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IP FRONTIERS

Court: YouTube may be liable for copyright infringement

Where it 'willfully blinded' itself to user's infringing posts

Internet service providers can no longer avoid liability by turning a blind eye to copyright-infringing content posted to their websites. In its April 5 *Viacom v. YouTube* decision, the Court of Appeals for the Second Circuit, an appellate court, found that if YouTube turned a blind eye to infringement, the company could be liable for copyright-infringing video clips even if it did not otherwise have actual knowledge of specific infringing clips.

A copyright is a property right in an original work of authorship (including literary, musical, dramatic, pictorial, graphic and audiovisual creations) fixed in any tangible medium of expression, which gives the holder exclusive rights in the work, including the right to copy. To post videos on YouTube, users must agree to the website's Terms of Use Agreement, which provides that users will not submit copyrighted material unless they own the copyright or have permission from the rightful owner to post the material.

So, it is impermissible for users to post clips from protected works, including TV shows. By uploading such content, users subject themselves to liability for copyright infringement under the Digital Millennium Copyright Act. However, the DMCA includes safe harbors that generally protect service providers, such as YouTube, from liability for infringement claims based on content that users upload to the website.

Viacom, an American media conglomerate, sued YouTube alleging infringement of copyrights held by Viacom, based on YouTube posts of clips from shows such as *SpongeBob SquarePants*, *The Daily Show*, *The Colbert Report* and *South Park*. YouTube established that upon being informed of specific infringing content (for example, via takedown notices), the specific content was removed from the website. However, internal YouTube communications indicated that the company knew there was a continuing general issue with infringing content on the website (evidenced, by, for example, a 2006 report where one

of the website's founders recommended pre-emptively removing "blatantly illegal" clips of well-known shows on the site).

In 2010, the lower court granted summary judgment to YouTube, holding that it was entitled to DMCA safe harbor protection primarily because YouTube had insufficient notice of the particular infringing clips-in-suit. More specifically, the district court held that mere knowledge of the prevalence of infringing activity was not enough to establish liability — rather, the lower court found that to be liable, YouTube must have been aware of specific and identifiable infringements of particular individual items (e.g., by takedown notices).

Viacom appealed the lower court's holding in favor of YouTube. On appeal, the appellate court reversed and remanded the lower court's decision, finding that YouTube could not avoid liability for copyright infringement by willfully blinding itself to the infringing content uploaded to its website. A person is "willfully blind" or engages in "conscious avoidance" amounting to knowledge if the person was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.

While affirming the lower court's holding that the safe harbor requires knowledge or awareness of specific infringing activity, the appellate court held that the willful blindness doctrine may be applied, in appropriate circumstances, to demonstrate knowledge or awareness of specific instances of infringement under the DMCA safe harbor. Accordingly, the appellate court vacated the lower court's order, holding that a reasonable jury could find that YouTube had actual knowledge or awareness of specific infringing activity on its website.

While not a clear victory for either side, the decision unequivocally places more of a burden on service providers to remove copyright-infringing content from their websites.

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