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COURT MISSES OPPORTUNITY TO CLARIFY SCOPE OF COPYRIGHT SAFE HARBOR FOR INFRINGEMENT CASES

(Viacom Int'l, Inc. v. YouTube, Inc.)

On June 23, 2010, the U.S. District Court for the Southern District of New York issued a decision effectively granting blanket immunity to website operators who tolerate and profit from copyright infringement. In *Viacom International v. YouTube*, the district court granted summary judgment for YouTube and held that the Digital Millennium Copyright Act of 1998 (DMCA) shielded YouTube from liability, even while conceding that a jury could very well find that YouTube and Google knew about and tolerated copyright infringement (and that they generated profit from the infringement). The decision was a setback for the Washington Legal Foundation (WLF), which filed a brief in the case arguing that Congress intended the DMCA to establish a regime of shared responsibility on the part of both copyright owners *and* Internet service providers to police infringement and rigorously enforce intellectual property rights.

“Unfortunately, the court’s decision will have costly implications nationwide for copyright holders, recording artists, and content producers,” said WLF Senior Litigator Cory Andrews. “Congress enacted the DMCA to protect the intellectual property rights of copyright owners and to limit the liability of certain innocent service providers, not to eliminate altogether a service provider’s liability for tolerating copyright infringement.”

WLF’s brief was drafted with the *pro bono* assistance of Russell Frackman and Paul Montclare with the law firm Mitchell Silberberg & Knupp LLP.

Copyright laws protect owners of the copyrighted work from having their music or films downloaded without paying their owner a royalty fee. With the exploding growth of the Internet and related technological advances, methods have been developed to make copyright piracy easier. YouTube encourages and facilitates the uploading of videos from Internet users to the YouTube website, including copyrighted videos owned by Viacom and others. YouTube then displays these videos or offers

them to the public for free download. YouTube profits from this conduct by selling advertisements on the web pages that display the copyrighted videos. The more popular a video, the more users who visit the YouTube website, and the more money YouTube collects in advertising revenues.

But, as WLF argued in its brief, the DMCA was never intended to encourage service providers to exploit the existence of the statute's safe harbors by designing businesses based on an ability to avoid liability while improperly profiting from copyrighted content. Because YouTube's operations are very different from the kinds of passive, innocent service provider conduct that was before Congress when it enacted the DMCA, WLF urged the court to carefully consider the intent and purpose of Congress in passing the statute. Although Congress could not fully anticipate the technological changes that would later confront the courts, the legislative history of the DMCA reveals that Congress was concerned by the dangers posed by large-scale infringement of copyrighted works over the Internet.

Following the district court's ruling, Viacom immediately announced that it plans to appeal the decision to the U.S. Court of Appeals for the Second Circuit. WLF intends to file an *amicus* brief on appeal in support of Viacom.

WLF is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. Among other things, WLF works to protect the rights of property owners, including owners of intellectual property.

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For further information, contact WLF Senior Litigator Cory Andrews, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.