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Op-Ed Contributor

Make Way for Copyright Chaos

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LAST week, Viacom asked a federal court to order the video-sharing service YouTube to pay it more than \$1 billion in damages for some 150,000 videos that Viacom claims it owns and YouTube users have shared. “YouTube,” the complaint alleges, “has harnessed technology to willfully infringe copyrights on a huge scale,” threatening not just Viacom, but “the economic underpinnings of one of the most important sectors of the United States economy.”

Yet as federal courts get started on this multiyear litigation about the legality of a business model, we should not forget one prominent actor in this drama largely responsible for the eagerness with which business disputes get thrown to the courts: the Supreme Court.

For most of the history of copyright law, it was Congress that was at the center of copyright policy making. As the Supreme Court explained in its 1984 Sony Betamax decision, the Constitution makes plain that “it is Congress that has been assigned the task of defining the scope of the limited monopoly,” or copyright. It has thus been “Congress that has fashioned the new rules that new technology made necessary.” The court explained that “sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials.” In the view of the court in Sony, if you don’t like how new technologies affect copyright, take your problem to Congress.

The court reaffirmed this principle of deference in 2003, even when the question at stake was a constitutional challenge to Congress’s extension of copyright by 20 years. Challenges are evaluated “against the backdrop of Congress’s previous exercises of its authority under the Copyright Clause” of the Constitution, it wrote. Congress’s practice — not simply the Constitution’s text, or its original understanding — thus determined the Constitution’s meaning.

These cases together signaled a very strong and sensible policy: The complex balance of interests within any copyright statute are best struck by Congress.

But 20 months ago, the Supreme Court reversed this wise policy of deference. Drawing upon common law-like power, the court expanded the Copyright Act in the *Grokster* case to cover a form of liability it had never before recognized in the context of copyright — the wrong of providing technology that induces copyright infringement. It announced this new form of liability even though at precisely the same time Congress was holding hearings about whether to amend the Copyright Act to create the same liability.

The *Grokster* case thus sent a clear message to lawyers everywhere: You get two bites at the copyright policy-making apple, one in Congress and one in the courts. But in Congress, you need hundreds of votes. In the courts, you need just five.

Viacom has now accepted this invitation from the Supreme Court. The core of its case centers on the “safe harbor” provision of the 1998 Digital Millennium Copyright Act. The provision, a compromise among a wide range of interests, was intended to protect copyright owners while making it possible for Internet businesses to avoid crippling copyright liability. As applied to YouTube, the provision immunizes the company from liability for material posted by its users, so long as it takes steps to remove infringing material soon after it is notified by the copyright owner.

The content industry was a big supporter of the Digital Millennium Copyright Act in 1998. Viacom is apparently less of a supporter today. It complains that YouTube has not done enough “to take reasonable precautions to deter the rampant infringement on its site.” Instead, the Viacom argument goes, YouTube has shifted the burden of monitoring that infringement onto the victim of that infringement — namely, Viacom.

But it wasn't YouTube that engineered this shift. It was the Digital Millennium Copyright Act. As the statute plainly states, a provider (like YouTube) need not monitor its service or affirmatively seek facts indicating infringing activity. That burden, instead, rests on the copyright owner. In exchange, the law gives the copyright owner the benefit of an expedited procedure to identify and remove infringing material from a Web site. The provision was thus a deal, created to balance conflicting interests in light of the technology of the time.

Whether or not that balance made sense in 1998, Viacom believes it no longer makes sense today. Long ago, Justice Hugo Black argued that it was not up to the Supreme Court to keep the Constitution “in tune with the times.” And it is here that the cupidity of the court begins to matter. For by setting the precedent that the court is as entitled to keep the Copyright Act “in tune with the times” as Congress, it has created an incentive for companies like Viacom, no longer satisfied with a statute, to turn to the courts to get the law updated. Congress, of course, is perfectly capable of changing or removing the safe harbor provision to meet Viacom's liking. But

Viacom recognizes there's no political support for the change it wants. It thus turns to a policy maker that doesn't need political support — the Supreme Court.

The conservatives on the Supreme Court have long warned about just this dynamic. And while I remain a skeptic about deferring to Congress on constitutional matters, this case is a powerful lesson about the costs of judicial policy making in an area as complex as copyright. The Internet will now face years of uncertainty before this fundamental question about the meaning of a decade-old legislative deal gets resolved.

No doubt the justices are clever, maybe even more clever than Congress. But however clever, it's hard to believe that their input is worth the millions in economic value that will be wasted long before they announce their decision.

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