

Court Ruling in YouTube Appeal is (Mostly) a Win for Internet

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April 5, 2012

The 2nd Circuit Court of Appeals issued a [decision](#) [2] today in Viacom's blockbuster lawsuit against YouTube – a case CDT [cited in 2010](#) [3] as one of the leading "things to watch" that will shape the Internet's future. Fortunately, the news is mostly good. While the decision is not a complete win for YouTube and indeed sends the matter back to the District Court for further factual determinations, the principal legal rulings appear to represent a "win" for the Internet.

Viacom's lawsuit represented a full broadside attack on the crucial "safe harbor" that protects companies that host user-generated content from being held liable whenever users upload infringing material. Without this protection, set forth in Section 512 of the Digital Millennium Copyright Act (DMCA), liability risks would cripple the operation of user-generated content and social networking sites. It would be hard to overstate the negative impact for free expression.

Viacom sought to disqualify YouTube from the safe harbor on a variety of grounds that would have radically pared back the provision's applicability and rendered it largely irrelevant to much of "Web 2.0." Almost exactly one year ago, CDT joined a number of advocacy groups in an [amicus brief](#) [4] urging the court to reject Viacom's cramped reading of section 512. Today's decision decisively rejected the dangerous interpretations we warned against in our brief.

First, the court rejected Viacom's theory that a company cannot qualify for the safe harbor if it has "generalized knowledge" that there is some infringing content on its site. Rather, a company is disqualified only if it has specific knowledge about individual instances of infringing content. That confirms what had already been a strong trend in the case law, and it is a crucial point. Every UGC site, if it operates at any scale, knows at a generalized level that it harbors some infringing content. If that were enough to forfeit safe harbor protections, nobody would qualify.

Second, the court rejected Viacom's theory that a company can be disqualified, under the "right and ability to control" language of 512(c)(1)(B), based on the fact that it has the technical ability to remove specific items of content. Virtually every hosting site has that ability, or it wouldn't be able to comply with the "notice-and-takedown" requirements that are a prerequisite for safe harbor protection anyway.

Third, the court rejected Viacom's theory that the safe harbor for content hosts applies only to the provision of raw storage space, with any additional actions – such as formatting or transcoding – barring a company's eligibility. Under Viacom's theory, few if any user-generated content and social networking sites (all of which offer much more than bare-bones hosting) would qualify for safe harbor protection.

Today's decision does, however, leave several unsettled questions. The court said that "willful blindness" regarding specific instances of infringement could disqualify a company from the safe harbor. It also rightly emphasized, however, that a willful blindness analysis cannot be used as a backdoor way to impose a monitoring requirement. It is not clear what kinds of activities would give rise to a finding of willful blindness, given the express rejection of any obligation to monitor.

In addition, the court gave little guidance regarding how to evaluate when a company has a "right and ability to control" user content. It suggests that some higher level of involvement in determining what content gets posted might create a "right and ability to control," but it largely punts that issue back to the lower court for further fact-finding.

With respect to YouTube itself, the bottom line is that the case will continue. Today's decision leaves open the possibility that YouTube might have had sufficiently specific knowledge of individual

instances of infringement to jeopardize its safe harbor protection.

So the case will go on. But the good news for the Internet is that most of the major legal issues have been decided in ways that appear to preserve the ability of the section 512 safe harbor to provide legal certainty and foster innovation and free expression.

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