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Copyrights/Digital Millennium Copyright Act

Panelists Debate Intentions of DMCA And Who is Liable Under *YouTube* Decision

The Digital Millennium Copyright Act, as applied today, no longer does what it was intended to do, and rulings in cases such as *Viacom International Inc. v. YouTube Inc.* result in notice-and-takedown letters being the only available remedy for copyright holders to halt infringing content from appearing on sites such as YouTube, Russell Frackman of Mitchell Silberberg & Knupp, Los Angeles, said at a July 27 Copyright Society of the USA panel event.

The recent rulings affirm that the burden remains on copyright owners to identify specific acts of infringement occurring on user-generated content websites. Courts have rejected the argument that once a website operator has been alerted to the presence of infringing content, that this constitutes a “red flag” shifting the burden to the service provider to actively seek out further infringement.

Amicus Brief Authors Debate. The program, hosted by Arent Fox and moderated by Robert Kasunic, deputy general counsel of the U.S. Copyright Office, featured parties who filed amicus briefs with the U.S. Court of Appeals for the Second Circuit on behalf of various organizations, supporting either Viacom or YouTube in the pending appeal of their DMCA dispute.

Frackman, who filed a brief in support of Viacom, said that the U.S. District Court for the Southern District of New York in *YouTube* “got the law wrong.”

Mary E. Rasenberger, counsel at Skadden, Arps, Slate, Meagher & Flom, New York, agreed, and said that the court “lured us into looking at [17 U.S.C. §] 512 under a false dichotomy: either requiring generalized knowledge or specific knowledge of every infringing item” when she said that there is actually “a vast swath of knowledge in between” those standards.

In support of YouTube, Jonathan Band, an intellectual property attorney based in Washington, D.C., said that the position Viacom has taken in this litigation “would erode the utility of the safe harbor provisions of the DMCA altogether, particularly where user-generated content is involved.” He added later that, when Congress was writing the DMCA, web hosting existed and that it “anticipated this situation exactly.”

Patrick J. Coyne, a partner at Finnegan, Henderson, Farabow, Garrett & Dunner, Washington, D.C., who wrote a brief on behalf of the American Intellectual Property Lawyers Association in support of neither party, said that the DMCA is “one of the worst written statutes I have ever seen; you can see the crumbly compromises that were made” and the inconsistencies.

Coyne said that he viewed the tactics chosen in *YouTube* as akin to lions hunting zebras, with Viacom being the lion and YouTube being the zebra. Does the lion choose to go after the fastest and strongest zebra to try to intimidate the other zebras, or does it go after the slowest, weakest, or fattest zebra, he asked. Viacom chose an overly complicated fact pattern in this case to try and fight YouTube; thus going after the wrong zebra, he posited.

Viacom Alleges Massive Infringement on Website. Viacom Inc. is the world's fourth largest media conglomerate, and its assets include extensive holdings in the motion picture, television, and online industries. Viacom's production companies and TV channels include Paramount Pictures Corp., Comedy Central, BET, Spike, TV Land, Nickelodeon, MTV, and VH1. YouTube Inc., a subsidiary of Google Inc., operates YouTube, the most popular user-generated video-sharing website.

Viacom alleged that many of the videos hosted on the YouTube website infringed its copyrights. In February 2007, Viacom sent in bulk more than 100,000 notices to YouTube, pursuant to the Online Copyright Infringement Liability Limitation Act provision of the Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512(c). YouTube took down the videos identified in the notices,

but Viacom argued that the presence of so many infringing videos meant that YouTube had failed to act on its own when it had knowledge of massive infringement on its website.

In March 2007, Viacom sued YouTube, alleging copyright infringement. *Viacom International Inc. v. YouTube Inc.*, No. 07-2103 (S.D.N.Y. complaint filed March 13, 2007) (73 PTCJ 604, 3/16/07). The complaint sought damages of \$1 billion. YouTube argued that it was shielded from liability as a result of its compliance with the safe harbor provisions of Section 512.

During the discovery process, Viacom asked YouTube to disclose data on YouTube's users and the logs of what videos they had viewed. According to Viacom, the data was necessary in order to show that the infringing videos constituted a significant attraction for YouTube users. In July 2008, YouTube agreed in a stipulation to turn over data regarding viewership of videos, but without identifying data such as user names and internet protocol addresses (76 PTCJ 341, 7/11/08; 76 PTCJ 430, 7/25/08).

In a parallel case, the Football Association Premier League Ltd., which operates England's top professional soccer league, and several other copyright holders also sued YouTube, alleging that its copyright interest in broadcasts of sporting events were being infringed on the video-sharing website. *Football Association Premier League Ltd. v. YouTube Inc.*, No. 07-cv-3582 (S.D.N.Y. complaint filed May 4, 2007) (74 PTCJ 60, 5/11/07).

S.D.N.Y. Rules 'Mere Knowledge' is Not Enough. YouTube moved for summary judgment that it was shielded from liability in both cases for direct and indirect infringement by the Section 512(c) safe harbor. The safe harbor protects an online service provider from liability for infringement committed by users if it complies with standards that require it to take down infringing videos when it has notice of their presence on their servers.

The copyright owners also moved for partial summary judgment that the safe harbor did not apply because YouTube had actual knowledge of infringement even without notice sent by copyright owners and had failed to act.

In June 2010, Judge Louis L. Stanton awarded summary judgment in YouTube's favor, rejecting the copyright owners' argument that YouTube was not protected by the safe harbor because it possessed "[m]ere knowledge of prevalence of such activity in general," as a result of the general knowledge that users post and watch infringing videos on the YouTube service. *Viacom International Inc. v. YouTube Inc.*, 95 USPQ2d 1766 (S.D.N.Y. 2010) (80 PTCJ 289, 7/2/10).

Stanton ruled that, under the safe harbor provision of the DMCA, an online service provider has a duty to take down infringing content when it has "knowledge of

specific and identifiable infringements of particular individual items."

Viacom appealed. Both sides submitted appellate briefs and numerous amicus briefs have been filed as well.

DMCA Faulty, but Correctly Applied. One thing all of the panelists at the July 27 event agreed upon was that the DMCA is "outdated" and cannot keep up with today's technology and usage. Coyne said that judicial decisions, such as the ruling in *YouTube*, "cannot undo this statute," and that "the remedy is with Congress." However, he said that this was unlikely to happen as Congress is "a mess," also referencing how long it took for patent reform to finally make some headway in the body.

Ron Lazebnik, a law professor at Fordham University, New York, said that he too would prefer legislative action, as the plain language of the statute did not unambiguously address the issue under discussion. Frackman, however, said that he did not believe that Congress would change the law, stating that clarification of the statute was "up to the [YouTube] court," and predicting that the Second Circuit would reverse the case.

Band said that if Viacom's position were to prevail, it would make it impossible to launch websites that depend on user-generated content—such as YouTube, Facebook, or Twitter. According to Band, all such website operators would have the knowledge that some percentage of the content on their sites would be infringing. Lazebnik also agreed, saying that too great a burden would be created by Viacom's position—that one notice of infringement constituted a "red flag" putting the burden on the service provider to monitor further infringement.

Copyright Holders Have Rights Too. Frackman said that it is not technology that is the concern for him and his clients, but the use of the technology. "We don't want to keep Justin Bieber off YouTube . . . , we want to protect copyrights," he said.

Rasenberger said that in 2005 to 2006—the period of time the case is focused on—YouTube's founders knew that around 80 percent of the content on the site was infringing, and they in fact welcomed it. She argued that the notice and takedown measures simply do not work on a mass scale and that it makes copyright owners hesitant to provide their works online. One of the main purposes of copyrights is to allow people to earn a living from works, she added.

Coyne countered, saying that Congress made its decision when drafting the DMCA to put the burden on the content owner, "fair or not." Unfortunately, he said, this places the financial burden on the content owner.

BY NATHAN POLLARD