

Court Ruling Increases Difficulty of Protecting Copyrighted Material Online

May 2012

It is not uncommon for television stations and other media organizations to find their copyrighted content on third-party websites, without authorization—posted not by the site operator, but by a user. Such posting of copyrighted material online could run afoul of the federal Copyright Act, which provides a copyright holder with exclusive rights to reproduce a copyrighted work, prepare derivative works based on a copyrighted work and to publicly perform a copyrighted work.

A recent ruling by the United States Court of Appeals for the Second Circuit, however, will make it more difficult for copyright owners to hold YouTube and other “user-generated content” sites responsible for hosting and distributing infringing material. In *Viacom International, Inc. v. YouTube, Inc.*, Viacom sued YouTube alleging direct and secondary copyright infringement for displaying, reproducing and publicly performing more than 60,000 works for which Viacom owned the copyright. A consolidated class action alleged similar violations on behalf of other copyright owners.

YouTube claimed that it was protected by the safe harbor provision of the Digital Millennium Copyright Act (DMCA), which provides immunity to service providers if they: (i) do not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, are not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, act expeditiously to remove, or disable access to, the material. Under this standard, YouTube claims it could not have been liable for any copyright infringement where it did not know that actual clips were both uploaded to its site and infringing. The lower court

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agreed, granting YouTube's motion for summary judgment.

The Second Circuit opinion, which largely affirms the lower court, provides clarity to content providers and service providers about the standard for actual knowledge in the DMCA safe harbor. As to the first requirement under the safe harbor, the court determined that a service provider only has "actual knowledge" if it is aware of specific infringing activity. General knowledge that there may be infringing clips on the site would not suffice; the service provider would have to know that a specific clip is both on its site and infringing. The court determined that requiring knowledge about specific infringing clips is consistent with the requirement that a service provider expeditiously remove access to the material "upon obtaining such knowledge." As the court observed, "expeditious removal is possible only if the service provider knows with particularity which items to remove."

The court also clarified the relationship between the "actual knowledge" provision in part one and the "facts or circumstances" provision in part two, finding that the former is a subjective standard, while the latter is objective. Thus, there are two bases upon which a service provider can obtain sufficient knowledge to lose its immunity if it fails to remove infringing clips: first, the provider can obtain subjective knowledge of the presence of infringing material; and second, the provider can obtain knowledge of facts and circumstances that would make the infringement "'objectively' obvious to a reasonable person." The court did not opine on what facts and circumstances should provide a "red flag" to a service provider about the presence of infringing content.

While the "actual knowledge" standard articulated by the Second Circuit will make it more difficult for content providers to hold services like YouTube responsible for hosting infringing material, this does not equate to absolute immunity for such services. The court cited several instances where YouTube appeared to have knowledge of specific infringing material, such as a March 2006 report from YouTube's founder stating that, "[a]s of today, episodes and clips of the following well-known shows can still be found [on YouTube]: Family Guy, South Park, MTV Cribs, Daily Show, Reno 911, [and] Dave Chapelle [sic]." For those clips, the court determined that a reasonable jury could have found that YouTube had the requisite actual knowledge that it was hosting infringing material on its site.

As a result of this decision, content providers that want to keep their copyrighted material from being distributed online without their permission will have to take a more active approach to monitoring sites like YouTube for infringing material and notifying the sites when they find such material. By sending a takedown notice, content owners can ensure that service providers have actual knowledge that they are hosting infringing material and that they will have to expeditiously remove such material to avoid liability.