

To say the stakes are huge would be an understatement. The filing references a very interesting point. If you are under the safe harbor rules, and merely a conduit to others hosting files, how in the world could you give yourself a license to those files ? In other words, Youtube owns what you just uploaded, and can do anything they want with it, without limitation, but at the same time under the DMCA they want to be considered only a conduit that falls under the safe harbors .

They cant have it both ways.

gonna be interesting !

NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION

Francis C.J. Pizzulli (State Bar No. 67151)
718 Wilshire Blvd.
Santa Monica, CA 90401
Telephone: (310) 451-8020
Fax: (310) 458-6156
E-mail: pizzullilaw@yahoo.com
Attorney for Plaintiff
Robert Tur d/b/a Los Angeles News Service
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
ROBERT TUR d/b/a LOS ANGELES
NEWS SERVICE,
Plaintiff,
v.
YOUTUBE, INC.,
Defendant.

Case No. CV 06-4436-FMC (AJWx)
NOTICE OF MOTION AND MOTION
FOR SUMMARY ADJUDICATION
OF DEFENDANT'S FIRST
AFFIRMATIVE DEFENSE
OF DMCA SAFE HARBOR;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF
ROBERT F. TUR AND
ACCOMPANYING EXHIBITS
Fed. R. Civ. P. 56
Date of hearing: December 4, 2006
Time: 10:00 a.m.
Court: The Honorable
Florence-Marie
Cooper

2

NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION

PLEASE TAKE NOTICE that on December 4, 2006 at 10:00 a.m. or as soon thereafter as counsel may be heard, Plaintiff Robert Tur will move the Court for a partial summary judgment and/or, in the alternative, an order to specify material facts that appear without substantial controversy in connection with Defendant YouTube's First [Affirmative] Defense (DMCA Safe Harbor). In particular, Plaintiff Tur seeks an order specifying that, contrary to the requirement of 17 U.S.C. §512(c)(1)(A), YouTube does receive a financial benefit directly attributable to the infringing activity alleged herein, in a case in which the service provider has the right and ability to control such activity, and therefore, that Defendant YouTube is barred from relying upon the DMCA safe harbor in this case.

This motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on October ____, 2006.

This motion is based upon the attached Memorandum of Points and Authorities, the Declaration of Robert Tur and accompanying exhibits, and pleadings and papers on file herein, along with the accompanying Statement of Uncontroverted Facts and Conclusions of Law, Fed. R. Civ. P. 56(d), in Support of Plaintiff's Motion for Summary Adjudication of Defendant's First Affirmative Defense of DMCA Safe Harbor; and [Proposed] Order Specifying Material Facts

3

NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION

1

Without Substantial Controversy and Conclusion of Law Re: First Defense of

Francis C. Pizzulli
Attorney for Plaintiff Robert Tur,
d/b/a Los Angeles News Service

4

NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION
MEMORANDUM OF POINTS AND AUTHORITIES
INTRODUCTION

There can be no dispute that serious and repetitive infringements of Tur's copyrighted works are displayed on Defendant's website, YouTube.com, on a daily basis. As is evident from YouTube's publicity campaign, directed against its reputation as an, e.g., "bootleg-heavy site,"¹ YouTube's first and paramount defense is the safe harbor provided by 17 U.S.C. §512(c)(1) of the Digital Millennium Copyright Act ("DMCA"), more particularly, the Online Copyright Infringement Liability Limitation Act ("OCILLA") portion of the DMCA. Despite the potential complexities of this case, however, the First [Affirmative] Defense of DMCA Safe Harbor is relatively simple to adjudicate. That is because one of the three essential conditions for a putative Internet service provider to escape direct, contributory or vicarious liability for undisputed copyright infringement, occurring on its website cannot be satisfied as a matter of undisputed fact. The source of the undisputed facts is party admissions derived from YouTube's very own website. Adjudication of this motion should therefore streamline discovery and further proceedings in this case.

1 Los Angeles Times, __ [date], __ [page], Fed. Evid. R. ____.

5

NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION

1

28

SUMMARY

The safe harbor immunity provided by 17 U.S.C. §512(c)(1) of OCILLA is not met by YouTube with respect to the infringements of Tur's works appearing on YouTube.com because YouTube receives a financial benefit in the form of banner advertising directly attributable to the infringing video clips. See, e.g., Exhibits ____.

BACKGROUND

Plaintiff Robert Tur is a pioneering television journalist who, in connection with his Los Angeles News Service, has obtained numerous copyright registrations for segments of newsworthy videotape footage.

Plaintiff's tape library of over 10,000 hours includes works such as Tur's first-on-the-scene tracking of the ignominious 1994 freeway chase of O.J. Simpson (PA-733-108). In 1992, Tur reported exclusively over the intersection of Florence and Normandie the shocking attack upon Reginald Denny at the start of the 1992 Los Angeles riots (PA-576-704).

Over the past two decades, Tur has helped the copyright owners of newsworthy works generally in successfully litigating limitations to the assertion of "fair use" as an excuse for pirating news organizations' copyrights. See, e.g., Los Angeles News Service v. CBS Broadcasting, Inc., 305 F.3d 924 (9th Cir. 2002);

6

NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION

28

Los Angeles News Service v. KCAL-TV Channel 9, 108 F.3d 1119 (9th Cir. 1997); Los Angeles News Service v. Tullo, 973 F.2d 791 (9th Cir. 1992).

Tur filed this complaint well before any news of a pending \$1.6 billion acquisition of Defendant YouTube by Google, Inc. Rather, in light of MGM, Inc. v. Grokster Ltd., (____ U.S. ____, 125 S. Ct. 2764 (2005)), Tur was called upon to file this complaint, a la Cincinnatus, to address a new threat to news media copyrights.

YouTube operates a web site where users may post audiovisual content for viewing via "streaming" through the YouTube website. YouTube Answer, ¶14. Defendant YouTube was started in approximately February, 2005, and its service was publicly launched December 15, 2005. YouTube has grown into one of the most popular video services on the Internet. Approximately 65,000 clips are uploaded to the YouTube service per day, with more than 100 million views per day of videos on YouTube.com. Id., ¶¶17-18 and 35.

Tur's copyrighted works are routinely infringed by users of the YouTube

service, and thereby with the direct, contributory and/or vicarious liability of YouTube. See Tur Declaration.

YouTube attempts to immunize itself from liability under MGM, Inc. v. Grokster Ltd., supra, principally by relying upon 17 U.S.C. §512(c)(1).

7

NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION

1

28

YOUTUBE DOES NOT QUALIFY FOR THE DMCA/OCILLA SAFE HARBOR, AS A MATTER OF LAW, BECAUSE OF THE DIRECT ADVERTISING BENEFITS IT OBTAINS FROM THE INFRINGEMENTS OF TUR'S WORKS.

YouTube's first defense of DMC/OCILLA safe harbor is based upon §512(c)(1), as follows:**(c) Information residing on systems or networks at direction of users.**

(1) In general. A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

(A) (i) does not have actual knowledge that the material or an 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;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

8

NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION

1

28

YouTube, however, cannot satisfy the necessary condition of §512(c)(1)(b).

As is manifest in Exhibit 1-____ attached hereto, YouTube applies banner advertising to the locations on its website where infringing copies of Tur's works have been uploaded and are displayed. In addition, YouTube advertises in juxtaposition to the infringing clips of Tur's works, promotions for other advertises in juxtaposition to the infringing clips of Tur's works, promotions for other YouTube site locations, as well as promoting its branding. See Tur Decl. and exhibits.

YouTube admits in its answer what is obvious from the attached screencaptured exhibits, i.e., that it sells advertising on its Website. Answer, ¶20. See also, e.g., Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 858 (C.D. Cal. 2006) (broad definition of "direct financial benefit" would encompass even a "future hope to 'monetize,' citing 4 Nimmer on Copyright § 12.04[A][1] (2005) (commenting on A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001))).

Further, YouTube further admits that, in effect, that it "has the right and ability to control such [infringing] activity", within the meaning of §512(c)(1)(B) by virtue of its online User Agreement. In relevant part, the User Agreement, which is entered into electronically by each user of YouTube, grants and entitles YouTube as follows:

9

NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION

1

28

...hereby grant[s] YouTube a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform the User

Submissions in connection with the YouTube Website and YouTube's (and its successor's) business, including without limitation for promoting and redistributing part or all of the YouTube Website (and derivative works thereof) in any media formats and through any media channels. [You] also hereby grant each user of the YouTube Website a non-exclusive license to access [your] User Submissions through the Website, and to use, reproduce, distribute, prepare derivative works of, display and perform such User Submissions as permitted through the functionality of the Website and under these Terms of Service....

Tur Decl., ¶ 7.

Thus, given YouTube's inability to comply with §512(c)(1)(B), YouTube should be precluded from relying on a safe harbor defense. Such an adjudication, pursuant to Fed. R. Civ. P. 56(d), will substantially streamline discovery, pretrial, and trial proceedings in this case. For example, partial summary judgment/summary adjudication of the First Defense will obviate or truncate substantial discovery and issues otherwise pertinent to the safe harbor defense, such as:

1. Whether YouTube qualifies as a §512(k) service provider;
2. The timing and/or extent of the actual knowledge of YouTube that the registered works were being infringed;
3. Whether and when, and to what extent, YouTube was aware of the facts or circumstances from which infringing was or should be apparent;

10

NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION

1

28

4. Whether and when, and to what extent, upon obtaining such knowledge or awareness of the infringing activity, YouTube has acted expeditiously to remove or disable access to infringing material;
5. Whether an alleged "take-down procedure", in the context of YouTube's business-operational model, qualifies as a meaningful take-down of infringing material if, as with Tur's notice of infringements in his complaint, the alleged take-down is immediately followed by an even greater number of infringing uploads of the cited work on a continuing basis.
6. Whether YouTube qualifies as a storage-at-the-direction-of-users service provider, within the meaning of §512(c), where the YouTube service manipulates, categorizes, sorts, and promotes the audiovisual data uploaded by its users, as well as to link and embed video clips with other sites.

Thus, it would be an appropriate use of Rule 56(d) to adjudicate the First Defense. As explained in *Boston Scientific Corp. v. B. Cordis Corp.*, 422 F. Supp. 2d 1102, 1106 (N.D. Cal. 2006):

Plaintiffs' motions do not dispose of the entire case – they merely prevent Cordis from asserting anticipation and priority as affirmative defenses. Accordingly, the Court regards the motions as motions for partial summary judgment.

11

NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION

1

28

Although motions for partial summary judgment are common, Rule 56 of the Federal Rules of Civil Procedure, which governs summary judgment, does not contain an explicit procedure entitled "partial summary judgment." However, inherent in Rule 56 is authority of the District Court to grant partial summary judgment, i.e., on a particular claim or a particular affirmative defense, even if doing so would leave other triable issues.

Therefore, the motion should be granted.

Dated: November __, 2006 Respectfully submitted,

Francis C.J. Pizzulli
Attorney for Plaintiff Robert Tur
d/b/a Los Angeles News Service

12

NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION

1

28

DECLARATION OF ROBERT TUR

I, Robert Tur, declare as follows:

1. I [along with Marika _____ and _____] am an owner of the Los Angeles News Service ("LANS").
2. LANS is a duly accredited news gathering and reporting organization, which produces video and audio tape recordings of newsworthy events.
3. LANS both operates and contracts to other news organizations and licenses and sells news video, videotapes, photographs, and other products used by other news operations for all media, including television, cable, motion picture, Internet and print media.
4. I am the owner of, inter alia, the following registered copyrighted works:
 - a. PA-576-702: "Beating of man in brown hatchback with rescue;"
 - b. PA-576-703: "Beating of man in white panel truck;"
 - c. PA-839-603: "Earthquake;"
 - d. PA-576-704: "Beating of Reginald Denny", and
 - e. PA-862-544: "North Hollywood shootout."

13

NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION

1

28

Each of these five works (collectively, "Infringed Works-A") has been uploaded on the YouTube website, YouTube.com, both before the filing of the complaint in this case, after service of the complaint on YouTube, and presently.

5. At no time have I given an assignment, license, or permission of any kind to YouTube or to any of its users who have uploaded my copyrighted works onto YouTube.com.

6. A representative set of infringements currently ongoing of my Infringed Works-A include Exhibits 1-____, attached hereto. These exhibits are true and correct copies of downloads of YouTube.com taken on _____, 2006. Each of them shows a frame from one of my Infringed Works A juxtaposed against the following types of advertising: (a) banner advertising – such as for NetFlix; (b) promotion of other YouTube.com videos (on the right side of the screen captured); (c) promotion/branding of the YouTube.com logo and name (at the upper part of the screen captured).

7. At the YouTube.com website is the User Agreement, which must automatically be accepted electronically by each user. Section 5.B of the User Agreement states in relevant part:

...you hereby grant YouTube a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform the User Submissions in connection with the YouTube Website and YouTube's (and its successor's) business, including without limitation for promoting and redistributing part or all of the YouTube Website (and

14

NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION

1

28

derivative works thereof) in any media formats and through any media channels. You also hereby grant each user of the YouTube Website a non-exclusive license to access your User Submissions through the Website, and to use, reproduce, distribute, prepare derivative works of, display and perform such User Submissions as permitted through the functionality of the Website and under these Terms of Service....

The foregoing facts are within my personal knowledge, and I could competently testify to them.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 13th day of November, 2006 at Santa Monica, California.

Robert Tur

15

NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION

1

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over

the age of 18 and not a party to the within action; my business address Boulevard, Santa Monica, California 90401.

On November 13, 2006, I served the foregoing document described as

NOTICE OF MOTION AND MOTION FOR SUMMARY

ADJUDICATION OF DEFENDANT'S FIRST AFFIRMATIVE

DEFENSE OF DMCA SAFE HARBOR; MEMORANDUM OF

-POINTS AND AUTHORITIES; DECLARATION OF ROBERT TUR

AND ACCOMPANYING EXHIBITS FED. R. CIV. P. 56

on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

BY U.S. MAIL I placed such envelope, with postage fully prepaid thereon,

in the United States mail at Santa Monica, California.

X BY PERSONAL SERVICE / FAX. By stipulation of counsel, papers in connection with this motion are deemed personally served upon Defendant YouTube, Inc. on the day of fax transmission thereof prior to 5 p.m. PST.

Claire E. Goldstein

Weil, Gotshal & Manges LLP

201 Redwood Shores Parkway

Redwood Shores, CA 94065

Fax: (650) 802-3100

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed on November 13, 2006 at Santa Monica, California.

S. Hathaway