The Texas International Pop Festival was the first major rock festival in Texas. Held August 30 - September 1, 1969, two weeks after Woodstock, at the Dallas International Motor Speedway in Lewisville. Produced by Alex Cooley, Angus Wynne and Jack Calmes. Poster art by Lance V. Bragg.

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What do the shows, *Family Guy*, *The Daily Show*, and *MTV Cribs* have in common? These programs are just a few examples of copyrighted TV shows that Viacom and other plaintiffs claimed that YouTube knew were posted in ways that infringed copyrights, but that YouTube did not remove them “expeditiously,” as required by the Digital Millennium Copyright Act (“DMCA”) in *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir 2012).

On remand from the Second Circuit Court of Appeal, the district court in *Viacom Int’l, Inc. v. Youtube, Inc.*, 940 F. Supp. 2d 110 (S.D.N.Y. 2013) held that the DMCA shielded the video-sharing site, YouTube, from liability.

The court examined the following four inquiries:

(A) Whether, on the current record, YouTube had knowledge or awareness of any specific infringements (including any clips-in-suit not expressly noted in this opinion);

(B) Whether, on the current record, YouTube willfully blinded itself to specific infringements;

(C) Whether YouTube had the “right and ability to control” infringing activity within the meaning of § 512(c)(1)(B); and

(D) Whether any clips-in-suit were syndicated to a third party and, if so, whether such syndication occurred “by reason of the storage at the direction of the user” within the meaning of § 512 (c)(1), so that YouTube may claim the protection of the § 512(c) safe harbor.

*Viacom Int’l, Inc.*, supra, 940 F. Supp. 2d 110 at 113. The case underscores the importance of a well-crafted takedown notice.

### Specific Instances Of Infringement

Since both sides were unable to determine whether there were specific instances of infringement because of the sheer volume of the material involved, the court reasoned this even further justified the requirement that the copyright owner has the burden of identifying the infringement by giving notice to the service provider, as specified by 17 U.S.C. § 512 (c)(3)(A).

Since the online service provider’s “knowledge or awareness of specific infringing activity” is key in determining whether the service provider is able to utilize safe-harbor protections, DMCA notices should allege details directed towards establishing potential service provider liability.

Just because a TV network sends a DMCA-complaint notice to an online service provider, however, doesn’t mean that the service provider loses the safe-harbor protection. Removing the safe-harbor protection based on mere knowledge of infringing material alone would lead to a Catch 22. No website operator would have incentive to fix a problem if it would be punished anyway. Rather, if the site learns it is hosting infringing material and acts quickly to remove it, the online service provider keeps the safe harbor protection. If the site doesn’t remove the material quickly after it learns it exists, then it could face liability.

### Willful Blindness

The question of willful blindness centers around whether a reasonable jury could conclude that YouTube had knowledge or awareness of infringing activity, such that it would be exempt from the DMCA (17 U.S.C. § 512) safe-harbor provisions.

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1 Republished from Lewis Brisbois Bisgaard & Smith Intellectual Property Newsletter, Fall 2012.
The appellate court remanded the case to the district court to evaluate the issue of willful blindness. Willful blindness means that a service provider cannot bury its head in the sand to avoid information about infringing content. If the online service provider did engage in willful blindness, it could be deemed to have knowledge or awareness of infringement, and thus would be ineligible for the DMCA safe harbor protections. The district court held there was “no showing of willful blindness to specific infringements of clips-in-suit.” Viacom Int’l, Inc., supra, 940 F. Supp. 2d 110 at 117.

Right and Ability to Control

The DMCA safe harbor provisions also require that if an online service provider has the “right and ability” to control infringing activity, it cannot also profit from that infringing activity. The Court of Appeals said that the right and ability to control requires “something more” than the ability to merely remove access to materials posted on a website.

The district court determined that YouTube did not have the right and ability to control the alleged infringing activity on its site.

“...[D]uring the period relevant to this litigation, the record establishes that YouTube influenced its users by exercising its right not to monitor its service for infringements, by enforcing basic rules regarding content (such as limitations on violent, sexual or hate material), by facilitating access to all user-stored material regardless (and without actual or constructive knowledge) of whether it was infringing, and by monitoring its site for some infringing material and assisting some content owners in their efforts to do the same. There is no evidence that YouTube induced its users to submit infringing videos, provided users with detailed instructions about what content to upload or edited their content, prescreened submissions for quality, steered users to infringing videos, or otherwise interacted with infringing users to a point where it might be said to have participated in their infringing activity.”

Id. at 121.

Storage at the Direction of the User

When infringing material resides on a network that the service provider operates, there’s a safe harbor provision that is available when infringement occurs as a result of the storage at the direction of the user (§ 512(c)(1)).

The district court had initially found that that YouTube's software fell within this category. The Second Circuit affirmed with respect to the conversion of videos to YouTube's standard format and playing back the videos on the “watch” page, both of which the court considered to be automatic functions. The Second Circuit remanded to the district court as to the third-party syndication, such as when the videos uploaded to YouTube can be accessed on mobile devices, specifically licensed to Verizon Wireless.

“...[T]he critical feature of these transactions is not the identity of the party initiating them, but that they are steps by a service provider taken to make user-stored videos more readily accessible (without manual intervention) from its system to those using contemporary hardware. They are therefore protected by the § 512(c) safe harbor.”


Stay Tuned

YouTube's business model is built on user-posted and generated content. YouTube remains protected by the DMCA as long as it “expeditiously” removes infringing material after it is notified by the copyright holder. The appellate court has now moved the line for expeditious removal more in the favor of content owners. Content owners now sending DMCA notices thus stand to benefit by stating in their notices specific bases for the claim that the service provider is or has been made aware of the infringement, and how the service provider appears to be profiting from the infringement.