

## AUTHORS

Meaghan Hemmings Kent  
Martin L. Saad

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April 25, 2013

### DMCA Safe Harbor Upheld for YouTube Once Again in *Viacom v. YouTube*

*IP Buzz*

On April 18, 2013, the U.S. District Court for the Southern District of New York again held that YouTube is subject to the safe harbor provisions of the Digital Millennium Copyright Act as an internet service provider despite alleged general knowledge of extensive copyright infringement.

The case was initiated in 2007 by Viacom and others against YouTube for the alleged hosting of copyright infringing materials. In 2010, the District Court determined on summary judgment that YouTube fell within the safe harbor of the DMCA (718 F.Supp.2d 514 (S.D.N.Y. 2010)). That decision was appealed to the Second Circuit, which vacated the decision and remanded, focusing on whether there was knowledge of “specific infringements” rather than generalized knowledge of infringement. The Second Circuit remanded the case back to the District Court to determine whether, based on the record, YouTube: (a) had knowledge or awareness of specific infringements, (b) was willfully blind to specific infringements, (c) had the “right and ability” to control the infringing conduct, and (d) stored any syndicated clips at the direction of users. 676 F.3d 19 (2d Cir. 2012). On all of these issues on remand, Judge Louis Stanton of the Southern District of New York held for YouTube.

As to YouTube’s knowledge of specific infringements, Viacom acknowledged that it had not put forth evidence that YouTube had knowledge of specific clips, but argued that it was not its burden to do so. Instead, it argued that since the DMCA safe harbor is an affirmative defense, YouTube had the burden to prove each element of the defense, including that YouTube did not have knowledge of the specific clips at issue.

The District Court held that though this argument was “ingenious,” its foundation was an “anachronistic” and pre-DMCA concept. Judge Stanton’s opinion explained that the DMCA safe harbor provision was enacted because internet service providers provide a useful function, but that the volume of works placed through their services would mean that they could easily “ignorantly” provide access to infringing material. As such, he explained, to encourage service providers, the DMCA safe harbor places the burden on the copyright owner to identify and notify the service provider of the specific infringing works.

Judge Stanton went on to explain that this system of placing the burden on the copyright owner and requiring that the copyright owner notify the service provider of each infringement is “entirely workable.” He noted that the system is “practicable in practice,” pointing to evidence that in 2007, Viacom sent over 100,000 notices to YouTube, which were each taken down within one business day. However, Viacom and other copyright owners have argued that being required to send hundreds of notices per day to YouTube to simply protect their works is not practicable or workable. Instead, copyright owners argue, it places an unfair burden and expense that should instead be borne by the service provider who is aware of the significant volume of infringement and whose business model they argue encourages infringement.

Judge Stanton went on to find that YouTube was not willfully blind despite a large volume of infringing content and memoranda among executives acknowledging that infringement was on-going. He held that “nothing in the applicable section of the DMCA shall be construed to require YouTube’s affirmatively seeking facts indicating infringing activity.” As to the remaining issues of whether YouTube fell within the safe harbor, he again held for YouTube and went on to state, “[t]he governing principle must remain clear: knowledge of the prevalence of infringing activity, and welcoming it, does not itself forfeit the safe harbor. To forfeit that, the provider must influence or participate in the infringement.”

While this decision is a win for service providers, it will be a frustrating loss for copyright owners. Viacom has already indicated that it intends to appeal this decision. Venable will continue to monitor the case. If you have any questions regarding copyright infringement, the DMCA or this opinion, please

contact the authors or another member of the [Copyright Group](#).