

VIACOM v. YOUTUBE: A CASE OF INTENTIONAL INFRINGEMENT

VIACOM'S SPIN: YouTube was intentionally built on infringement. Viacom has uncovered an enormous number of internal YouTube communications showing that YouTube consciously intended to profit from infringement. In YouTube's own words, the site contained "truckloads" of infringing content. YouTube's business plan was to do whatever it took, "however evil," to attract viewers "then 3 months, sell it". As founder Steve Chen put it, YouTube needed to "steal" videos because those videos make "our traffic surge[]." Another YouTube founder even uploaded stolen content!

According to YouTube's internal estimates, its online traffic would drop by 80% if they took down infringing videos. YouTube simply did not care that it was infringing on a massive scale – their plan was to get big, sell out, and deal with the consequences later. As founder Chad Hurley put it, "save your meal money for some lawsuits!" The plan worked: Google purchased YouTube for \$1.8 billion a mere 16 months after YouTube was founded.

FACT: Viacom's creative editing and splicing of these documents is as shameful as it is easy to refute; their claims aren't supported by the actual emails. The truth is that, from the beginning, YouTube was intended to be a site for user-generated content and personal expression. Moreover, the founders went above and beyond what the law required to keep unauthorized material off the site, deploying hashing technology to prevent repeat uploads, imposing a 10-minute upload limit and equipping content owners with electronic takedown tools.

VIACOM'S SPIN: Google bought YouTube precisely because it was a haven of infringement, and it continued those illegal practices. Google knew from the beginning that YouTube's popularity depended on infringing material. Many senior Google executives warned that YouTube was a "rogue enabler of content theft" and a "video Grokster." Still, Google had an internal debate – should it comply with copyright law, or should it become a haven for infringing videos?

Google made its choice – it would turn its back on its "Don't Be Evil" corporate motto and, instead, turn a blind eye to the infringement to get more people to the site. As one executive put it: the "lesson" from YouTube was "to play faster and looser and be aggressive until either a court says 'no' or a deal gets struck."

FACT: Google bought YouTube because it was the breakout winner in the online video space. That success was built on a staggeringly diverse array of videos documenting all facets of the human endeavor. Viacom's own documents confirm this. It also wanted to buy YouTube and thought it would be a "transformative acquisition" for the company. But Viacom lost out, and its sour grapes have caused it to re-write history and make the absurd claim that YouTube lacks legitimate social value.

VIACOM'S SPIN: Google and YouTube could have stopped infringement at any time but chose not to. Google and YouTube have always had the technology to stop infringement. In

fact, they have used this technology for years to protect the content of their business partners. But they refused to use it to protect Viacom's works unless Viacom agreed to license those works on Google's terms. Effectively, Google and YouTube held out copyright protection as ransom for a license.

FACT: This story is not true – and Viacom knows it. YouTube never refused Viacom (or any other copyright owner) access to any technology based on the absence of a licensing deal. Also, the idea that there was some “magic bullet” technology out there that YouTube could have used to protect Viacom’s work is nonsense. It was precisely because no such technology existed that YouTube spent tens of thousands of hours and millions of dollars building its own industry-leading content identification technology. No other user-generated content website has done anything like that. YouTube worked closely with Viacom in developing and testing that technology, and it has always been available to Viacom, whether or not it wants to license content. In fact, Viacom has been successfully using YouTube’s technology for years to find and manage its content on YouTube.

VIACOM’S SPIN: Google and YouTube have tried to hide their wrongdoing. Google and YouTube claimed to have “lost” almost all of the internal documents that Viacom ultimately discovered showing their illegal intent. Viacom was able to get those documents only because other sources had retained their own copies. Likewise, Google executives developed selective amnesia at their depositions, and found themselves unable to recall anything about their \$1.8 billion acquisition of YouTube.

FACT: Chad Hurley produced mountains of emails and documents during discovery in this case, and there is zero evidence to suggest that the loss of some of Chad Hurley’s emails – which was documented at the time that it occurred, long before this lawsuit – was anything other than an accident. And Viacom knows it – if they had any actual evidence, they’d make a motion to the court rather than making vague, reckless, and unsupported allegations.

VIACOM’S SPIN: The law is clear that Google and YouTube are liable for their infringement. The Supreme Court unanimously held in *Grokster* that a service that intends infringement is liable for that infringement. And Congress did not immunize intentional infringement in the DMCA. To the contrary, the DMCA does not absolve a service provider that sees “red flags” of infringing activity, or even if it simply profits from infringement while failing to exercise its power to stop it. No case has ever suggested the DMCA immunizes rampant intentional infringement of the sort Google and YouTube have engaged in. And this is the right rule: the founders’ emails expressly acknowledge that they can build traffic during the delay between a content owner seeing copyright infringement and sending a takedown notice; they also acknowledge the “trend” for private videos to contain copyrighted works to be shared. When YouTube says it wants copyright owners to police the site, what they are really saying is they want to deny copyright owners *anyway* to prevent infringement.

FACT: Viacom is wrong on both the facts and the law. Viacom’s entire case depends

on the claim that YouTube is like Grokster or Napster, but anyone who has spent even a few minutes on YouTube knows that this claim is laughable. The law is clearly on YouTube's side, as Court after court has ruled that sites like YouTube that host content uploaded by users are not liable under copyright law if they respond appropriately to take-down requests. When YouTube says that copyright owners, not Internet video hosting services, should take primary responsibility for policing any misuse of their copyrights, it is saying exactly what Congress expected when it passed the DMCA. And that approach makes perfect sense: YouTube doesn't know which videos are among the thousands that Viacom and its stealth-marketers uploaded to YouTube, just like YouTube doesn't know which videos are among the countless videos that Viacom deliberately chose not to take down for promotional reasons. Only Viacom knows those things, and that's precisely why Viacom, the content owner, not YouTube, the service provider, is charged under the law with determining what content is authorized and what content is not.