Lackenbach Siegel, LLP
INTELLECTUAL PROPERTY ATTORNEYS SINCE 1923

Lackenbach Siegel Client Alert

Just Say You Don't Know It Infringes.

The Digital Millenium Copyright Act ("DMCA") generally creates copyright infringement liability for Internet service providers who either create a device or service designed to circumvent protection against copyright infringement. The DMCA also creates a "safe harbor" – a way out of liability – for providers who follow certain guidelines set forth in the statute. For providers who store potentially infringing material online, the safe harbor (DMCA Section 512(c)) applies if the provider can show that it does not receive any profit from the infringing activity, is not aware of facts making the presence of infringing material on the site apparent, and acts quickly to remove infringing material upon receiving notice of an infringement.

Two recent cases, however, demonstrate how blurry and, frankly, subjective application of this safe harbor can be. In *Viacom v. Google*, in which Viacom sued **Google** for promulgating infringements through **Google's** wildly popular **Youtube** online video service, the Court determined that **Google** qualified for the safe harbor and granted summary judgment in favor of **Google** dismissing Viacom's claim. The Court determined that the **Youtube** service was capable of many non-infringing uses, and that **Google** had no effective means of knowing and separating infringing from non-infringing content in order to prevent the infringements committed by **Youtube** users. The Court was also swayed by the fact that **Google** showed that it was "committed to fighting piracy" by limiting the length of videos and swiftly responding to complaints by removing content.

In *Recording Industry Association of America ("RIAA") v. Limewire*, however, in which the RIAA sued the popular **Limewire** music file-sharing site under the DMCA for permitting facilities to store and download infringing copies of copyrighted songs, the Court went the opposite way entirely. Since **Limewire** was found to overwhelmingly appeal to persons seeking to copy music for free and thus infringe, and its managers were found to be aware of this fact (and perhaps to have encouraged it some), the Court threw the book at **Limewire** and granted the RIAA summary judgment on their infringement claims.

Dear Lackenbach Siegel Clients:

Here at Lackenbach, we have on several occasions received frantic calls from clients whose children have received threatening letters from music companies, or the RIAA, accusing them (mostly teenagers) of using illegal file sharing programs to "steal" copyrighted music. These initial threatening letters are almost always sent to extract an early settlement to lower legal costs for the industry. The RIAA is not going to take every teenager who uses Limewire, or the like, to court because that is simply not practical or even possible. One popular approach to the receipt of such letters is to sit tight, and wait and see if you receive a second, more litigation specific letter. Most often, a settlement can still be reached, but there is a chance you will never receive a second letter or hear from the RIAA again.

To discuss the DMCA, please contact: Robert Golden, RGolden@LSLLP.com

Consider These Points:

- Most everybody knows that **Youtube** is filled with copyrighted videos that nobody pays for, i.e., infringements
- There is no reason to believe that **Limewire** is any less capable of non-infringing uses than **Youtube**
- **Youtube** is a true cultural phenomenon supported by all major social networking platforms and entirely mainstream
- The music industry, since targeting Napster from the inception of file-sharing technology years ago, has successfully made music file-sharing synonymous with piracy and part of a decidedly non-mainstream subculture
- The music industry still has not figured out how to monetize digital music effectively, making protective litigation against entities like **Napster** and **Limewire** a vitally important part of the industry's current business model

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