

VIACOM V. YOUTUBE - DMCA Case Summary

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The VIACOM V. YOUTUBE decision, decided: April 5, 2012 by the Second Circuit out of New York, deals with issues of first impression related to the DMCA knowledge standard, and issues related to what automated software functions may disqualify a service provider from the DMCA “storage” safe harbor.

I. THE KNOWLEDGE REQUIREMENT RULINGS

The DMCA requires the ISP to “expeditiously” remove or disable the infringing material when the service provider has "actual" knowledge or "red flag" knowledge of specific infringing activity on its website or service. This case adds new clarity to the definition of “knowledge” and sanctions applicability of a new theory of “knowledge” that is not in the DMCA itself to be applied to DMCA cases.

First, the court rejected Viacom’s argument that its “estimates” of the large amount of infringing content on YouTube “suggest that YouTube was conscious that significant quantities of material on the YouTube website were infringing.” The Court said,

“But such estimates are insufficient, standing alone, to create a triable issue of fact as to whether YouTube actually knew, or was aware of facts or circumstances that would indicate, the existence of particular instances of infringement.”

So, mere estimates of the amount of infringing content, by themselves do not necessarily indicate that the service provider had “knowledge”.

Second, the Court upholds a large body of precedent that requires the service provider to remove infringing material only after it has knowledge or awareness of specific and identifiable infringing activity (as opposed to a general awareness that infringing material may be present on the website or service). The Court’s says:

“Based on the text of § 512(c)(1)(A), as well as the limited case law on point, we affirm ... that actual knowledge or awareness of facts or circumstances that indicate specific and identifiable instances of infringement will disqualify a service provider from the safe harbor.”

Third, the Court clarifies the standards for “actual” knowledge” and “red flag” knowledge”. The Court clearly specified the tests for actual and red flag knowledge.

Actual knowledge = a subject test
Red Flag knowledge = an objective test

The Court says:

“In other words, the actual knowledge provision turns on whether the provider actually or “subjectively” knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement “objectively” obvious to a reasonable person. The red flag provision, because it incorporates an objective standard, is not swallowed up by the actual is not swallowed up by the actual knowledge provision under our construction of the § 512(c) safe harbor. Both provisions do independent work, and both apply only to specific instances of infringement.”

The Court listed the previous decisions that looked at the issue (only 3 cases) and said,

“While we decline to adopt the reasoning of those decisions in toto, we note that no court has embraced the contrary proposition—urged by the plaintiffs—that the red flag provision “requires less specificity” than the actual knowledge provision.”

Fourth, the Court considered an issue of first impression and held that,

“[A]lthough the DMCA does not mention “willful blindness”, the willful blindness doctrine may be applied, in appropriate circumstances, to demonstrate knowledge or awareness of specific instances of infringement under the DMCA. “

Viacom argued that YouTube was “willfully blind” to specific infringing activity. i.e., it applied the common law willful blindness doctrine in the DMCA context.

A person is “willfully blind” or engages in “conscious avoidance” amounting to knowledge where the person ““was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.” The exact meaning of this standard will be litigated in DMCA cases to come.

Fifth, the Court reaffirmed that “Section 512(m) is explicit: DMCA safe harbor protection cannot be conditioned on affirmative monitoring by a service provider.”

II. RIGHT & CONTROL and Automated Software Functions That May Disqualify the Service Provider from the Storage Safe Harbor.

The §512(c) storage safe harbor provides that an eligible service provider must “not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.” 17 U.S.C. § 512(c)(1)(B). This is called the “right and control” provision.

Service providers usually incorporate many automated software functions that run behind the scenes to make the user experience easier or to decrease load on the provider's servers and resources. The question is whether or not these automated software functions constitute "right and control" so that the service provider is disqualified from the "storage" safe harbor.

The Court indicated that, "...the relevant case law makes clear that the § 512(c) safe harbor extends to software functions performed "for the purpose of facilitating access to user-stored material." Thus, the question for the Courts is to determine if the software functions for that purpose or for some other purpose (that would disqualify the service provider from immunity).

The Court said,

"Accordingly, we conclude that the "right and ability to control" infringing activity under § 512(c)(1)(B) "requires something more than the ability to remove or block access to materials posted on a service provider's website." MP3tunes, LLC (emphasis added) (citations omitted)."

"The remaining—and more difficult—question is how to define the "something more" that is required."

The "something more" means the Court looks to see what the service provider is doing behind the scenes or in the back end to provide the service to the user. This is a case by case consideration – it all depending on what the service provider does in each case.

The court ruled that the following automated software functions of YouTube were not "something more" which means that by virtue of those functions, YouTube did not have "Right and Control" and was still eligible for DMCA protection under 512(c).

A. Transcoding & Playback. The Court found that transcoding and playback were automated software functions that fell within the "Storage" safe harbor storage ("by reason of the storage at the direction of a user."). Transcoding involves "[m]aking copies of a video in a different encoding scheme" in order to render the video "viewable over the Internet to most users." The playback process involves "deliver[ing] copies of YouTube videos to a user's browser cache" in response to a user request." (citations omitted)

B. Thumbnails of 'related videos'. The "related videos" function involves a YouTube computer algorithm identifying and displaying "thumbnails" of clips that are "related" to the video selected by the user. "Viacom claimed that this practice constitutes content promotion, not "access" to stored content, and therefore falls beyond the scope of the safe harbor."

The Court said,

"The record makes clear that the related videos algorithm "is fully automated and operates solely in response to user input without the active involvement of YouTube employees." (citation omitted).

Furthermore, the related videos function serves to help YouTube users locate and gain access to material stored at the direction of other users. Because the algorithm “is closely related to, and follows from, the storage itself,” and is “narrowly directed toward providing access to material stored at the direction of users,” (citation omitted), we conclude that the related videos function is also protected by the § 512(c) safe harbor.”

However, with respect to a function known as “third party syndication,” the Court said this software function is “the closest case.”

Here is what happened in the Court’s words:

In or around March 2007, YouTube transcoded a select number of videos into a format compatible with mobile devices and “syndicated” or licensed the videos to Verizon Wireless and other companies. The plaintiffs argue—with some force—that business transactions do not occur at the “direction of a user” within the meaning of § 512(c)(1) when they involve the manual selection of copyrighted material for licensing to a third party. The parties do not dispute, however, that none of the clips-in-suit were among the approximately 2,000 videos provided to Verizon Wireless.

The Court sent the issue back down to the District Court (the trial court) and said:

“In order to avoid rendering an advisory opinion on the outer boundaries of the storage provision, we remand for fact-finding on the question of whether any of the clips-in-suit were in fact syndicated to any other third party.”

In other words, this is still an open issue for YouTube, yet to be determined.

WHAT HAPPENS NEXT?

The trial court will consider the following issues:

1. Whether, on the current record, YouTube had knowledge or awareness of any specific infringements (including any clips-in-suit not expressly noted in this opinion);
2. Whether, on the current record, YouTube willfully blinded itself to specific infringements;
3. Whether YouTube had the “right and ability to control” infringing activity within the meaning of § 512(c)(1)(B); and

4. Whether any clips-in-suit were syndicated to a third party and, if so, whether such syndication occurred “by reason of the storage at the direction of the user” within the meaning of § 512(c)(1), so that YouTube may claim the protection of the § 512(c) safe harbor.

Decided: April 5, 2012 Docket No. 10-3270-cv

VIACOM INTERNATIONAL, INC., COMEDY PARTNERS, COUNTRY MUSIC TELEVISION, INC., PARAMOUNT PICTURES CORPORATION, BLACK ENTERTAINMENT TELEVISION, LLC, Plaintiffs-Appellants, v. YOUTUBE, INC., YOUTUBE, LLC, GOOGLE, INC., Defendants-Appellees.