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## Ninth Circuit "Safe Harbor" for Web Hosts and Venture Firms

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**What You Need to Know:** The Ninth Circuit Court of Appeals recently held that the copyright owner, not the Internet service provider or Internet host, bears the burden of policing copyrighted content on video-hosting websites: the copyright holder must identify specific infringing materials before liability can be shifted to the Internet service provider or host under the Digital Millennium Copyright Act (DMCA). In addition, the Court held that venture capital investors in an Internet startup cannot incur liability for the startup's allegedly infringing conduct based on their conduct as typical investors.

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### Ninth Circuit's Recent Case: *UMG Recordings, Inc. v. Veoh Networks, Inc.*

On December 20, 2011, the Ninth Circuit Court of Appeals dismissed all claims of secondary liability against WilmerHale client Shelter Capital Partners, one of three venture capital defendants involved in a long-running copyright infringement lawsuit filed by Universal Music Group (UMG) against online service provider/host Veoh Networks and its investors. The Court also ruled that the venture investors could not be guilty of secondary liability by virtue of their roles as investors and board members in the Veoh startup. In doing so, the Ninth Circuit made clear that *UMG Recordings, Inc. v. Bertelsmann AG*, a case dealing with investor liability for Napster's copyright infringement, was limited to its unique facts.

The Ninth Circuit resolved the question of primary liability in favor of Veoh, a YouTube competitor, upholding summary judgment that the company and its video-hosting service are protected against copyright liability under the system storage and notice-and-take-down safe harbors of the DMCA. In affirming the lower court's judgment against UMG, the Circuit held that a host's general knowledge that copyrightable material may be available on its site and that its services might be used for infringement is insufficient to constitute grounds for liability under the DMCA. The Court put the burden on copyright owners to identify specific infringing materials on a service provider's site and bring them to the provider's attention, reasoning that because the copyright holder knows precisely what material it owns, it is better able to efficiently identify infringing copies than the service provider. The Second Circuit Court of Appeals is currently considering similar issues of primary liability in a

separate case, *Viacom v. YouTube*.

UMG's claims against the three investor defendants for contributory infringement, vicarious infringement, and inducement to infringe rested on largely unprecedented theories of secondary liability for venture capital investors, which—if vindicated—threatened to have a chilling effect on investment in Internet innovation. The Court affirmed the District Court's findings that funding alone, coupled with Board representation, cannot constitute materially assisting infringement and that independent minority investors cannot control a company absent allegations that they agreed to act in concert. These holdings indicate that investors will not be held liable for secondary copyright infringement for performing their normal functions, including funding startups, selecting board members, and having board members participate in board deliberations and policy decisions.

### Practice Considerations

For copyright holders seeking to protect their copyrighted materials in cyberspace, this decision puts the burden on the copyright holder to specifically identify copyrighted works and communicate the presence of these works to the service provider or host before the provider can be held liable under the DMCA, at least in the Ninth Circuit.

For video-hosting service providers, this decision holds that such providers are "Internet service providers" for purposes of the DMCA and thus qualify for its safe harbor provisions. This decision requires providers to comply with the notice-and-take-down provisions of the DMCA in order to qualify for its safe harbor, but relieves providers of an unqualified duty to police their sites for copyrighted content unless they receive notice of specific infringing works on their sites.

For venture investors, this decision generally precludes liability for performing normal investor functions, such as funding a startup company, selecting some of its board members, and having board members participate in board deliberations and policy decisions, absent majority control by one investor or an agreement by several investors to act in concert for unlawful purposes.

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