

## Viacom Appeals YouTube Copyright Ruling

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Viacom last week fulfilled its promise and appealed the summary judgment granted to YouTube in June. If Viacom wins, companies allowing users to submit content could be forced to take a more active role in watching out for copyright infringement.

Viacom sued Google and YouTube for \$1 billion in 2007 alleging massive copyright infringement arising from materials uploaded by YouTube users without authorization.

Google and YouTube have maintained that they fulfilled their obligations under the DMCA to remove infringing material when properly notified, and the judge handling the case agreed.

In his ruling, U.S. District Court Judge Louis Stanton found that general awareness of infringing activity on YouTube was not enough to disqualify YouTube from the DMCA's Safe Harbor protections.

"Mere knowledge of prevalence of such activity in general is not enough," he wrote.

**Robert J. deBrauwere, an attorney with New York law firm Pryor Cashman**, said in a phone interview that Viacom may challenge the judge's interpretation of the law or consideration of the facts.

In an e-mail, he explained, "The critical issue for the Court was whether 'actual knowledge' of infringement or awareness of 'red flags' from which 'infringing activity is apparent' is limited to actual or constructive knowledge that infringing activity exists (even if pervasive) or 'actual or constructive knowledge of specific and identifiable infringements of individual items.'"

In essence, Viacom is arguing YouTube failed to do enough to meet its content policing obligations and should therefore be disallowed DMCA Safe Harbor protection.

And this argument may find some support at the appellate level. According to deBrauwere, Judge Stanton's decision consists of lengthy citations of the DMCA and legislative history, but provides less detail addressing facts and their application to the law.

"The interesting thing is the decision doesn't contain a lot of analysis," said deBrauwere. "It's really a very brief and cursory discussion."

While noting that he has represented both content providers and service providers in such cases, deBrauwere suggests Viacom has a shot at winning on appeal because part of the DMCA hasn't fully been considered in some cases.

"It appears on some level that this 512(c)(1)(a) 'red flags' provision of the DMCA has been given short shrift in some of the opinions to the benefit of some of the ISPs," he said.

What this means is that if Viacom's argument holds sway, YouTube would bear some responsibility for contributory infringement despite responding promptly to specific takedown requests if infringing activity continued to be apparent.

A victory for Viacom would force service providers to take a more active role in policing content. It might just make some service providers rethink content uploading.

The sad part about all this that Google has spent \$100 million defending against this lawsuit. Presumably Viacom has spent about as much. That money could have been used for something more constructive.