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Federal Court in New York Reiterates Viability of DMCA "Safe Harbor" Provision

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In a case pitting a major producer of video programming (Viacom) against the owner of the biggest user-provided content website (Google), the U.S. District Court for the Southern District of New York has reiterated the viability of the Digital Millennium Copyright Act's "safe harbor" provision which protects from copyright liability Internet Service Providers and operators of websites that accumulate user-supplied content. *Viacom International, Inc. et al. v. YouTube, Inc. et al.* No. 07 Civ. 2103 (S.D.N.Y. 2010). Viacom claimed that Google, the owner of the You Tube website, should be held liable for the fact that large numbers of illegal copies of Viacom television programs were uploaded by users to You Tube's website, even though You Tube removed the programs within a day of receiving Viacom's "take-down" notice. Viacom argued that, notwithstanding You Tube's compliance with the take-down notices (which should have entitled it to safe harbor protection from liability), You Tube fell within the exception to the safe harbor defined by the statute: it had actual knowledge of the infringement from facts or circumstances because it had a general awareness of assertedly widespread and common infringements by the users of You Tube. Viacom argued that because Google had a general awareness that significant amounts of copyrighted material was being posted on the You Tube site without the copyright holders' permission, this was a fact or circumstance sufficient to impute to Google actual knowledge of the existence of infringing copies of Viacom programs stored on the site.

The court held that a general awareness of the fact that infringing material was posted on the site did not meet the "facts or circumstances" test in the statute: "the [statutory] phrases 'actual knowledge that the material or an activity' is infringing, and 'facts or circumstances' indicating infringing activity, describe knowledge of specific and identifiable infringements of particular items. Mere knowledge of prevalence of such an activity is not enough." Noting that the legislative history expressly disclaimed imposing any obligation on web site owners to actively police content uploaded by users, the court held that "to let knowledge of a generalized practice of infringement . . . or of a proclivity of users to post infringing materials, impose responsibility on service providers to discover which of their users' postings infringe a copyright would contravene the structure of the DMCA." The court rejected as a false parallel Viacom's attempted use of the Supreme Court's 2005 *MGM Studios, Inc. v. Grokster, Ltd*. decision and the decisions of several lower courts, none of which involved the DMCA defense. The court noted that, unlike You Tube, the defendants in those cases supplied peer-to-peer

software that allowed participating users to locate and then share unauthorized copies of copyrighted works: “the *Grokster* model does not comport with that of a service provider who furnishes a platform on which its users post and access all sorts of materials as they wish, while the [service] provider is unaware of its content, but identifies an agent to receive complaints of infringement.”

In short, under the New York federal court’s decision, all that a website operator must do to secure the DMCA safe harbor protection against liability is provide an agent for receipt of take-down notices and act on those notices promptly when they are received. The burden of policing such web sites for infringing material is left squarely in the lap of the copyright owner, not the operator of the site.