11 denied because there are genuine factual disputes as to whether YouTube has
12 knowledge of (or is aware of facts and circumstances indicating) infringement,
13 maintains and enforces a reasonable repeat infringer policy, or even is eligible for
14 the protections of Section 512(c) in the first place.

15 **B. Under The Applicable Common Law Standard For Vicarious**
16 **Liability, YouTube Has Not Met The Requirements Of**
17 **Section 512(c)(1)(B).**

18 Tur's motion presented a single, narrow issue: whether YouTube is
19 disqualified from the DMCA safe harbor it invokes because it "receives a financial
20 benefit directly attributable to the infringing activity, in a case in which the service
21 provider has the right and ability to control such activity." 17 U.S.C. §
22 512(c)(1)(B). YouTube's arguments on this question hinge on a clearly incorrect
23 view of the applicable law. YouTube contends that the standard for "direct financial
24 benefit" and "right and ability to control" under Section 512(c)(1)(B) is different
25 and significantly narrower than the test for vicarious liability under common law.
Memo. at 21-22. The Ninth Circuit now has firmly rejected that contention:

26 "Based on the 'well-established rule of construction that
27 where Congress uses terms that have accumulated settled
28 meaning under common law, a court must infer, unless the
statute otherwise dictates, that Congress means to
incorporate the established meaning of these terms' ...
[W]e hold that 'direct financial benefit' should be