Google Emerges From $1 Billion Youtube Copyright Suit

07.12.2010

The Digital Millennium Copyright Act ("DMCA") wins again as the United States District Court for the Southern District of New York Judge Louis Stanton rules that the Internet service providers ("ISPs") were protected from copyright liability through their "notice and takedown" procedures. *Viacom Internat'l Inc. v. YouTube, Inc.*, 02 Civ. 3582 (S.D.N.Y. June 23, 2010).

The DMCA provides safe harbor to ISPs against copyright claims if they provide proper notice and takedown procedures for removing infringing content. 17 U.S.C. § 512(c). Viacom sued YouTube, now owned by Google, for multiple counts of copyright infringement in 2007, based on claims that tens of thousands of videos were uploaded to YouTube's site without Viacom's authorization, and that defendants had actual knowledge of this infringing activity. However, YouTube had designated an agent to remove the content in response to DMCA takedown notices and acted quickly to remove close to 100,000 videos within a business day.

Viacom argued that YouTube was not protected by the DMCA because it had actual knowledge and was aware of facts and circumstances from which infringing activity was apparent; that it received a financial benefit directly attributable to that infringing activity; and that such infringement did not result solely from providing storage at the direction of a user. However, the court found that YouTube had nothing more than a generalized knowledge that infringement was occurring on its sites, and that an ISP did not have a duty to actively investigate, monitor, or search its service for infringements.

The court reviewed precedent and legislative history regarding the DMCA to support the proposition that "actual knowledge" required a showing that the sites contained blatant infringing activity or "red flags," namely obvious infringements that would have been apparent to a reasonable person operating under the same or similar circumstances. For example, the copyright owner could prove that infringing activity was apparent if it were a "pirate" site of the type where sound recordings, software, movies, or books were available for illegal downloading.

The court distinguished recent file-sharing cases, such as *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) and *Arista Records LLC v. Lime Group LLC*, No. 06 Civ. 5936, 2010 WL 2291485 (S.D.N.Y. May 25, 2010), stating that "peer-to-peer file-sharing networks … are not covered by the safe harbor provisions of DMCA §512(c)" and that the DMCA defense in *Arista* was denied on undisputed evidence of "purposeful, culpable expression and conduct aimed at promoting infringing uses of the websites." *Grokster* was distinguishable because defendants in that case distributed software products with the express intent "of succeeding to the business of the notoriously infringing Napster" whereas YouTube is "a service provider who furnishes a platform on which its users post and access all sorts of materials as they wish, while the provider is unaware of its content."

Copyright holders have long complained that the DMCA puts the onus on them to send the notices and police the ISPs. Viacom has promised to appeal the decision, so the future of the law remains uncertain.

To see the memorandum opinion for this case, click here: Viacom v YouTube.pdf

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