

# Appellate Court Vacates Summary Judgment for Google in Copyright Infringement Suit

April 10, 2012

Last week the Second Circuit Court of Appeals issued an [opinion](#) in the ongoing copyright dispute between Viacom and YouTube/Google. In 2006, Viacom filed a \$1 billion lawsuit against Google, alleging that tens of thousands of videos submitted by users and displayed on YouTube violated Viacom's copyrights, and that Google should be liable for the infringement.

In 2010, a federal district court [granted Google's motion for summary judgment](#), holding that Google was entitled to take advantage of the safe harbor provision under the Digital Millennium Copyright Act ("DMCA"). The DMCA safe harbor provision limits the liability of online service providers for copyright infringement that occurs due to a third party's storage of infringing material on the online service provider's system, provided that certain requirements are met. The service provider (1) must not have knowledge of the infringing activity (actual knowledge or "red flag"--awareness of facts or circumstances from which infringing activity is apparent); (2) must not receive a financial benefit directly attributable to the infringing activity; and (3) upon notice from the copyright owner, must take down the infringing content.

Viacom appealed the District Court decision, claiming that Google did not satisfy all of the requirements under the DMCA safe harbor. In its ruling, the Second Circuit vacated the order granting summary judgment, stating that a reasonable jury could find that Google had actual knowledge or awareness of specific infringing activity on its website based on emails and internal documents at Google. The Second Circuit remanded the case back to the District Court.

The Second Circuit's opinion identifies three types of knowledge that may cause a service provider to lose protection under the safe harbor:

- Actual knowledge or awareness of specific infringing material--Based on the subjective knowledge of specific infringement;
- "Red Flag" knowledge--Based on awareness of facts that would have made the specific infringement objectively obvious to a reasonable person; or
- Willful blindness to specific infringing activity--The Court held that the willful blindness doctrine could be applied in appropriate circumstances to demonstrate knowledge or awareness of specific instances of infringement

The Court also addressed the issue of whether Google had the right to control and benefit from the infringing activity, concluding that the standard requires something more than the ability to remove or block access to materials posted on a service provider's website, but remanding the issue for the District Court to determine what is "something more."

The Second Circuit's opinion continues to define the scope of the DMCA safe harbor, while key issues are yet to be resolved by the District Court. Companies engaging in social media, especially the use of user-generated content, should continue to watch this case.