How Safe is Safe? Second Circuit's YouTube Decision Limits the Reach of the DMCA's "Safe Harbor" Provisions

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What Happened

The Second Circuit's recent *YouTube* decision (*Viacom International Inc., et al. v. YouTube Inc., et al.* and related cases) is most notable for a surprising shift in balance, away from the rote application to a service provider of the Digital Millennium Copyright Act's ("DMCA's") safe harbor provision, and toward a more fact-based pragmatic approach. While agreeing with the District Court that, to be disqualified from invoking Section 512(c), there must be "actual knowledge of facts or circumstances that indicate specific and identifiable instances of Infringement," Slip. Op. at 19, the Court of Appeals on review found that summary judgment for YouTube was precluded because the record suggested the existence of "a material issue of fact regarding YouTube's knowledge or awareness of specific instances of infringement." Id. at 21.

In short, the panel chose not to adopt the "all-or-nothing" positions taken by content creators and content distributors, and instead opted for a more practical approach that may prove useful as both groups navigate the many opportunities and pitfalls offered by fast-changing technologies. This balanced approach significantly contrasts with other recent strongly pro-service provider decisions. While the Second Circuit affirmed the legitimacy of much of YouTube's business model, it was unwilling to adopt the unconditional language of *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir.2011) ("UMG"), or the lower Court's ruling for YouTube. Instead, it chose to inquire into whether indicia of actual knowledge or awareness sufficient to dispel the safe harbor protections had been presented.

Background

YouTube was founded in February, 2005, at a time when weighing long-established principles of content protection for copyright owners against the opportunities of new technologies and the rights of consumer users was controversial and very much at issue. By that time, the DMCA and its "safe harbors" for certain service provider activities had been in effect for 7 years. On March 13, 2007, plaintiff Viacom and others brought suit against YouTube, Google, and others, alleging direct and secondary copyright infringement. In essence, the lawsuit argued that the service was not doing enough to remove plaintiff's copyrighted content

from its website, and that it could not invoke the safe harbor protections of the DMCA. YouTube's consistent policy had been to remove content from its site once it received a request from a content owner, as provided in the DMCA. However, since there was no dispute that YouTube knew that its site was filled with content that had been posted without the consent of copyright owners, plaintiffs challenged that a fair reading of the DMCA placed a more general obligation on YouTube to take affirmative action to remove infringing content. The content owners underscored their argument by pointing to the fact that YouTube makes substantial money from advertising, the value of which is tied to traffic on the site.

Although the Second Circuit panel affirmed the decision of the lower court that YouTube's obligations derived from specific infringements and knowledge, not from an inchoate general obligation and awareness of the need to avoid the posting of infringing content, it held that that obligation is not as passive as the District Court had held. YouTube could not simply wait to act until it received a notice. Instead, the panel recognized that YouTube is obligated to remove specific content that it knows to be an infringing post and those it should know to be infringing, the so-called "red flags." While the lower court had ruled as a matter of law that YouTube's current practices allowed it the benefits of the DMCA, the Second Circuit, citing statements by YouTube executives about their awareness generally of the presence of infringing content on the site, held that the content owners were entitled to have a jury decide whether YouTube knew of specific infringing content on its site that it did not remove -- holding, at the same time, that YouTube did not have a general obligation to police its site. At least one thing is certain; the Second Circuit has made the cost of defending claims by content distributors like YouTube far more complex and substantially more expensive.

Most interesting is the Court's treatment of "willful blindness." Even though the Second Circuit affirmed that the obligations of the DMCA are specific and not general, relating to specific postings, the Court left open the possibility that a doctrine outside the DMCA could in fact change everything. Content owners had argued that it was wrong to allow the owner of a site profiting from infringing content to act with "willful blindness." The Second Circuit recognized that there is no willful blindness exception to the DMCA -- indeed, the Act does not mention that doctrine at all. The Court held, however, that the doctrine might still apply. Without deciding the issue, the Second Circuit asked the lower court to consider willful blindness on remand, noting that the analysis would be fact intensive. While it seems unlikely that any court will create a "willful blindness" exception so broad that it guts the safe harbor provisions enacted by Congress in the DMCA, this aspect of the decision should be troubling to YouTube and other content distributors.

The Second Circuit opinion also gave content owners a little more hope when it rejected the conclusion of the lower court that the right and ability to control the presence of infringing content on a website is not triggered only after the site owners knows of the infringing content. This conclusion is inconsistent with the decision of the Ninth Circuit Court of Appeals in *UMG*, which found such specific knowledge to be a prerequisite. According to the Second Circuit, if the owner of a site has the right and the ability to control

the presence of infringing content on its site, it would indeed have the general obligation to prevent infringing content from being posted on the site. The panel concluded that here, the "right and ability to control" meant something more than the ability to take down or block the posting of content to the site. It again left it to the lower court to decide what "control" was sufficient to trigger this obligation.

What This Means

The Court's rebalancing of interests necessarily gives hope to both sides. While YouTube probably reads the Second Circuit's opinion as an affirmation of its business model, the Court's opinion reopened a number of doors closed by the lower court, such that content owners now may have reason to believe that they might ultimately prevail. However, for other businesses standing on the sidelines, the Second Circuit's opinion both fails to alleviate the risk for content distribution business models, and to provide content owners the unequivocal reassurances they desire. Consumer demand for content and control over it continues to explode, suggesting that litigation is almost certain to continue. Perhaps this decision opens the door to a business solution in which revenues from accessing and communicating content can be more equitably shared between content owners and distributors without further litigation.

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