PRAGERU V. YOUTUBE

ERIC GEORGE

The most important lawsuit in America right now—and perhaps the free world—is Prager University v. YouTube. You might consider this a grandiose statement, especially since I'm the lead attorney for PragerU. I assure you, it's not.

That's because this case is about the most fundamental freedom Americans have: freedom of speech, as enunciated in the First Amendment to the United States Constitution. All our freedoms—the very *concept* of freedom—springs from this right. Lose it, and we're no longer free—not as individuals, and not as a nation. I'm not willing to accept that. PragerU doesn't accept that. And you shouldn't, either. Okay, so how did we get into this situation? A little background.

PragerU is what is called a 501(c)(3)—a non-profit educational media company. It's known primarily for its five-minute videos. In 2016, viewers began to notice that certain PragerU videos were no longer available. YouTube had placed them on its "restricted" list, which prevents the videos from playing on computers using content filters to screen out violence and pornography.

PragerU assumed this was simply a case of "bad algorithms." But YouTube said no—each "restricted" video had been reviewed by a walking, talking human. The list included such diverse titles as "Are the Police Racist?" by Heather Mac Donald, "Israel's Legal Founding" by Alan Dershowitz, and even a video on the Ten Commandments by Dennis Prager. YouTube deemed each one unsuitable for young people, treating these videos the same as they would, say, for ones containing pornography or excessive violence. Keep in mind, this is PragerU we're talking about—as Main Street as you can get! And that, ultimately, turns out to be the issue.

PragerU's center-right content—many of their videos, by the way, have no political theme at all—offends YouTube's sensibilities. In other words, the videos aren't being restricted to protect young people from inappropriate content; they're being restricted to protect young people from ideas YouTube disagrees with.

We didn't want to sue. We tried to reach an accommodation. But when YouTube wouldn't take the "offending" videos off their restricted list—there are now 100 on that list—we had no other option. YouTube was infringing on our right to free speech. We filed in federal court in late 2017, and thereafter in California state court.

Wait a second, you might say—YouTube, which is owned by Google, is a private company. Can't they do anything they want? The answer is: Yes...and no. Yes, if they are a publisher. No, if they are a public forum.

So what's the difference? This gets right to the nub of the matter. A publisher chooses the content that resides on its site. The New York Times is a perfect example. You can't write a story and just expect the New York Times to publish it. The Times chooses what appears on its pages or website. And if they publish a story that contains a malicious lie, or violates copyright law, they can be sued. PragerU is also a publisher. It decides what material gets placed on its website. Most sites are publishers.

In contrast, a public forum—which can be a physical location, like the classic town square or a shopping mall, or a virtual location, like a website—is a place that must allow individuals and organizations to exercise their free speech rights.

YouTube is an example of a public forum. In fact, YouTube describes *itself* as a public forum. You make a video. YouTube hosts it. And anyone with an internet connection can watch it. Facebook is also a public forum, and so is Twitter.

Here's why this is so important: A public forum under Section 230 of the Communications Decency Act—a law co-sponsored by Democrats and Republicans and passed by Congress in 1996—is not subject to liability for content placed on its site. If someone posts a video about how to build a bomb or writes a threatening comment, the public forum website cannot be held legally responsible for that content.

That's a *good* thing. It gives YouTube and other public forums the chance to host a wide variety of material, from nature videos to political diatribes, without fear of being sued. And it worked. And then, it didn't.

A few years ago, the social media giants—Google, Facebook, YouTube, and Twitter—started to behave not like public forums, but like publishers. They stopped following Section 230, which specifically requires that these websites promote "a true diversity of political discourse," and began to judge content by their own political and social criteria.

In other words, the social media giants want it both ways: They want the protections of a public forum and the editorial control of a publisher. We're fine if they're a publisher. And we're fine if they're a public forum. They just can't be both.

If we win our legal action, YouTube will have to return to the way things were when they started. That's freedom. But if we lose, YouTube gets to act as a publisher while pretending to be a public forum. That would mean much less freedom.

And then, eventually, no freedom. Because the most powerful internet sites on earth will determine what you see—and what you don't.

I'm Eric George, Managing Partner, Brown George Ross, for Prager University.