THE AM LAW LITIGATION DAILY

CORPORATE COUNSEL

Judge Blocks YouTube Copyright Class Action

Jan Wolfe

The Litigation Daily / Corporate Counsel

05-16-2013

Copyright owners from around the world, including American music publishers and a U.K. soccer league, banded together with much fanfare in 2007 to bring a class action lawsuit against YouTube LLC and its parent Google Inc. One of the plaintiffs' lawyers at Proskauer Rose told Law360 at the time that the case was "an answer to Google's imperialistic quest to take this infringement machine from the U.S. and into other countries. Other countries are saying no, that they're going to stop it."

Proskauer and its co-counsel Bernstein Litowitz Berger & Grossmann obviously failed to stop Youtube, which is now the third most popular Web site in the world. And thanks to a ruling that came down on Wednesday, their hopes of collecting much in the way of statutory or punitive damages are looking mighty slim too.

In a 13-page order, U.S. District Judge Louis Stanton in Manhattan denied class certification in the case, ruling that the copyright claims against YouTube are far too individualized to be resolved on a class-wide basis. Noting that YouTube's site traffic now exceeds 1 billion daily views, Stanton wrote that "[t]he suggestion that a class action of these dimensions can be managed with judicial resourcefulness is flattering, but unrealistic."

Judge Stanton's negativity toward the case didn't come as a surprise. He tossed it on summary judgment in 2010, along with a parallel $1 billion case brought solely by Viacom Inc., which owns the copyrights to TV shows like South Park and The Daily Show. Because YouTube complied with requests to take down infringing content, it can seek refuge in the "safe harbor" provisions of the Digital Millennium Copyright Act, he ruled at the time.

The U.S. Court of Appeals for the Second Circuit revived both the class action and the Viacom case in April 2012. The appellate court ruled that Stanton didn't properly consider whether YouTube's leader turned a blind eye to infringing conduct on the part of its users. Still, Stanton dismissed Viacom's case once again on April 18, prompting us to name Google lawyers Andrew Schapiro of Quinn Emanuel Urquhart & Sullivan and David Kramer of Wilson Sonsini Goodrich & Rosati our Litigators of the Week.

The parallel class action now seems headed for a similar fate. Proskauer and Bernstein Litowitz sought to represent two classes: copyright holders whose works were repeatedly infringed even after YouTube complied with a takedown notice (the so-called "repeat infringement class"), and music publishers whose compositions were monetized by YouTube (the so-called "music publisher class"). Stanton refused to certify both classes on Wednesday, noting that "generally speaking, copyright claims are poor candidates for class action treatment."

The lead plaintiffs, which include the Football Association Premier League Ltd and Bourne Co. Music Publishers, can still pursue claims against YouTube in an individual capacity. Proskauer's Charles Sims told us that he expects those individual claims to be stayed while Viacom appeals Stanton's dismissal of its claims

back up to the Second Circuit. Sims declined to comment further, except to say that his clients are disappointed with the class cert ruling and reviewing their options.

We didn't immediately hear back from YouTube counsel Andrew Schapiro of Quinn Emanuel.

In related news, on Tuesday U.S. District Judge William Pauley III in Manhattan revived part of a copyright case that Capitol Records LLC, EMI Virgin Songs Inc., and other record labels and music publishers brought against the digital music service MP3Tunes Inc. and its former CEO. In an earlier decision, Pauley had ruled that under the DMCA, MP3Tunes can't be liable for songs for which it never received take-down notices. Pauley reversed himself on Tuesday, citing the Second Circuit's 2012 ruling in the YouTube cases. Jenner & Block and Pryor Cashman represent the plaintiffs. Former MP3Tunes CEO Michael Robertson has Ackerman Senterfitt.

---

billboard biz
Morning Fix

RECORD COMPANIES' COPYRIGHT CLAIMS REVIVED, THANKS TO YOUTUBE DECISION

May 17, 2013

A judge has revived copyright claims by record companies and music publishers against a digital music site after re-evaluating the case following an appeals court ruling that clarified how the Digital Millennium Copyright Act can be applied. The ruling allows certain claims to move toward trial in the Manhattan federal court in a lawsuit filed by Capitol Records LLC and other plaintiffs, including EMI Virgin Songs Inc, against MP3Tunes and its former chief executive. The plaintiffs are represented by Pryor Cashman and Jenner & Block.

THOMSON REUTERS NEWS & INSIGHT

Record companies' copyright claims revived, thanks to YouTube decision

5/16/2013

By Erin Geiger Smith
(Reuters) - A judge has revived copyright claims by record companies and music publishers against a digital music site after re-evaluating the case following an appeals court ruling that clarified how the Digital Millennium Copyright Act can be applied.

The ruling allows certain claims to move toward trial in the Manhattan federal court in a lawsuit filed by Capitol Records LLC and other plaintiffs, including EMI Virgin Songs Inc, against MP3Tunes and its former chief executive. The plaintiffs are represented by Pryor Cashman and Jenner & Block.

U.S. District Judge William Pauley on Tuesday agreed to reconsider his earlier finding in the case that MP3Tunes was not liable for certain songs available on the site without authorization.

The now defunct MP3Tunes owned websites that allowed users to load and link to digital music files, and the music companies alleged that much of the music on the site infringed their copyrights.

In his earlier decision, Pauley ruled that MP3Tunes was protected by the Digital Millennium Copyright Act for those songs for which it had not received so-called takedown notices from the music companies.

The DMCA limits the liability of online service providers for copyright infringement by users, but allows content owners to notify service providers of potentially infringing content and to demand the content be taken down.

The music companies are claiming that former CEO Michael Robertson, who is a co-defendant in the case, should be found vicariously liable for MP3Tunes' actions.

Robertson had argued that the music companies' motion to reconsider should be denied. The music companies in turn had asked Pauley to reconsider whether the defendants were protected by the DMCA in the wake of an April 2012 ruling in the 2nd U.S. Circuit Court of Appeals.

In that case, Viacom International Inc v. YouTube Inc, the court reinstated claims brought by Viacom Inc against Google-owned YouTube.

Viacom alleged infringement through videos posted on YouTube of programs like "The Daily Show with Jon Stewart." The appeals court held that fact-finding is required to determine whether a website purposefully ignored users' infringement before a court can determine if the website deserves DMCA protection. The appeals court sent the case back to the trial court to determine whether YouTube's level of knowledge meant it did not deserve DMCA protection.

JUDGE APPLIES VIACOM

In Tuesday's ruling in the MP3Files case, Pauley, applying the Viacom case's reasoning, said that a jury could reasonably find that some emails to MP3Tunes from users about the origins of the music they posted should have prompted the site to evaluate possible infringement.

He said the Viacom decision indicates that copyright owners can prove a party has actual or apparent knowledge of infringement through evidence other than takedown notices. Therefore, he wrote, whether Robertson and MP3Tunes had such knowledge is also a fact question for the jury.

The judge upheld certain portions of his earlier decision, including that Robertson was liable for infringement for 47 songs he personally made available on the sites.

Ira Sacks of Ackerman Senterfitt, who represents Robertson, said that though he believed the case should have been dismissed, he thinks the legal standards will be favorable to his client at trial.

MP3Tunes does not have an attorney on the case and did not submit a response to the plaintiffs' motion for reconsideration, according to docket records.

Pryor Cashman's Frank Scibilia, who represents the music publishing plaintiffs, called the decision "significant." He said Pauley's decision affirmed that a website is not entitled to turn away when it has been shown there is a high probability it is hosting infringing content.

Andrew Bart of Jenner & Block, who represents the record company plaintiffs, directed inquiries to Capitol Records, which did not immediately respond to a request for comment.

While Tuesday's decision gives the music companies another chance to prove their claims, winning the case is not certain.

When the Viacom case returned to the district court, U.S. District Judge Louis Stanton rejected Viacom's damages claims against Google, saying the Internet giant did not exhibit willful blindness.

Scibilia told Reuters that he thinks the facts in the MP3Tunes case are different. The websites at issue in this case, he said, were designed to be a on-demand music service, but one that didn't pay licensing fees.

No trial date has been set.

The case is Capitol Records, Inc v. MP3Tunes, U.S. District Court for the Southern District of New York, No. 07-09931.

For music company plaintiffs, including Capitol Records: Andrew Bart of Jenner & Block.

For EMI music publishing plaintiffs: Frank Scibilia of Pryor Cashman.

For Robertson: Ira Sacks of Ackerman Senterfitt.

(Corrects 20th paragraph to change "a one-man music service" to "an on-demand music service.")

Follow us on Twitter @ReutersLegal | Like us on Facebook

LAW360

EMI Wins Bid For Review In MP3Tunes Copyright Row

By David McAfee

Law360, Los Angeles (May 14, 2013, 8:07 PM ET) -- A New York federal judge on Tuesday partially granted EMI record labels' motion to reconsider a 2011 ruling that found that defunct music storage service MP3TunesLLC was protected by safe harbor laws, saying the decision relied on another ruling that was later reversed.

The decision comes three months after EMI argued that the Second Circuit's decision in Viacom International Inc. v. YouTube Inc. meant that courts have to look at whether service providers were willfully blind to

infringement before granting Digital Millennium Copyright Act protection. The court in that case reversed a win for video-sharing site YouTube after finding that company insiders knew they were hosting "blatantly illegal" material.

U.S. District Judge William H. Pauley III on Tuesday sided with EMI, saying the Viacom ruling directs district courts to engage in explicit fact-finding on the issue of willful blindness before determining that a party is entitled to DMCA protections.

"This court finds that a jury could reasonably interpret several documents in the record as imposing a duty to make further inquiries into specific and identifiable instances of possible infringement," Judge Pauley wrote in the order. "Because Viacom emphasizes the importance of explicit fact-finding in establishing willful blindness, this court vacates the portion of the October 2011 order granting summary judgment to defendants on the issue of contributory infringement liability for those songs not subject to DMCA-compliant takedown notices and finds that factual issues preclude summary judgment."

The judge also withdrew its prior grant of summary judgment to the defendants on their lack of actual or apparent "red flag" knowledge of infringing content and instead concluded that there are material issues of fact that warrant trial.

The judge denied EMI's motion to revive its dismissed inducement of copyright infringement claim as a separate cause of action, saying the evidence before the court doesn't meet the "high degree of proof" required for an inducement claim.

MP3Tunes' founder, British entrepreneur Michael Robertson, also sought review of the 2011 order's finding that he was liable for direct copyright infringement of 47 songs he personally uploaded from unauthorized websites.

But the judge found that, while Robertson offered some new evidence, it fell short of what the court said would be required to rebut a finding of direct infringement.

"Because this court finds that Robertson fails to establish a broad implied license for the songs at issue, the equitable defenses he raises against EMI are without merit," Judge Pauley wrote in the order. "Further, this court rejects Robertson's request to reopen discovery or revisit earlier discovery disputes."

Fourteen EMI Group labels sued MP3Tunes and Robertson in 2007, claiming that the online provider's locker service infringed EMI's copyrights and that Robertson tried to build his business by deliberately giving consumers access to free content that infringed record labels' copyrights.

In his October 2011 ruling, Judge Pauley found MP3Tunes was shielded by the DMCA safe harbor, except in the case of several hundred songs identified in EMI affiliates' takedown notices that were not removed from users' online lockers.

MP3Tunes filed for bankruptcy in April, with Robertson blaming years of legal attacks for the site's downfall.

Representatives for the parties didn't immediately return requests for comment on Tuesday.

EMI is represented by Andrew H. Bart, Carletta F. Higginson, Joseph J. McFadden and Steven B. Fabrizio of Jenner & Block LLP; Donald S. Zakarin, Frank P. Scibilia and Mona Simonian of Pryor Cashman LLP; and Mark A. Tamoshunas of the Law Offices of Mark Tamoshunas PC.

MP3Tunes and Robertson are represented by Ira S. Sacks and Mark S. Lafayette of Akerman Senterfitt LLP.

The case is Capitol Records Inc. et al. v. MP3Tunes LLC et al., case number 1:07-cv-09931, in the United States District Court for the Southern District of New York.

--Additional reporting by Richard Vanderford and Erin Coe. Editing by Katherine Rautenberg.