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Court Follows Reasoning of WRF *Amicus* Brief and Argument in Copyright Case and Confirms Constraints on Potential Liability of Internet Service Providers

June 1, 2004

The U.S. Court of Appeals for the Fourth Circuit, adopting the arguments advanced by attorneys in Wiley Rein & Fielding's Copyright Practice, has rejected an effort by the major copyright industries to hold Internet service providers strictly liable for the copyright infringement of their users. The arguments were presented on behalf of a number of major Internet companies and associations.

The Court held that the 1998 Digital Millennium Copyright Act (DMCA) liability limitations do *not* supplant the long-standing requirement that a service provider, or any alleged infringer, commit a "volitional" act of copying to be held directly liable for infringement. And the Court further held that a service provider's routine and cursory screening of materials posted by its users does not constitute such volitional act giving rise to direct liability.

The WRF brief and oral argument opposed efforts by the plaintiff and the major motion picture studios and record labels to impose *per se* copyright liability on Internet service providers for copyright infringement by the users of their systems, based mainly on the case of *Playboy v. Frena*. WRF's brief argued that the *Playboy* case was an early and over-simplified approach to online infringement, and urged the Court to follow the approach set forth in the more widely-favored Religious Tech. Ctr. v. Netcom case, holding that a service provider is not directly liable for infringing materials on its system or network. Rather, service provider liability is properly analyzed under contributory and vicarious liability theories, and their additional

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requirements.

WRF further argued, and the Court agreed, that the DMCA did not abrogate the "Netcom" rule, but rather added an existing layer of liability limitations; indeed, in the DMCA legislative history Congress endorsed the Netcom approach.

The Court also adopted WRF's argument that it should apply the "substantial noninfringing use," or "staple article of commerce," doctrine to Internet service providers. Under this doctrine, applied in the landmark *Sony v. Universal City Studios*("Sony") Supreme Court case, one is not liable merely for making, selling, or providing a copying device that has substantial noninfringing uses. The Fourth Circuit explained that an Internet service provider is like the owner of a copy shop, merely providing its customers with the tools to copy, and thus is not directly liable for infringing acts by its users. This aspect of the Fourth Circuit's ruling is significant, since some have questioned whether*Sony* applies to service providers.

WRF copyright attorneys Bruce G. Joseph and Scott E. Bain filed the brief on behalf of Amazon.com, Inc., BellSouth Telecommunications, Inc., eBay Inc., Google Inc., Verizon Communications Inc., and Yahoo! Inc., and trade associations Computer & Communications Industry Association, U.S. Internet Industry Association, NetCoalition and U.S. Internet Service Provider Association. Joseph, leader of the Firm's copyright practice group, argued on behalf of *amici.*

Read more about the amicus brief

Read court opinion