No. 19-3388

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE OHIO STATE UNIVERSITY,

Plaintiff-Appellant,

v.

REDBUBBLE, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Ohio, No. 17-cv-01092

BRIEF FOR AMICUS CURIAE
ENGINE ADVOCACY
IN SUPPORT OF APPELLEE

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 19-3388 Case Name: The Ohio State University v. Redbubble

Name of counsel: Jeffrey Pearlman

Pursuant to 6th Cir. R. 26.1, Engine Advocacy
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1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

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I certify that on November 29, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Jeffrey Pearlman

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF AMICUS CURIAE

Amicus Engine Advocacy ("Engine") is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups, working with government and a community of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship.[1] Engine conducts research, organizes events, and spearheads campaigns to educate elected officials, the entrepreneur community, and the general public on issues vital to fostering technological innovation.

Engine seeks to bring to the Court's attention relevant perspectives on the impact of this case that are not likely to be fully presented by the parties. In particular, Engine submits this brief to highlight the detrimental effects that imposing direct trademark liability on platforms for third-party content would have on startups and the economy.[2]

[1] Pursuant to Fed. R. App. P. 29(a)(2), all parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than amicus curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

[2] Amicus thanks University of Southern California Gould School of Law Intellectual Property and Technology Law Clinic students Megan Lee and Steven Friedland for their substantial assistance in drafting this brief.

SUMMARY OF ARGUMENT

Startups, particularly online startups, are vital drivers of the American economy. Startups provide innovation, job opportunities, and new services that enable content creators like artists, bloggers, and filmmakers to participate in and grow their own businesses. Lawmakers and courts alike have long recognized the tremendous economic value of startups and, for this reason, have consistently applied balanced legal frameworks that allow startups to rise and prosper. Without these frameworks, many startups would die off, and with them, the innovation, jobs, and opportunities for content creators.

In attempting to hold Redbubble directly liable for its users' allegedly infringing products, The Ohio State University ("OSU") seeks to expand intermediary liability in a way that would have disastrous economic consequences. First, by allowing online platforms to be directly liable in these circumstances, platforms would be forced to face the impossible and expensive task of affirmatively monitoring all third-party activity on their websites. Since any attempt to filter infringing content would be imperfect, however, platforms would still be exposed to crippling liability, which on top of the costly policing measures, could be fatal for startups. Second, these increased costs and the legal uncertainty would discourage future online investment, effectively killing startups before they can get off the ground. Third, by disproportionately impacting startups, which lack the resources to absorb increased costs, increased direct liability would serve to entrench incumbent tech companies, thereby creating a non-competitive online marketplace.

The district court's ruling is consistent with well-established trademark infringement case law and Congressional policy. To hold otherwise would upend the carefully crafted and balanced legal frameworks that have allowed technology and startups to grow and innovate. This Court should not skew this balanced framework by departing from established trademark infringement law to create liability where it should not exist.

ARGUMENT

I. Startups Drive Innovation and Job Creation in the Online Marketplace.

Startups play a vital role in our economy as innovators and job creators. Startups are more willing and able than their well-established counterparts to take the risks necessary to bring new ideas to the market. Sam Hogg, *Why Small Companies Have the Innovation Advantage*, Entrepreneur (Nov. 15, 2011), https://perma.cc/RFN8-LF7Y. In doing so, startups drive the economy not just by creating numerous jobs, but also by enabling users like graphic artists, bloggers, filmmakers, and other content creators to participate in and profit from new economies. *See* Robert Shapiro & Siddhartha Aneja, *Taking Root: The Growth of America's New Creative Economy*, Re:Create Coalition (2017), https://perma.cc/JHR4-HBN6. As one commentator warns, "[w]ithout startups, there would be no net job growth in the U.S. economy." Tim Kane, *The Importance of Startups in Job Creation and Job Destruction*, Kauffman Foundation 2 (July 2010), https://perma.cc/TEJ2-9DZM; *accord* Michael Mandel, *How the Startup Economy is Spreading Across the Country and How It Can Be Accelerated*, Progressive Policy Institute 1 (Mar. 29, 2017), https://perma.cc/B5VJ-5JXC.

The importance of high-tech, high-growth startups is not lost on lawmakers, either. For example, Senator Wyden has recognized, "[m]ost innovation in the digital economy comes from the startups and small firms." Senator Ron Wyden, Press Release, *Wyden Issues Warning About SESTA* (Nov. 8, 2017), https://perma.cc/XXD6-QMX2; *see also* Representative Chrissy Houlahan & Representative Cathy McMorris Rodgers, *What Makes America Great is What Makes American Startups Thrive*, Roll Call (Aug. 21, 2019), https://perma.cc/26GX-L93T ("small businesses and startups are the true drivers of our economy.").

For these reasons, policymakers and courts have created and applied balanced legal frameworks that allow startups to rise and prosper. James Pethokoukis, *Should Big Tech Be Held More Liable for the Content on Their Platforms?*, American Enterprise Institute (Mar. 20, 2018), https://www.aei.org/technology-and-innovation/should-big-tech-be-held-more-liable-an-aeideas-online-symposium/ ("many [] popular applications . . . might not have survived Americans' litigious nature while waiting for the evolution of the law."). Chipping away at existing legal frameworks governing intermediary liability would create new and onerous burdens for online startups, put their users at risk of over-enforcement, and open doors to crippling litigation. This would all come with devasting consequences for the American economy, not just eliminating valued innovators and job creators, but also by stripping content creators of the platforms their livelihoods depend on.

II. Holding Platforms Like Redbubble Liable for Direct Infringement Would Have a Severe Negative Impact.

Holding platforms like Redbubble—with no direct involvement in or even knowledge of specific infringing conduct—directly liable for trademark infringement would be harmful to startups and other key socioeconomic contributors. Numerous platforms, many of which are startups, provide services that build on and add value to third-party content in the same manner as Redbubble. These platforms help content creators that lack the resources to create or sustain businesses on even a small scale to connect to consumers globally. *See* Shapiro, *Taking Root: The Growth of America's New Creative Economy* at 2 ("In 2017, nearly 17 million Americans earned income posting their personal creations on [nine chosen] platforms . . . [and] earned a baseline of $6.8 billion . . . ."). Should Redbubble be held liable, existing and prospective startups and the legitimate content creators who rely on them would likely be forced out of the market, ultimately leading to a less innovative and less competitive online marketplace and harming the economy as a whole.

A. *Increased Liability Would Impose Unsustainable Costs on Existing Startups.*

If Redbubble were held liable for direct infringement, platforms would be forced to assume serious—even fatal—financial burdens both by way of increased costs required for proactive policing and protracted litigation.

First, if a startup were directly liable for the infringing activity of its users, it would be faced with the impossible task of constantly monitoring all of the content uploaded by all of its users. For Redbubble this would mean affirmatively monitoring the activity of 845,000 independent third parties and the content of nearly 315 million products. *See* Appellee's Br. at 8.

To police on such a large scale, platforms would be required to deploy often-unreliable automated content moderation tools and hire numerous content moderators, which many platforms simply cannot afford. *See* Jennifer M. Urban et al., *Notice and Takedown in Everyday Practice* 64 (UC Berkeley Public Law Research Paper No. 2755628, Mar. 30, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628 (noting that some small platforms already struggle to comply with the DMCA's notice and takedown procedure for copyright, and that "[t]he struggle increased further if pressure to implement [proactive] measures arose."); *see generally* Béatrice Martinet & Reinhard J. Oertli, *Liability of E-Commerce Platforms for Copyright and Trademark Infringement: A World Tour*, American Bar Association (2015), https://perma.cc/3RPT-WBSN (cautioning against automated trademark detection, as it "may [] cause the blocking of legitimate offers . . . [which] would have a chilling effect on business."). And as a startup's user base grows—a good thing for economic growth and innovation—the costs of affirmatively policing content would also grow, disincentivizing growth. These are costs that startups simply cannot afford.

OSU argues that trademark holders have "[no] responsibility to police [platforms] to identify and request removal of counterfeits," as policing sites themselves "would be a full time job." Opinion, R. 48, Page ID # 918 (quoting OSU's letter to Redbubble). OSU's unwillingness to police its own marks, however, demonstrates why proactive policing by platforms would be impractical. According to OSU, policing *eight* trademarks is overly difficult and burdensome. But there are over *2.5 million* active trademarks in the U.S. alone. *4th Quarter FY 2019, At a Glance*, United States Patent and Trademark Office (visited Nov. 25, 2019), https://www.uspto.gov/dashboards/trademarks/main.dashxml. Learning, monitoring, and identifying the alleged infringement of millions of marks in millions of products is much more than "a full time job." Shifting that burden to Internet startups would create an impossible and unaffordable task.

Volume is not the only problem with saddling platform startups with direct liability: they are also ill-equipped to accurately identify specific instances of infringement in the first place. Trademark owners are far better situated to initially identify potential infringement. In particular, rightsholders are far better positioned to recognize their own marks and identify when the use of a mark might confuse consumers or otherwise constitute infringement. They also are the only ones in a position to recognize when use of a mark is licensed and therefore not infringing.

If, as OSU suggests, trademark holders should have "[no] responsibility . . . to identify and request removal of counterfeits," Opinion, R. 48, Page ID # 918, platforms would be forced to try to identify all infringements themselves, leading to inferior enforcement and worse results. Without the trademark holder's expertise, platforms would both over- and under-police—unintentionally blocking some legitimate content[3] while letting others slip through the cracks of an imperfect system. Martinet, *Liability of E-Commerce Platforms for Copyright and Trademark Infringement: A World Tour*; *see* Urban, *Notice and Takedown in Everyday Practice* at 56–60.

Second, even if startups were able to shoulder the costs of human- and automated-content moderation systems, this would not eliminate the risk of crippling liability. *Some* infringing material would remain even after implementing costly policing measures, and platforms would still face the constant risk of litigation and ruinous damages. Platforms would therefore be forced to assume legal costs, which for startups, could be just as fatal. *See* Adi Kumar, *CDA 230 Success Cases: Wikipedia*, Electronic Frontier Foundation (July 26, 2013), https://perma.cc/5FG2-

[3] The problem of over-policing is illustrated by current events in copyright enforcement. An image-hosting service recently apologized for mistakenly removing images for purported copyright infringement beyond what even the rightsholder wanted. *See, e.g.*, Matt Novak, *Baby Yoda GIFs Are Back Online and Giphy Has Apologized to Disney for Some Reason*, Gizmodo (Nov. 25, 2019), https://perma.cc/HRP3-LYAY.

LV99 ("[i]f the Wikimedia Foundation could be held legally liable every time there was a good faith inaccuracy on its Projects, we would have most likely been sued out of existence pretty early on.").

B. Increased Liability Would Discourage Entrepreneurs and Investors from Entering the Market.

The impact of expanding platforms' liability would not end with existing startups. It would risk future innovation and deter new startups before they can even get off the ground.

While any new business must cope with prospective operating and legal costs, substantially increasing those costs to cover the direct liability risk of all users would likely doom startups, which have limited budgets and depend on investment. Online startups in particular have been able to innovate and succeed because they can get started without hiring teams of lawyers and content moderators. Accordingly, the level of investment needed to realize their ideas is attainable. As numerous investors recognized in a letter to the FCC supporting net neutrality to promote startups, "without the need for lawyers, large teams, or major revenues, . . . startups have had the opportunity to experiment, adapt and grow . . . ." Reply Comments of Engine Ex. A, WC Docket No. 17-108 (Aug. 30, 2017).

Expanding platform liability would discourage future investment, as it would not only create additional operating costs, but also expose platforms to litigation, creating further uncertainty on investment. *See id.*; Matthew C. Le Merle et al., *The*

Impact of Internet Regulation on Early Stage Investment, Engine & Fifth Era (Nov. 2014), https://perma.cc/FX9B-PYSA. Indeed, in the copyright context, investors report concern about intermediaries like Redbubble being the focus of efforts to combat user-generated infringing content. Ultimately, exposing intermediaries to increased direct liability would deter many investors. Merle, *The Impact of Internet Regulation on Early Stage Investment*.

Policymakers are also motivated to have investors be interested in innovation, not legal fees. *See, e.g.*, Senator Ron Wyden, *Floor Remarks: CDA 230 and SESTA*, Medium (Mar. 21, 2018), https://perma.cc/V5WZ-VCAE ("Fewer [investors] will be willing to risk their deep pockets if their early-round investments are swallowed up by legal fees instead of paying for coders."). In order to allow online startups to obtain new and continued investment, they must be able to operate with the certainty that they will not face the massive legal liability inevitably created by holding them responsible for all of their users' activities.

C. *Increased Liability Would Reduce Competition and the Harm the Economy.*

Increased liability and legal uncertainty would ultimately reduce online competition by forcing newcomers out of the market and increasing barriers to new entry. This would leave only the established, well-resourced mega-platforms operating, with the only potential competition coming from other established, well-resourced companies.

As discussed above, using the threat of direct liability to force platforms to police all user-generated content would create new burdens and open doors to expensive litigation and damages. *Supra* Part II.A–B. But those burdens and costs would not affect all platforms equally. Instead, it would effectively create a non-competitive playing field, because only large, well-funded, and established companies—like incumbent tech giants—can meet those burdens and stay in business.

Large companies have the resources necessary to handle ongoing litigation and increased liability, whereas startups do not. Indeed, "[w]hen platform liability risks expand, wealthy incumbents can hire lawyers and armies of moderators to adapt to new standards. Startups and smaller companies can't." Daphne Keller, *Toward a Clearer Conversation About Platform Liability*, Knight First Amendment Institute (May 7, 2018), https://perma.cc/85CY-FFXC; *see also* Elliot Harmon, *Google Will Survive SESTA. Your Startup Might Not*, Electronic Frontier Foundation (Sept. 22, 2017), https://perma.cc/5V6S-AV59

In sum, "[h]igh regulatory costs entrench incumbents." Daniel O'Connor, *The Digital Single Market and A Duty of Care: Preserving the Transatlantic Legal Foundation of a Thriving Internet*, Disruptive Competition Project (July 9, 2015), https://perma.cc/YJH4-5YFV. For this reason, holding Redbubble liable would irreparably harm the online marketplace and risk eliminating innovators and job creators that the American economy depends on.

III. Courts and Congress Have Historically Designed and Applied Balanced Legal Frameworks that Foster Innovation and Growth for Internet Platforms.

As Redbubble has explained, existing trademark law does not extend direct infringement liability to Internet platforms that enable third parties to upload and sell content they create. Instead, the secondary liability standards not at issue in this case would be the right way to determine if a platform was liable for alleged infringement by its users. *See* Appellee's Br. at 22.

Contrary to settled expectations, OSU asks the Court to apply a novel and unprecedented approach to find Redbubble directly liable for infringement. This is inconsistent with the established secondary liability framework for assessing whether platforms have culpably facilitated infringement. Moreover, OSU's request contradicts policies underpinning other legal frameworks that govern how platforms engage with third-party content.

Lawmakers have consistently understood the problem of holding platforms directly responsible for the wrongful conduct of their users, developing balanced legal frameworks governing liability in response. Consequently, these frameworks have explicitly or implicitly fostered innovation and permitted startup growth. This

Court should not create a new form of direct infringement liability that would be inconsistent with both broader policy and statutory text.

A. Creating Liability Here Would Undermine Well-Established Doctrine Governing When and How Intermediaries are Liable for Trademark Infringement.

Although the Lanham Act does not explicitly address intermediaries like Redbubble, decades of well-settled case law address the liability of those accused of facilitating infringement. *E.g.*, *Inwood Labs. v. Ives Labs., Inc.*, 456 U.S. 844 (1982); *Coach, Inc. v. Goodfellow*, 717 F.3d 498 (6th Cir. 2013); *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996). Intermediaries are only contributorily or vicariously liable for infringement under specific circumstances that establish a connection between the intermediary and infringing party, ensuring that intermediaries are not automatically liable for all of their participants' activities.

For instance, a party is liable for contributory infringement only if it "intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement." *Inwood Labs,* 456 U.S. at 854. This standard requires either active assistance of the platform or knowledge of specific instances of infringement (which OSU refused to provide).

Similarly, this Court has found vicarious liability for trademark infringement when an intermediary and infringing party "have an actual or apparent partnership, have authority to bind one another in transactions, or exercise joint ownership or control over the infringing product." *Grubbs v. Sheakley Grp., Inc.*, 807 F.3d 785, 793 (6th Cir. 2015) (citing *Coach, Inc. v. Goodfellow*, 717 F.3d at 502). This requires far more than a generic platform-user relationship.

These common law doctrines provide the legal certainty that allows platforms to better assess and mitigate their risks while allowing them to pursue innovative activities online.

B. Trademark Law Should Remain Consistent with Other Areas that Handle Intermediary Liability Similarly, Avoiding Direct Liability for Third Party Conduct and Promoting Innovation.

Platforms can find a similar legal certainty in statutes in other areas of law because lawmakers have relied on analogous policies when crafting laws governing Internet platforms. In particular, lawmakers have repeatedly declined to automatically hold platforms directly liable for a user's conduct, recognizing the impossible, costly burden of policing content and the importance of promoting innovation.

For instance, in copyright law, many similar legal doctrines apply to intermediary liability. For example, Section 512 of the Digital Millennium Copyright Act shields platforms from infringement liability provided they follow minimum guidelines and address specific instances of alleged infringement once they know about them. *See* Digital Millennium Copyright Act of 1998 § 202, 17 U.S.C. § 512(c) (2019). Similar to secondary trademark infringement, platforms may still be found liable for specific instances of copyright infringement that they know about.

Congress also recognized that rightsholders are better situated to identify copyrighted works and infringement, leaving responsibility for that task with the owners rather than the platforms. S. Rep. No. 105-190, at 20 (1998); *see also* 17 U.S.C. § 512(c)(3) (shifting the burden of monitoring on copyright owners with the notice and takedown procedure); Urban, *Notice and Takedown in Everyday Practice* at 34–35 (noting that since the 2000s, most rightsholders utilize automated systems and apply a secondary filter through manual checks). The same reasoning is mirrored in the trademark context, where owners of the marks are similarly best-suited to know what potential infringement looks like. *Supra* Part II.A.

In addressing user-generated content more generally through Section 230 of the Communications Decency Act, Congress again decided not to hold platforms liable for all of their users' activities. *See* 47 U.S.C. § 230. With a stated goal of promoting continued development of the Internet, *id.* § 230(b)(1), this law reflects Congress's recognition that it would be impossible for platforms to "take the responsibility to edit out information that is going to be coming into them from all manner of sources onto their bulletin board." *See* 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995).

Similar policies are reflected in judicial opinions applying the law. Courts acknowledge Congress's desire "to promote the development of e-commerce." *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004) (quoting *Zeran v. America Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997) (applying Section 230)). Notably, this Court has also recognized Congress's vision for "an uninhibited, robust, and wide-open internet," rejecting a rule that would have "cloud[ed] that vision." *See Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 415 (6th Cir. 2014) (citing 47 U.S.C. § 230 (a)(1)–(5)). The burden OSU wishes to impose on Redbubble is not only unrealistic but contrary to these principles, embodied in existing law across a variety of domains—including trademarks.

Congress and the courts have consistently recognized the danger of holding platforms liable for *all* of the activities of their users, whether the subject matter is trademark, copyright, or defamation. There is no reason for this Court to deviate from existing trademark infringement law to create such liability now.

CONCLUSION

The online startup ecosystem is of vital importance to our economy. Startups thrive today in large part because of the balanced legal frameworks that govern intermediary liability. In this case, applying that framework results in Redbubble not directly being liable for trademark infringement. Were the Court to accept OSU's argument, startups would be saddled with unsustainable compliance costs and legal liability that would harm existing startups and deter future investment, leading to reduced services, slowed innovation, and harm to consumers and the economy alike. For the reasons stated above, amicus Engine respectfully requests that this Court affirm the decision below.

Dated: November 29, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 3704 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b).

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Date: November 29, 2019

/s/ Jef Pearlman/
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I hereby certify that on November 29, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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