

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EXPLOROLOGIST LIMITED	}	Civ. No. 2:07-cv-01848-LP
	}	
Plaintiff,	}	
	}	The Honorable
	}	Louis H. Pollak
	}	
	}	
v.	}	
	}	
BRIAN SAPIENT a/k/a BRIAN J. CUTLER	}	
_____	}	

AMICUS BRIEF OF GOOGLE INC., COMPUTER &  
COMMUNICATIONS INDUSTRY ASSOCIATION,  
AMERICAN LIBRARY ASSOCIATION, AMERICAN  
ASSOCIATION OF LAW LIBRARIES, ASSOCIATION OF  
RESEARCH LIBRARIES, SPECIAL LIBRARIES  
ASSOCIATION, AND PUBLIC KNOWLEDGE

IN SUPPORT OF DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT

*Introduction*

Google Inc.,<sup>1</sup> the Computer & Communications Industry Association,<sup>2</sup> the American Library Association,<sup>3</sup> American Association of Law Libraries,<sup>4</sup> Association of Research

<sup>1</sup> Google Inc. is a Delaware corporation with its principal place of business in Mountain View, California. YouTube, Inc. is a wholly-owned subsidiary of Google Inc. and joins in this brief under its parent.

<sup>2</sup> The Computer & Communications Industry Association is a nonprofit membership organization for a wide range of companies in the computer, Internet, information technology, and telecommunications industries, represented by their senior executives. Created over three decades ago, CCIA promotes open markets, open systems, open networks, and full, fair, and open competition. Its members include AMD, Cascode Technologies, Fujitsu, Google, The Linux Foundation, Microsoft, Netcom Solutions, OpenConnect, Oracle, Yahoo!, redhat, and Sun Microsystems.

<sup>3</sup> The American Library Association is the oldest and largest library association in the world, with more than 65,000 members. Its mission is to promote the highest quality

Libraries,<sup>5</sup> Medical Library Association,<sup>6</sup> the Special Libraries Association,<sup>7</sup> and Public Knowledge<sup>8</sup> (“Amici”) submit this brief in support of Defendant’s motion for summary judgment. A decision by this court finding liability for a claim of infringement of the United Kingdom Copyright Act under the facts of this case would have serious negative consequences for our industries and organizations, and would result in the suppression of material imbued with strong First Amendment interests. A finding of liability would also provide a welcome mat for foreign citizens who cannot make out a claim under U.S. copyright law to misuse U.S. courts by recasting their claim as one for violation of foreign law.

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library and information services and public access to information. ALA offers professional services and publications to members and nonmembers.

<sup>4</sup> The American Association of Law Libraries was founded in 1906 to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information. With over 5,000 members, the Association represents law librarians and related professionals who are affiliated with a wide range of institutions: law firms; law schools; corporate legal departments; courts; and local, state and federal government agencies.

<sup>5</sup> The Association of Research Libraries is a nonprofit organization of 123 research libraries at comprehensive, research-extensive institutions in the US and Canada that share similar research missions, aspirations, and achievements. ARL member libraries make up a large portion of the academic and research library marketplace, spending more than \$1 billion every year on library materials.

<sup>6</sup> The Medical Library Association (MLA) is a nonprofit, educational organization with more than 4,000 health sciences information professional members and partners worldwide. MLA provides lifelong educational opportunities, supports a knowledgebase of health information research, and works with a global network of partners to promote the importance of quality information for improved health to the health care community and the public.

<sup>7</sup> The Special Libraries Association (SLA) was founded in 1909 in the state of New York and is now the international association representing the interests of thousands of information professionals in over eighty countries worldwide. Special librarians are information resource experts who collect, analyze, evaluate, package, and disseminate information to facilitate accurate decision-making in corporate, academic, and government settings.

<sup>8</sup> Public Knowledge is a non-profit public interest group based in Washington D.C. that works to further the public’s interest in issues related to digital technology and information.

Pursuant to Federal Rule of Civil Procedure 44.1 and the Court's Order of October 25, 2007, Amici attach as Exhibit A to this brief an expert report from the foremost authority on United Kingdom intellectual property law, Professor Sir Hugh Laddie, Q.C. In 1995, Professor Laddie<sup>9</sup> was appointed to serve on Her Majesty's High Court of Justice of England and Wales, in the Patents and Chancery divisions. High Court judges are appointed by the Queen on the recommendation of the Lord Chancellor, after an open competition administered by the Judicial Appointments Commission. Professor Laddie served on the High Court with great distinction for ten years until his resignation in 2005, when he left the bench to become a Visiting Professorial Fellow at Queen Mary College, University of London, and to join the British intellectual property boutique Willoughby & Partners as a consultant, where he leads the firm's arbitration and mediation practice. Since September 1, 2006 he has been a full Professor of Law at University College, London, which created a Chair in Intellectual Property for him, and which has given him the responsibility of developing intellectual property law courses across the college. He is also the co-author of the leading UK treatise on intellectual property, "Modern Law of Copyright and Design," currently in its third edition with a fourth edition in preparation.

In other service at the bar, in 1992 he was appointed Vice Chairman of the Copyright Tribunal, a statutory body that settles disputes between collecting societies and users of copyrighted works over royalty rates. In 1986, he was appointed a Queen's

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<sup>9</sup> Describing the expert as "Professor Sir Hugh Laddie" is the conventional way of referring to an individual who had been knighted and then becomes a professor. For ease of referral, we refer to him as Professor Laddie.

Counsel (having been called to the bar in 1969), and argued many important copyright cases in court as a private lawyer. From 1981 to 1986, he served as a counsel for Her Majesty's Treasury, a capacity in which he represented the British Government and the British Patent Office in all areas of Intellectual Property law litigation.

### *I. Three Grounds Upon Which Summary Judgment May Be Granted to Defendant*

As Professor Laddie explains in his report, Plaintiff's claims under the UK Copyright Act are fatally deficient. There are three independent grounds upon which summary judgment may be granted to Defendant.

First, Defendant cannot be liable for any alleged acts of infringement based on authorization because, as in the United States,<sup>10</sup> there is no separate authorization right under UK law. Laddie Report ¶12, quoting *ABKCO Music & Co. Records, Inc. v. Music Collection International Limited* [1995] R.P.C. 657 (Court of Appeal, opinion of Lord Justice Neill). Instead, authorization concerns *who* may be liable for infringement; authorization is not a distinct substantive right.

Second, there is no liability under the UK Copyright Act for the uploading of the video or for YouTube's hosting of the video because no acts of direct infringement occurred in the UK as required by UK law. Laddie Report ¶¶11-13. The UK statute is explicit in limiting copyright owners' rights to those acts that occur "*in* the United Kingdom," UK Copyright Act section 16(1), quoted in Laddie Report ¶9. As the Court indicated in its October 25<sup>th</sup> order, "plaintiff's claim is derivative in nature – and thus

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<sup>10</sup> See *Latin American Music Co. v. Archdiocese of San Juan*, 499 F.3d 32, 46 (1<sup>st</sup> Cir. 2007).

entirely dependent on YouTube’s conduct being actionable.” Order at 2. Because YouTube’s conduct is not actionable, Defendant is not liable either.

Third and finally, Plaintiff’s effort to state a substantive claim of “causing the work to be seen” fails because (a) there is no such right under UK law, Laddie Report ¶17, and (b) even generously construing Plaintiff’s claim to be instead brought under the UK right of communicating a work to the public (UK Copyright Act §§16(1)(d), 20, quoted in Laddie Report ¶¶9, 17), Plaintiff’s claim fails nonetheless because as with all violations of the UK Copyright Act, the activity in question must have occurred in the UK, Laddie Report ¶¶17-18, yet no relevant activity occurred in the United Kingdom. Liability for communicating a work to the public requires that the servers from which the communication is made be located in the UK, but YouTube does not have servers in the UK, Patry Affidavit ¶3 (Exhibit B). Accordingly, no communication of a work to the public can be made out under UK law, Laddie Report ¶¶17-18.

## II. Plaintiff’s Authorization Claim Fails

Under U.S. law, copyright owners are granted the right to do and to authorize enumerated activities, 17 U.S.C. §106. The Congressional committee reports indicate that the “authorization” language does not represent a separate right, but rather is directed toward *who* may be held liable for violating a grant of a substantive right; that is, the language “to authorize” is intended to encompass the previous judge-made application of contributory infringement and vicarious liability doctrines, H.R. Rep. No. 1476, 94<sup>th</sup> Cong., 2d Sess. 61 (1976). Thus, it is not surprising that the First Circuit held in *Latin American Music Co. v. Archdiocese of San Juan*, 499 F.3d 32, 46 (1st Cir. 2007):

Mere authorization of an infringing act is an insufficient basis for copyright infringement. *Venegas-Hernandez v. Asociacion De Compositores, Editores De Musica Latinoamericana*, 424 F.3d 50, 57-58 (1st Cir. 2005). Infringement depends upon whether an infringing act, such as copying or performing, has occurred. *Id.* at 58-59. Therefore, to prove infringement, a claimant must show “an infringing act after the authorization.” *Id.* at 59.

*A fortiori*, where the unconsented-to authorization occurs in the U.S., but the alleged infringing act occurs overseas, there is no liability since the U.S. Act does not operate extraterritorially, *Subafilms, Ltd. v. MGM-Pathe Communications Co., Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088 (9th Cir. 1994)(en banc).

UK copyright law is to the same effect. Like 17 U.S.C. §106, Section 16(1) of the UK Copyright Act lists enumerated rights granted to the copyright owner (referred to as “restricted acts”),<sup>11</sup> and then in Section 16(2) lists *who* can be liable for violating those rights. Laddie Report ¶¶9-10. The authorization language in Section 16(2) of the UK Act is, again as in U.S., law, not a grant of separate right. See *ABKCO Music & Co. Records, Inc. v. Music Collection International Limited* [1995] R.P.C. 657 (Court of Appeal, opinion of Lord Justice Neill): “It is to be noted that authorizing another to do a restricted act is not itself a restricted act,” quoted in Laddie Report ¶12.

Plaintiff cannot make out a claim for infringement of UK law via authorization.

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<sup>11</sup> The right to communicate a work is first stated in Section 16(1)(d) and then expanded on in Section 20, much like the right of importation in U.S. copyright law in 17 USC §602 is a subset of the distribution right stated in 17 USC §106(3).

*III. Plaintiff's Claim Fails Because No Act of Infringement from Uploading or Hosting the Work Occurred in the UK*

Plaintiff asserts Defendant committed a violation of UK law by uploading the allegedly infringing video on to YouTube's servers, from which the video is then hosted for others to view. But as Professor Laddie also states in his report, "a finding of infringement through authorization is dependent upon there being a finding that the person who was authorized committed an infringement of United Kingdom copyright by performing, in the United Kingdom, one of the activities set out in section 16(1)." Laddie Report ¶10.<sup>12</sup> No such allegedly infringing acts occurred in the UK.

Professor Laddie's conclusion is derived from the plain language of the UK statute, which vests copyright owners only with "the exclusive right to do the following acts *in the United Kingdom*," UK Copyright Act, section 16(1), quoted in Laddie Report ¶9. It is hard to see how a legislature could make the point any more explicit. It is not contested in this case that the uploading of the video was by a U.S. citizen and occurred in the U.S. As the Patry Affidavit attached to this brief as Exhibit B states, YouTube does not have servers in the UK, Patry Affidavit, ¶3, so the hosting of the work did not occur in the UK either.

The Court noted in its October 25<sup>th</sup> order that without liability for YouTube, there can be no liability for Defendant. There can be no liability for YouTube because, among other reasons, it does not have servers in the UK, Patry Affidavit, ¶3. As Professor Laddie observes, there is no reported case in which a litigant in a UK court even argued

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<sup>12</sup> By "performing" here, Professor Laddie is not referring narrowly to the public performance right, but broadly to all rights granted in Section 16(1); "performing" here thus means "engaged in."

that the UK Act “covers activities carried on outside the jurisdiction of the UK courts.”  
Laddie Report ¶11.

In addition to the plain language of the UK statute, there is UK Court of Appeal authority<sup>13</sup> holding that the rights granted by the UK Act ‘are rights which protect the copyright only insofar as they are exercised in the United Kingdom. ... It is plain that the ‘doer’ of a restricted act will infringe the copyright if, but only if, he does that act within the United Kingdom. The act, if committed outside the United Kingdom, would not be a restricted act.’” Laddie Report ¶12, quoting Lord Justice Neill’s opinion in *ABKCO Music & Records Inc. v. Music Collection International Limited* [1995] R.P.C. 657. Professor Laddie concludes: “It follows from this that if the primary acts of which the plaintiff complains took place outside the United Kingdom there cannot be infringement of British copyright. Alleging authorization makes no difference to this. It is not an infringement to authorize a non-infringing activity.” Laddie Report ¶13.

#### *IV. Plaintiff’s “Causing the Film to Be Seen or Heard” Claim Does not Exist in UK Law*

Apparently unaware of the very statute it is suing under, Plaintiff alleges a violation of the UK Copyright Act for “causing the Film .. to be seen and heard in public within the United Kingdom.” Amended Complaint ¶11(b). Professor Laddie notes, however, “there is no such form of infringement under our law. ...” Laddie Report ¶17. No purpose would be served by permitting Plaintiff to once again amend its complaint because Professor Laddie has gone to the trouble of construing Plaintiff’s complaint in the most generous way possible and still finds the claim fatally

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<sup>13</sup> *ABKCO Music & Records Inc. v. Music Collection International Limited* [1995] R.P.C. 657.



deficient. Professor Laddie states: “I assume that what is meant to be covered is ‘communicating the work to the public,’ as dealt with by section 16(1)(d) of the Act. The latter cross-refers to section 20,” which he then quotes, Laddie Report at ¶20.

Sections 16(1)(d) and 20 are of course bounded by the same bar against extraterritorial application of UK law reviewed above: it is only a communication of the work to the public that occurs in the UK that violates the UK Act, and in this context that means servers physically located in the UK from which the communication to the public is made. As Professor Laddie states:

Although, so far as I am aware, there is no decided authority on point in [the] United Kingdom, I think it clear that “making available to the public” refers to activity which exposes the copyright material to access by members of the public. It is not necessary for the copyright owner to wait until a member of the public somewhere has taken advantage of the opportunity presented to him. All that is necessary is to show that the material is available. If this is so, then that is something which happens when the material is placed on the server, not when it is accessed. It is something which, in this case, occurred outside the United Kingdom. Once again, for the reasons set out above, it cannot be an infringement of United Kingdom copyright. If that is so, then again authorization of such non-infringing activity cannot itself be an act of infringement under the Act.

Laddie Report at ¶18.

There are sound reasons for this result: Plaintiff’s theory of UK law – under which the communication to the public right is violated by merely permitting UK citizens to view a website -- would result in UK law being impermissibly extended in an extraterritorial manner around the world to reach *all* websites, since UK citizens can access websites hosted anywhere in the world. This includes not only websites that are

not geographically delineated, such as Google.com, but also those that have a geographic specification e.g. .ca (Canada), .fr (France), or .de (Germany). For example, there is nothing preventing a UK, U.S. or any other citizen from accessing country-specific domains, such as Google.ca (Canada), Google.fr (France) Google.de (Germany) etc. One merely types in to the URL bar, Google.ca, Goolge.fr, or Google.de., and within milliseconds you are accessing a website emanating from those countries, no matter if the person typing in the URL is located in the US., the UK, or Bali. Under plaintiff's theory, once a work is posted on any website in the world, UK law applies and suit may be brought in the U.S. under its transitory tort theory. Neither the intent of Parliament or common sense supports such a clearly disastrous result.

### *Conclusion*

For the reasons stated above, defendant's motion for summary judgment should be granted: Plaintiff cannot make out a prima facie claim of infringement of UK copyright law, and its Amended Complaint must, therefore, be dismissed with prejudice.

Respectfully submitted,

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Dated: January 11, 2008

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2008, a copy of this Amicus brief, with exhibits, was mailed by Federal Express for delivery on January 14, 2008 to the following counsel to the parties:

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