

# VIACOM V. YOUTUBE—ALL EYES BLIND: THE LIMITS OF THE DMCA IN A WEB 2.0 WORLD

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One billion dollars<sup>1</sup>: that is what media giant Viacom demanded in damages in its lawsuit against YouTube and its parent company Google alleging copyright infringement over Viacom clips uploaded to YouTube.<sup>2</sup> For its part, Google spent more than \$100 million in pre-trial legal fees to defend itself against Viacom.<sup>3</sup> Congress enacted the Digital Millennium Copyright Act (DMCA) over a decade ago unaware of such a future conflict.<sup>4</sup> Congress did not divine YouTube—a website that encourages users to “Broadcast Yourself,”<sup>5</sup> has a video of a dog riding a skateboard as one of its main attractions,<sup>6</sup> and enthralls more viewers than most cable channels.<sup>7</sup> Congress was blind to the future technology, change, and costs of our new digital age. *Viacom v. YouTube* is but a prelude to future conflicts—an example of a coming wave of lawsuits and hamstrung legal judgments caused by an aging DMCA and related statutory provisions that are slipping into irrelevancy. Though YouTube won the day, the strained reasoning of the court may leave the service vulnerable on appeal. The legal analysis in *Viacom*

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1. This figure is close to the \$1.65 billion Google paid to purchase YouTube. Complaint for Declaratory and Injunctive Relief and Damages at 8, *Viacom v. YouTube*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), *appeal docketed*, No. 10-3270 (2d Cir. Dec. 3, 2010) (No. 07-2103).

2. Complaint for Declaratory and Injunctive Relief and Damages at 5, *Viacom v. YouTube*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), *appeal docketed*, No. 10-3270 (2d Cir. Dec. 3, 2010) (No. 07-2103).

3. Erick Schonfeld, *Google Spent \$100 Million Defending Against Viacom’s \$1 Billion Lawsuit*, TECHCRUNCH (Nov. 30, 2010, 5:46 PM), <http://techcrunch.com/2010/07/15/google-viacom-100-million-lawsuit>.

4. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) [hereinafter *DMCA*].

5. YOUTUBE, <http://www.youtube.com>, (last visited Feb. 1, 2009).

6. This video has more than 14 million views. *Skateboarding Dog*, YOUTUBE (Jan. 24, 2011, 1:44 AM), <http://www.youtube.com/watch?v=CQzUsTFqtW0>.

7. Leena Rao, *ComScore: Facebook Passes Yahoo to Become the Second Largest Video Site in the U.S.*, TECHCRUNCH (Oct. 27, 2010, 12:03 PM), <http://techcrunch.com/2010/09/30/comscore-facebook-passes-yahoo-to-become-the-second-largest-video-site-in-the-u-s/>.

*v. YouTube* demonstrates that the DMCA is unprepared to handle the demands of today, and more importantly, the uncertainties of tomorrow.

Hyperbole was widespread on both sides of the lawsuit. Attorneys for YouTube argued that a Viacom victory would be a blow to free expression on the Internet.<sup>8</sup> YouTube argued that its services had connected politicians to their constituents, allowed reporters to bring news from far-off war zones, and provided tools to protesters to fight repressive regimes.<sup>9</sup> The liberation of peoples, after all, was more important than the liberation of business cycles. For its part, Viacom stoked fears that if YouTube continued allowing users to upload copyrighted content with reckless abandon, studio after studio would collapse in Hollywood.<sup>10</sup> It was not fair, Viacom argued, for copyright owners to have the burden of policing YouTube's site for copyright infringement.<sup>11</sup> Echoing the concerns of many copyright owners, Viacom refused to continue playing a game of "whac-a-mole"—using DMCA takedown notices to remove content only to see it pop up somewhere else.<sup>12</sup>

In response to thousands of pieces of evidence, the court provided a meager thirty page opinion, half of it directly quoting legislative history, and almost none of it touching on important factual issues raised by both sides.<sup>13</sup> The court granted summary judgment to YouTube, holding that YouTube was protected by the DMCA's safe harbor provision.<sup>14</sup> According to the court, YouTube removed content whenever it had "actual knowledge" or

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8. Michael H. Rubin, Partner, Wilson Sonsini Goodrich & Rosati, *YouTube, A Look Back at Viacom v. YouTube & Beyond*, Remarks at the University of California Berkeley School of Law (Aug. 26, 2010).

9. Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 1–2, *Viacom v. YouTube*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), *appeal docketed*, No. 10-3270 (2d Cir. Dec. 3, 2010) (No. 07-2103).

10. Alex Pham, *Viacom, Google Trade Accusations Over YouTube*, L.A. TIMES, Nov. 11, 2010, *available at* <http://articles.latimes.com/2010/mar/19/business/la-fi-ct-viature19-2010mar19>.

11. Memorandum of Law in Support of Viacom's Motion for Partial Summary Judgment and Inapplicability of the Digital Millennium Copyright Act Safe Harbor Defense at 28, *Viacom v. YouTube*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), *appeal docketed*, No. 10-3270 (2d Cir. Dec. 3, 2010) (No. 07-2103) ("Defendants refused to prevent illegal uploading and imposed the entire burden on Viacom and the other studios to search YouTube 24/7 for infringing clips while Defendants reaped the profits.").

12. Nate Anderson, *Rightsholders Tire of Takedown Whac-A-Mole, Seek Gov't Help*, ARS TECHNICA (Jan. 31, 2011, 9:14 PM), <http://arstechnica.com/tech-policy/news/2010/05/rightsholders-tire-of-takedown-whac-a-mole-seek-govt-help.ars>.

13. *See Viacom v. YouTube*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), *appeal docketed*, No. 10-3270 (2d Cir. Dec. 3, 2010).

14. *Id.* at 529.

was “aware of facts and circumstances from which infringing activity [was] apparent” under § 512(c). YouTube was not liable for the infringement of its users because in responding to takedown notices with these actions, YouTube met the statutory requirements for safe harbor protection.

In some corners, the verdict was celebrated. Commentator Mike Masnick of *Tech Dirt* called it “a huge victory for common sense and the proper application of liability.”<sup>15</sup> Farhad Manjoo of *Slate*, who originally sided with Viacom, changed his mind shortly before the ruling and said he wanted to “upload a video apology to YouTube.”<sup>16</sup> Kent Walker, the Vice President and General Counsel of Google, hailed it as “an important victory not just for us, but also for the billions of people around the world who use the web to communicate and share experiences with each other.”<sup>17</sup>

Viacom, by contrast, called the decision “fundamentally flawed.”<sup>18</sup> Its many supporters were dismayed. The American Federation of Musicians warned that “YouTube is more than a widespread infringer of copyrights; it [is] a catalyst and engine for copyright infringement on a global scale, unleashing a Pandora’s box of illegal activity that will continue to threaten the output of America’s creative industries for years to come.”<sup>19</sup> Viacom has since hired superstar attorney Theodore Olson of *Bush v. Gore* and *Perry v. Schwarzenegger* fame to handle their appeal, which they filed in December of 2010.<sup>20</sup> Microsoft, the MPAA, the DGA, SAG, Electronic Arts, CBS, and the International Intellectual Property Institute have all filed amicus briefs in support of Viacom’s appeal.<sup>21</sup>

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15. Mike Masnick, *Huge Victory: Court Rules for YouTube Against Viacom*, TECHDIRT (Oct. 26, 2010, 2:21 PM), <http://www.techdirt.com/articles/20100623/1333269937.shtml>.

16. Farhad Manjoo, *Police Your Own Damn Copyrights*, SLATE (Oct. 27, 2010, 11:03 AM), <http://www.slate.com/id/2258086/pagenum/all/#p2>.

17. Kent Walker, *YouTube Wins Case Against Viacom*, BROADCASTING OURSELVES ;): THE OFFICIAL YOUTUBE BLOG (Oct. 27, 2010, 10:57 AM), <http://youtube-global.blogspot.com/2010/06/youtube-wins-case-against-viacom.html>.

18. Miguel Helft, *Judge Sides with Google in Viacom Video Suit*, N.Y. TIMES, Oct. 27, 2010, [http://www.nytimes.com/2010/06/24/technology/24google.html?\\_r=1](http://www.nytimes.com/2010/06/24/technology/24google.html?_r=1).

19. Brief for American Federation of Musicians et al. as Amici Curiae Supporting Plaintiffs, *Viacom v. YouTube* at 17, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), *appeal docketed*, No. 10-3270 (2d Cir. Dec. 3, 2010) (No. 10-3342).

20. Eriq Gardner, *Viacom Hires Superstar Lawyer to Handle YouTube Appeal*, HOLLYWOOD REPORTER (Oct. 27, 2010, 10:48 AM), <http://www.hollywoodreporter.com/blogs/thr-esq/viacom-hires-superstar-lawyer-handle-31587>.

21. Eriq Gardner, *Viacom Friends Back Appeal of YouTube Decision*, HOLLYWOOD REPORTER (Dec. 14, 2010, 4:04 PM), <http://www.hollywoodreporter.com/blogs/thr-esq/viacom-friends-appeal-youtube-decision-58856>.

While not nearly as dire as Viacom and its supporters contend, the decision in *Viacom v. YouTube* makes clear that the DMCA is slipping into irrelevancy and may not be able to accurately hit the moving target of issues raised in the evolving Internet landscape. Pressed against the dual concerns of looming and massive statutory damages and the DMCA's inability to predict Web 2.0 technologies,<sup>22</sup> the court took a sledgehammer to the delicate issues at stake, rather than using the scalpel those issues deserved. The court ignored instances of specific knowledge and dismissed evidence of possibly overwhelming amounts of infringement. In choosing DMCA takedown notices over content filtering as the method of choice for "red flag" notification, the court chose to enforce a blunt instrument rather than an elegant tool.

This Article makes three arguments. First, there was a genuine issue of material fact as to whether YouTube was entitled to the § 512(c) safe harbor. Summary judgment was not appropriate as a matter of law, and the case should have gone to a jury. Second, the opinion strongly suggests that the only way for a "red flag" to be triggered is through a DMCA takedown notice. The consequence of this decision, then, is a notice and takedown *only* regime. Third, because of the possibility of heavy statutory damages, the DMCA's inability to foresee the advent of content filtering, and the desire to achieve the social policies inherent in the DMCA, the court had little choice but to read the "red flag" test as narrowly as possible.

Part I of this Note will trace the development of the DMCA. It follows the DMCA from its inception, to the reasoning behind the safe harbor provision, to the mechanics of the safe harbor and red flag knowledge standards, to the challenges the DMCA faces in a Web 2.0 world. Part I concludes with an analysis of the pertinent case history. Part II focuses on *Viacom v. YouTube*—tracing the roots of the case, summarizing the arguments and most persuasive evidence brought up by Viacom and YouTube, and providing the court's eventual holding and reasoning. Part III of this Note argues that summary judgment should not have been granted, that the consequence of the decision is a strict notice and takedown regime, and that the decision results from a DMCA that is unsustainable in a Web 2.0 world.

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22. A network of websites and service providers that thrive on user participation and content.

## I. BACKGROUND

### A. NEW WORLD, NEW RULES—ENTER THE DMCA

Copyright law in the United States safeguards “original works of authorship fixed in any tangible medium of expression.”<sup>23</sup> The law affords several rights to copyright owners, including the exclusive right to “make” and “distribute” reproductions of the work.<sup>24</sup> New innovations, ranging from the printing press to the VCR, have frequently challenged such rights.<sup>25</sup> Congress repeatedly revised the Copyright Act in an attempt to catch up with the march of technology—most notably in 1976.<sup>26</sup> At the close of the twentieth century, however, computer technology became an increasingly prevalent factor in the American way of life. These changes extended beyond the imagination of members of Congress in 1976.<sup>27</sup>

By 1996, Microsoft’s “revolutionary operating system,” Windows 95, had ushered in widespread personal computer use throughout the nation.<sup>28</sup> Many Americans were logging onto the Internet for the first time through dial up connections provided by services like America Online (AOL).<sup>29</sup> That year, industry introduced the DVD to trade show audiences.<sup>30</sup> Legal issues began to form as the Internet and CD-ripping computers began to challenge established business models and norms.<sup>31</sup> This technology allowed the copying and digital sharing over the Internet of movies, music, and television shows—contemporary cornerstones of tangible mediums of expression.

As a result of this sweeping digital revolution, American copyright law went through “perhaps the most tumultuous period of its three hundred year existence.”<sup>32</sup> In 1996, the World Intellectual Property Organization (WIPO)<sup>33</sup>

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23. 17 U.S.C. § 102 (2006).

24. *See id.*

25. Kevin C. Hormann, Comment, *The Death of the DMCA? How Viacom v. YouTube May Define the Future of Digital Content*, 46 HOUS. L. REV. 1345, 1349–50 (2009).

26. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (current version at 17 U.S.C. § 102 (2006)).

27. Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1, 2 (2010).

28. Aaron Freedman, *The DMCA: 10 Years of the Good, Bad, and Ugly*, MACUSER (Dec. 15, 2010, 3:18 AM), [http://www.macuser.com/legal/the\\_dmca\\_10\\_years\\_of\\_the\\_good.php](http://www.macuser.com/legal/the_dmca_10_years_of_the_good.php).

29. *Id.*

30. *Id.*

31. *Id.*

32. Peter S. Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age 2* (Berkeley Olin Program in Law & Econ., Working Paper No. 1602022, 2010).

33. A “specialized agency of the United Nations . . . dedicated to developing a balanced and accessible international intellectual property system.” *What is WIPO?*, WORLD

passed two important treaties: the WIPO Copyright Treaty (WCT)<sup>34</sup> and the WIPO Performances and Phonograms Treaty (WPPT).<sup>35</sup> Taken together, these two treaties created a structure of international rules governing digital media.<sup>36</sup> By 1997, WIPO required every member state, including the United States, to adopt these two treaties into their domestic legal structure.<sup>37</sup> Thus, it became Congress' task to change U.S. copyright law to include the WCT and WPPT.<sup>38</sup> This was the impetus for creating the DMCA and signing it into law in 1998.<sup>39</sup>

However, Congress did not pass the DMCA solely to satisfy America's commitment to WIPO—Congress also made several additions to the law beyond those addressed by the WCT and WPPT. One of the main additions is the second portion of DMCA Title I, which involves anti-circumvention rules that aim to prohibit consumers from thwarting copy protection technology.<sup>40</sup> This rule was meant to help ameliorate Hollywood's fears of copyright infringement.<sup>41</sup> The other main addition, codified in Title II, is the safe harbor provision that affords Online Service Providers (OSPs)<sup>42</sup> immunity from copyright infringement liability.<sup>43</sup>

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INTELLECTUAL PROPERTY ORGANIZATION (Dec. 16, 2010, 6:35 PM), [http://www.wipo.int/about-wipo/en/what\\_is\\_wipo.html](http://www.wipo.int/about-wipo/en/what_is_wipo.html).

34. Governing "the production and distribution rights of computer programs and databases." Freedman, *supra* note 28.

35. Governing "the production and distribution rights of performers and the makers of audio-only devices." *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *See* DMCA.

40. *See* David Kravets, *10 Years Later, Misunderstood DMCA is the Law That Saved the Web*, WIRED (Dec. 15, 2010, 3:16 AM), <http://www.wired.com/threatlevel/2008/10/ten-years-later>.

41. *Id.*

42. It is important to note that in both legal scholarship and legal opinions handed down by various courts, the terms OSPs and ISPs are often used imprecisely or interchangeably. An Internet Service Provider (ISP) generally provides *access* to the Internet, sometimes by assigning a user an IP address. By contrast, an OSP generally provides Internet *services*, like e-mail. The confusion may have arisen because in the early days of the Internet, Internet companies would provide both OSP and ISP services. *See* Musetta Durkee, Note, *The Truth Can Catch the Lie: The Flawed Understanding of Online Spaces in In RE: Anonymous Online Speakers*, 26 BERKELEY TECH. L.J. 773, 773 (2011). YouTube will be considered as an OSP for this Article.

43. 17 U.S.C. § 512 (2006) ("A service provider's compliance with paragraph (2) shall not subject the service provider to liability for copyright infringement with respect to the material identified in the notice provided under subsection (c)(1)(C).").

1. *Purpose of the Safe Harbor Provision*

Before the passage of the DMCA, the judiciary began to recognize the vast potential for contributory and vicarious infringement claims against OSPs.<sup>44</sup> There was a growing awareness that OSPs had “become the favored targets of lawsuits by copyright owners.”<sup>45</sup> Acting as “intermediaries” in the structure of the Internet, OSPs began to attract attention for the copyright infringement of their users.<sup>46</sup> Because of their “deep pockets, easy identifiability, and potential ability to act as gatekeepers,” OSPs were in danger of being held “liable for infringing materials distributed by their subscribers.”<sup>47</sup> Congress enacted the safe harbor provision in part as a “direct response” to the judiciary’s recognition of several liability issues for OSPs.<sup>48</sup> In fact, much of the safe harbor provision—ruling out direct and secondary liability for “passive, automatic acts engaged in through a technological process initiated by another”<sup>49</sup>—simply codified elements of existing court decisions.<sup>50</sup>

The major content producing industries and the rapidly growing Internet giants of the future came together and urged Congress to settle on the grand bargain that became the safe harbor.<sup>51</sup> These companies lobbied Congress to modify the DMCA to fulfill the dual purpose of both fostering investment in the Internet as well as protecting copyright owners and their intellectual property investments.

Congress listened to the arguments of these two factions and attempted to structure the law to satisfy both sides. Congress recognized that saddling service providers with potentially crippling levels of liability would discourage the growth of the Internet.<sup>52</sup> Congress wanted to “provide greater certainty to service providers concerning their legal exposure for infringements that

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44. Samuelson et al., *supra* note 27 at 44.

45. Eugene C. Kim, Note, *YouTube: Testing the Safe Harbors of Digital Copyright Law*, 17 S. CAL. INTERDISC. L.J. 139, 153 (2007).

46. Kravets, *supra* note 40.

47. *See* Kim, *supra* note 45, at 154.

48. Samuelson et al., *supra* note 27, at 44.

49. H.R. REP. NO. 105-551, pt. 2, at 49 (1998).

50. *See* Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc., 907 F. Supp. 1361, 1369 n.12 (N.D. Cal. 1995) (explaining that holding an OSP liable for a secondary transmission requires both actual knowledge of infringing conduct and volitional conduct to aid in the purpose of infringement).

51. Menell, *supra* note 32, at 2.

52. Peter S. Menell, *Intellectual Property Issues: Assessing the DMCA Safe Harbors: The Good, the Bad, and the Ugly*, MEDIA INSTITUTE (Sep. 14, 2010, 9:29 AM), [http://www.media.institute.org/new\\_site/IPI/2010/090110.php](http://www.media.institute.org/new_site/IPI/2010/090110.php).

may occur in the course of their activities.”<sup>53</sup> On the other hand, Congress worried that “the ease with which digital works can be copied and distributed worldwide virtually instantaneously” could cause copyright owners to resist making “their works readily available on the Internet.”<sup>54</sup> There was a need for “reasonable assurance[s]” to be made to copyright owners that they would “be protected against massive piracy.”<sup>55</sup> So Congress designed the safe harbor provision to provide “an efficient remedy for content owners who wish to protect their material without incurring substantial litigation fees.”<sup>56</sup>

While taking the needs of the two competing industries in consideration, Congress created the safe harbor provision “almost as a counterpoint to copyright law.”<sup>57</sup> Copyright law is intended to “restrict the use of creative content,” but “the purpose of the safe harbors is to promote the means of sharing and distribution.”<sup>58</sup> Thus the “burden for policing the Internet for copyright infringement is primarily on the copyright owner, and . . . online service providers must only cooperate when necessary to eliminate copyright infringement.”<sup>59</sup> The safe harbor clause, then, was designed to protect OSPs from liability for unknowingly hosting infringing content while also providing copyright owners the means and the burden to exercise their exclusive rights to their content.<sup>60</sup>

## 2. *The Mechanics of Safe Harbor*

The relevant safe harbor provision<sup>61</sup> in the *Viacom v. YouTube* case can be found in 17 U.S.C. § 512(c)(1).<sup>62</sup> It reads that a service provider shall not be liable for monetary relief if it:

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53. *Ellison v. Roberston*, 357 F.3d 1072, 1076 (9th Cir. 2004) (referencing 17 U.S.C. § 501(a)) (citation omitted).

54. S. REP. NO. 105-190, at 8 (1998).

55. *Id.*

56. Hormann, *supra* note 25, at 1369.

57. *Id.* at 1373.

58. *Id.*

59. Brandon Brown, Note, *Fortifying the Safe Harbors: Reevaluating the DMCA in a Web 2.0 World*, 23 BERKELEY TECH. L.J. 437, 438 (2008).

60. It is also important to note that in 1999, Congress passed HR 1761, the Digital Theft Deterrence and Copyright Damages Improvement Act. GLOBAL LEGAL INFORMATION NETWORK (Jan. 31, 2011, 11:19 PM), <http://www.glin.gov/view.action?glinID=69433>. This law ramped up statutory damages for copyright infringement to a maximum of \$30,000 per infringement, and set a cap at \$150,000 for cases of willful infringement. *Id.* This will prove important in later analysis.

61. 17 U.S.C. § 512(c) (2006) is the relevant provision because it applies to “Information Residing on Systems or Networks at Direction of Users.” The court in *Viacom v. YouTube* designated YouTube as such a system.

- (A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
- (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
- (C) upon notification of claimed infringement . . . responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.<sup>63</sup>

The safe harbor provision requires OSPs “not to interfere with standard technical measures used by copyright holders to identify or protect copyrighted works.”<sup>64</sup> It also requires OSPs to “adopt and reasonably implement a policy of terminating in appropriate circumstances the accounts of subscribers who are repeat infringers.”<sup>65</sup> Furthermore, it imposes on OSPs a “notice and takedown” procedure that requires OSPs to remove infringing material upon formal notice from a copyright holder.<sup>66</sup> Service providers who satisfy all of the above conditions are “protected from liability for all monetary relief for direct, vicarious, and contributory infringement in circumstances in which the infringing or allegedly infringing content are [sic] contained in the system without the knowledge and involvement of the service provider.”<sup>67</sup>

### 3. *The Knowledge Standard and Red Flags*

A key component of § 512(c) is the knowledge standard of § 512(c)(1)(A)(ii)—revoking immunity from liability if an OSP becomes “aware of facts or circumstances from which infringing activity is apparent.” This knowledge standard, according to Congress, is best understood as a “red flag” test.<sup>68</sup> According to Congress:

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62. § 512(c). Another, almost identical provision appears in § 512(d), which refers to information location tools—arguably a feature of YouTube. Discussion of this clause and its legal ramifications on *Viacom v. YouTube* are beyond the scope of this Note.

63. § 512(c).

64. Kim, *supra* note 45, at 157–58.

65. Debra Weinstein, *Defining Expeditions: Uncharted Territory of the DMCA Safe Harbor Provision*, 26 CARDOZO ARTS & ENT. L.J. 589, 597–98 (2008).

66. Samuelson et al., *supra* note 27, at 20.

67. Weinstein, *supra* note 65, at 597.

68. H.R. REP. NO. 105-551, pt. 2, at 53 (1998).

The “red flag” test has both a subjective and an objective element. In determining whether the service provider was aware of a “red flag,” the subjective awareness of the service provider of the facts or circumstances in question must be determined. However, in deciding whether those facts or circumstances constitute a “red flag”—in other words, whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances—an objective standard should be used.<sup>69</sup>

The red flag test, then, has two parts that an OSP must meet. First, a court must find the OSP to be subjectively aware of the circumstances relating to the infringement. Second, a court must also find that the infringement would have been apparent to a reasonable person operating under similar circumstances as the OSP. Congress devised this two-part structure for the red flag test “to ensure that an OSP is not burdened with the duty to monitor its services or to affirmatively investigate circumstances indicating infringing activity.”<sup>70</sup>

Furthermore, examples given in the Congressional committee report “make clear that the red flag must signal to the provider not just that the activity is occurring, but that the activity is infringing.”<sup>71</sup> In the context of information location tools,<sup>72</sup> the committee clarified that:

A directory provider would not be . . . aware merely because it saw one or more photographs of a celebrity at a site devoted to that person. The provider could not be expected . . . to determine whether the photograph was still protected by copyright or was in the public domain; if the photograph was still protected by copyright, whether the use was licensed; and if the use was not licensed, whether it was permitted under the fair use doctrine.<sup>73</sup>

Congress stressed that knowledge of infringement could be ascertained even if the content owner does not give formal notice, stating that “copyright owners are not obligated to give notification of claimed infringement in order to enforce their rights.”<sup>74</sup> Congress also outlined that:

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69. *Id.*

70. Liliانا Chang, *The Red Flag Test for Apparent Knowledge Under the DMCA § 512(c) Safe Harbors*, 28 CARDOZO ARTS & ENT. L.J. 195, 202 (2010).

71. R. Anthony Reese, *The Relationship Between the ISP Safe Harbors and the Ordinary Rules of Copyright Liability*, 32 COLUM. J.L. & ARTS 427, 434 (2009).

72. Red flag analysis under 17 U.S.C. § 512(c) is the same as under § 512(d).

73. H.R. REP. NO. 105-551, pt. 2, at 57–58 (1998).

74. *Id.* at 54.

Section 512 does not require the use of a notice and takedown procedure. A service provider wishing to benefit from the limitation on liability under subsection (c) must “take down” or disable access to infringing material residing on its system or network of which it has actual knowledge or that meets the “red flag” test, even if the copyright owner or its agent does not notify it of a claim of infringement.<sup>75</sup>

This quote makes plain that a court may find red flag knowledge *independently* of a takedown notice.

4. *A Decade Is Forever in Tech Years—The Impact of the DMCA and the Challenges of Web 2.0*

Since its passage in 1998, the DMCA has been tethered to the promulgation of online and digital media.<sup>76</sup> DMCA anti-circumvention laws have been heralded as the “*sine qua non* for technologies like the DVD.”<sup>77</sup> Similarly, the various immunities for liability extended by the DMCA have been described as “absolutely crucial for giving us the Internet today”<sup>78</sup>—without them, blogs, Myspace and AOL could not exist.<sup>79</sup> Other important technologies such as Digital Rights Management, the iPod, and iTunes may credit their existence, at least in part, to the DMCA.<sup>80</sup>

While the DMCA has certainly had an impact on the digital ecosystem we live in today, it is inadequate to address many of the challenges posed by that ecosystem. Just eight months after the passing of the bill, Napster was born.<sup>81</sup> Napster and its peer-to-peer system,<sup>82</sup> like many other Internet inventions that followed, upended much of the “foresight” of Congress and the DMCA.<sup>83</sup> Some estimates found that within a year, users of Napster had likely “distributed more music than the entire record industry from its inception a century earlier.”<sup>84</sup> The music industry responded by systematically filing suit against users who were sharing on the peer-to-peer networks—

75. S. REP. NO. 105-190, at 45 (1998).

76. See Freedman, *supra* note 28.

77. Kravets, *supra* note 40.

78. *Id.* (quoting Fred von Lohmann of the Electronic Frontier Foundation).

79. *Id.* (“You could not run a blog without [the protections provided by the DMCA]. You couldn’t run MySpace, AOL . . . .”)

80. See Freedman, *supra* note 28.

81. Menell, *supra* note 32, at 2.

82. A Peer-to-Peer system is a network where computer systems can share files between systems within the network.

83. Menell, *supra* note 32, at 2.

84. *Id.*

with the noted effect of alienating its own customer base in an attempt to usher in a “digital enforcement age.”<sup>85</sup> The collapse of the recording industry followed.<sup>86</sup>

Napster was only the beginning. Congress failed to foresee the rise of Web 2.0—a network of websites and service providers that thrive on user participation and content. This new Internet was developing in stark contrast to the operator driven architecture and function of the Internet in 1998. Services we take for granted today—photo sharing, search engines, blogs, e-commerce, video sharing, and social-networks—were at the time of the birth of the DMCA “unheard of, embryonic or not yet conceived.”<sup>87</sup> These are the Facebooks and YouTubes of the world—the present and future of the Internet.

Of course, Web 2.0 is no runaway train—service providers provide and control the software that facilitates user expression and content.<sup>88</sup> A particularly important technological breakthrough in the world of Web 2.0 has been the advent of content scanning tools. These tools use an audio or video “fingerprint” to identify and filter infringing works posted or distributed over the Internet. They have become “increasingly smart” and “capable of determining . . . how much of a copyrighted movie is contained in a given online file and even whether the file combines video or audio tracks from the movie with new material.”<sup>89</sup> Effective filtering technology is not cheap; YouTube and Google claim that their own fingerprinting technology, Content ID, is the product of “approximately 50,000 man hours of engineering time and millions of dollars of research and development costs.”<sup>90</sup> However, the technology can also be profitable—identified videos can be monetized through targeted advertisements.<sup>91</sup>

## B. PERTINENT CASE HISTORY

Despite Congress’ lack of prescience in divining the advent of Web 2.0, Congress correctly predicted that service providers would find themselves in

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85. *Id.*

86. *Id.*

87. Kravets, *supra* note 40.

88. Brown, *supra* note 59, at 441.

89. Samuelson et al., *supra* note 27, at 41.

90. Decl. of Salem at ¶¶ 8–12, [Viacom v. YouTube, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), *appeal docketed*, No. 10-3270 (2d Cir. Dec. 3, 2010)].

91. Claire Cain Miller, *YouTube Ads Turn Videos Into Revenue*, N.Y. TIMES, Oct. 26, 2010, *available at* [http://www.nytimes.com/2010/09/03/technology/03youtube.html?\\_r=1&th&emc=th](http://www.nytimes.com/2010/09/03/technology/03youtube.html?_r=1&th&emc=th).

court for the actions of their users. The history of court cases regarding service providers in a Web 2.0 world exemplifies two issues that are pertinent to the decision in *Viacom v. YouTube*. The first issue is that courts have exhibited a “clear pattern of deference toward the service providers” when analyzing the “red flag” test.<sup>92</sup> Activities that trigger a red flag and the burden on service providers to investigate such activities have both been whittled down over the years. According to some commentators, the courts have read the red flag to be “an immense crimson banner” before any further investigation is required for an OSP.<sup>93</sup> The second trend is that in some cases, particularly those involving peer-to-peer networks, inducing infringement will make OSPs liable for the acts of their users.

1. *Narrowing the Meaning of “Red Flags”*

Courts have taken a narrow interpretation of red flag knowledge in cases involving safe harbor protection. One of the first cases that sparked this trend was *Corbis Corp. v. Amazon.com*.<sup>94</sup> The plaintiff in that case owned copyrights to certain photographic images.<sup>95</sup> They alleged that the defendant OSP, Amazon, had directly and vicariously infringed copyrighted works because said works were uploaded to one of Amazon’s websites and then sold by independent vendors on the Amazon online storefront—without the copyright owner’s permission.<sup>96</sup>

The district court found that the § 512(c) safe harbor applied and immunized Amazon from the infringement claims.<sup>97</sup> An OSP is precluded from safe harbor protection, according to the court, if the OSP has “deliberately proceed[ed] in the face of blatant factors of which it is aware” or if there is “evidence that [the] service provider ‘turned a blind eye to ‘red flags’ of obvious infringement.’”<sup>98</sup> According to the court, “general awareness that a particular type of item may be easily infringed” was not a red flag.<sup>99</sup> Rather, Amazon needed to have apparent knowledge of “specific instances of infringement.”<sup>100</sup> The court found that no such specific knowledge existed on the part of Amazon and granted partial summary judgment for the

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92. Hormann, *supra* note 25, at 1366.

93. Jane C. Ginsburg, *Separating the Sony Sheep from the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 ARIZ. L. REV. 577, 596 (2008).

94. *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1108 (W.D. Wash. 2004).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 1108–09.

99. *Id.* at 1108.

100. *Id.*

defendants.<sup>101</sup> The court held that the “the DMCA does not impose on OSPs the obligation to conduct an affirmative investigation into potential infringement on each website”—therefore Amazon did not have the burden to find these *specific instances of infringement* that would have made them liable.<sup>102</sup>

*Perfect 10, Inc. v. CCBill LLC*, decided three years later, reached a similar result. In that case, the publisher of an adult magazine sued the defendant for providing services to websites that had posted stolen and unauthorized infringing content.<sup>103</sup> The copyright owners in the case alleged that the web host was “aware of facts or circumstances from which infringing activity was apparent” because hosted websites named “stolencebritypics.com” and “illegal.net” should have raised a red flag.<sup>104</sup> The court saw the situation differently, reasoning that “in the context of adult material, descriptors such as ‘illegal’ and ‘stolen’ might merely be attempts to make the material more enticing and appealing.”<sup>105</sup> Thus names of websites suggesting infringement was not enough to raise a red flag because further investigation was required to verify if there was actual infringement—a duty the court felt OSPs did not owe third parties.<sup>106</sup> The Ninth Circuit, however, refused to place an investigative burden on service providers to seek out infringed content when “facts and circumstances” hinted towards its existence.<sup>107</sup> Rather, the court argued, “DMCA notification procedures place the burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of the copyright.”<sup>108</sup> The safe harbor provision then granted the defendant immunity from the vicarious infringement claims through the safe harbor provision.<sup>109</sup>

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101. *Id.*

102. See ROBERT P. MERGES, PETER S. MENELL, & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 680 (5th ed. 2010) (emphasis added).

103. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1108 (9th Cir. 2007).

104. *Id.* at 1111.

105. Hormann, *supra* note 25, at 1368.

106. Many academics and commentators criticize the *Perfect 10* decision for holding that in some instances names of websites do not suggest infringement. See Liliana Chang, *The Red Flag Test for Apparent Knowledge Under the DMCA § 512(c) Safe Harbors*, 28 *CARDOZO ARTS & ENT. L.J.* 195, 209 (2010). Detractors of the court argue that such a view is in direct contradiction of legislative intent. *Id.* Indeed, Congress had explained in the often quoted House Report that “words such as ‘pirate,’ ‘bootleg,’ or slang terms in their URL” are obviously infringing, and that “safe harbor status for a provider that views such a site . . . would not be appropriate.” *Id.*

107. *Perfect 10*, 488 F.3d at 1114.

108. *Id.* at 1113.

109. *Id.* at 1118.

In *UMG Recordings, Inc. v. Veoh Networks*, the district court applied the *CCBill* holding to a video-sharing service provider, concluding that the § 512(c) safe harbor protection applied.<sup>110</sup> The court further found that “UMG’s ‘evidence’ [fell] short of establishing actual knowledge within the meaning of the DMCA.”<sup>111</sup> The court made clear “that merely hosting user-contributed material capable of copyright protection [was not] enough to impute actual knowledge to a service provider” because such a theory would render the “DMCA’s notice-and-takedown provisions completely superfluous.”<sup>112</sup> Finally the court also stated that UMG did not meet the “high bar for finding ‘red flag’ knowledge” as evidenced in *CCBill*—though it never gave an example of what would meet such a high bar.<sup>113</sup>

The court rejected UMG’s argument that Veoh was “ineligible for the safe harbor because its founders, employees, and investors knew that widespread infringement was occurring on the Veoh system.” The court held that “there was no case holding that a provider’s general awareness of infringement, without more, is enough to preclude application of § 512(c).”<sup>114</sup> Such general awareness was not enough to raise a red flag because it would be at odds with the safe harbor’s purpose of “facilitat[ing] the robust development and world-wide expansion of electronic commerce [and] communications . . . in the digital age.”<sup>115</sup>

## 2. *The Inducement Model*

Another set of cases act as important precedent for *Viacom v. YouTube*. These are *MGM Studios, Inc. v. Grokster, Ltd.* and *Columbia Pictures Industries, Inc. v. Fung*. These cases involved peer-to-peer (P2P) file sharing networks, which are not granted safe harbor immunity under DMCA § 512(c).<sup>116</sup> The Supreme Court’s opinion in *Grokster* does not even mention the DMCA.<sup>117</sup> However, these two cases were cornerstones of Viacom’s inducement

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110. *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1108 (C.D. Cal. 2009).

111. *Id.* at 1109.

112. *Id.*

113. *Id.* at 1110.

114. *Id.* at 1111.

115. *Id.* (citing S. REP. NO. 105-190, at 1–2 (1998)); H.R. REP. NO. 105-551, pt. 2, at 21 (1998).

116. *See* 17 U.S.C. § 512 (c) (2006).

117. *See* *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

argument, wherein Viacom attempted to create an analogy between YouTube's uploading and site maintenance, and P2P file sharing networks.<sup>118</sup>

The Supreme Court ruled against Grokster in that landmark case.<sup>119</sup> The case "addressed the more general law of contributory liability for copyright infringement, and its application to the particular subset of service providers."<sup>120</sup> Grokster was a P2P file-sharing network that was designed and advertised as the successor to Napster.<sup>121</sup> The Supreme Court found that there was "overwhelming" evidence that the Grokster service was swamped with infringing content—a result of the defendant inducing users to upload infringing work.<sup>122</sup> The Court then imported the inducement rule from patent law into copyright law, holding that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."<sup>123</sup>

Following the reasoning in *Grokster*, the defendant in *Columbia Pictures Industries, Inc. v. Fung* was denied safe harbor protection on evidence of " 'purposeful, culpable expression and conduct' aimed at promoting infringing uses of the websites."<sup>124</sup> Plaintiffs had brought suit claiming that the defendant had infringed on their copyrights by hosting a P2P file-sharing network. The defendant, Fung, raised a DMCA defense under § 512(d).<sup>125</sup> The court found that Fung had gone to great lengths to encourage the infringement—going so far as to give personal technical assistance on how to infringe certain works.<sup>126</sup> Because Fung had "personally engaged in a broad campaign of encouraging copyright infringement,"<sup>127</sup> he was liable "under theories of inducement, contributory infringement, and vicarious infringement."<sup>128</sup>

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118. Memorandum of Law in Support of Viacom's Motion for Partial Summary Judgment and Inapplicability of the Digital Millennium Copyright Act Safe Harbor Defense at 24–29, *Viacom v. YouTube*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), *appeal docketed*, No. 10-3270 (2d Cir. Dec. 3, 2010) (No. 07-2103).

119. *See* *MGM Studios*, 545 U.S. at 919.

120. *Viacom*, 718 F. Supp. 2d at 518.

121. *MGM Studios*, 545 U.S. at 1.

122. *Id.* at 936–37.

123. *Id.*

124. *Columbia Pictures Indus., Inc. v. Fung*, No 06-5578, 2009 WL 6355911, at \*9–10 (C.D. Cal. Dec. 21, 2009).

125. *Id.* at \*15.

126. *Id.* at \*11.

127. *Id.* at \*12.

128. *Id.* at \*1.

## II. VIACOM V. YOUTUBE

Hot on the heels of the development of the DMCA, the rise of Web 2.0, and the court cases that shaped liability for OSPs came YouTube. YouTube is a website that hosts user-generated videos that can easily be uploaded and disseminated. Videos can be shared with friends, and even “embedded” into sections of other websites—all for free.<sup>129</sup> Much like the other Web 2.0 prodigy, Facebook, YouTube grew fast. YouTube was started in February 2005 in order to share videos from a dinner party.<sup>130</sup> Less than a year later, YouTube was streaming more than thirty million videos a day.<sup>131</sup> By October 2006, tech giant Google purchased YouTube for \$1.65 billion in a stock-for-stock transaction.<sup>132</sup> In 2007 alone, YouTube used as much bandwidth as the entirety of the Internet in the year 2000.<sup>133</sup> Today, YouTube has 146.3 million unique viewers a day—far surpassing viewership for any media company web portal.<sup>134</sup>

YouTube’s size and success has brought with it both attention and derision, particularly from media powerhouse Viacom. Viacom owns a great number of television networks and movie studios, including Paramount Pictures, MTV, Comedy Central, and Nickelodeon.<sup>135</sup> Viacom has found much of its copyrighted content available on YouTube—clips of its most popular programming including *The Daily Show* and *The Colbert Report* are consistently on YouTube’s homepage top watched list.<sup>136</sup> Viacom has identified YouTube as a threat—stealing Viacom’s works and stymieing the development of Viacom’s own possible web content portals.

Attempts at reconciling the two parties failed. Viacom and YouTube had originally negotiated an agreement in 2006 that would have allowed for YouTube to host Viacom’s content on its site and split ad revenue through the site’s Content ID system.<sup>137</sup> But the deal eventually fell through when YouTube refused to pay Viacom’s demanded minimum payment guarantees that neared a billion dollars.<sup>138</sup> A frustrated Viacom next sent a takedown

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129. Hormann, *supra* note 25, at 1354.

130. *See* Kim, *supra* note 45, at 142.

131. *See id.* at 141.

132. Press Release, Google, Google to Acquire YouTube for \$1.65 Billion in Stock (Oct. 9, 2006) (on file with author).

133. Hormann, *supra* note 25, at 1356.

134. Rao, *supra* note 7.

135. Kim, *supra* note 45, at 139.

136. *Id.* at 143.

137. *Id.* at 169.

138. *Id.* at 143.

notice demanding removal of more than a hundred thousand clips on YouTube.<sup>139</sup> Viacom subsequently filed suit against YouTube and Google, claiming they were “liable for the intentional infringement of thousands of Viacom’s copyrighted works” under theories of direct and vicarious infringement.<sup>140</sup>

A. VIACOM’S ARGUMENT

Viacom based its legal argument on what it believed was an “indisputable fact”—that “tens of thousands of videos on YouTube, resulting in hundreds of millions of views, were taken unlawfully from Viacom’s copyrighted works without authorization.”<sup>141</sup> In broad strokes, Viacom accused YouTube of “victimizing content owners.”<sup>142</sup> Viacom alleged that the founders of YouTube had “single-mindedly focused on geometrically increasing the number of YouTube users to maximize its commercial value” and cast a “blind eye to . . . the huge number of unauthorized copyrighted works posted on the site” to achieve that end.<sup>143</sup> Viacom argued that Google and YouTube should be “liable for the rampant infringement they . . . fostered and profited from.”<sup>144</sup>

Viacom painted a picture of a young YouTube focused on garnering as many views as possible in order to quickly sell the company. To achieve this end, Viacom asserted, “YouTube implemented a policy of maintaining access to infringing videos unless and until it received a ‘cease and desist’ demand from the copyright owner.”<sup>145</sup> Viacom argued that such a reading of the law would “render most of the statute enacted by Congress a nullity, for responding to takedown notices is only one of numerous preconditions to DMCA immunity.”<sup>146</sup>

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139. Michael Arrington, *Google Slammed by Viacom Takedown Notice Demand*, TECHCRUNCH (Dec. 21, 2010, 12:20 AM), <http://techcrunch.com/2007/02/02/gootube-slammed-by-viacom-takedown-demand>.

140. *See* Viacom v. YouTube, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), *appeal docketed*, No. 10-3270 (2d Cir. Dec. 3, 2010).

141. Memorandum of Law in Support of Viacom’s Motion for Partial Summary Judgment and Inapplicability of the Digital Millennium Copyright Act Safe Harbor Defense at 1, *Viacom*, 718 F. Supp. 2d 514 (No. 07-2103).

142. *Id.*

143. *Id.*

144. *Id.*

145. Opening Brief for Plaintiffs-Appellants at 11, *Viacom*, 718 F. Supp. 2d 514 (No. 10-3270).

146. Memorandum of Law in Support of Viacom’s Motion for Partial Summary Judgment and Inapplicability of the Digital Millennium Copyright Act Safe Harbor Defense at 3–4, *Viacom*, 718 F. Supp. 2d 514 (No. 07-2103).

More specifically, Viacom posited that YouTube did not qualify for the DMCA safe harbor provision § 512(c)(1)(A) because YouTube had “actual knowledge” and was “aware of facts or circumstances from which infringing activity [was] apparent,” but failed to “act expeditiously” to stop it.<sup>147</sup> Viacom claimed that YouTube was, at a minimum, liable for contributory infringement based on its general knowledge and willful blindness of the pervasive infringement on the site.<sup>148</sup> General knowledge, according to Viacom, was achieved through the staggering amount of infringing material on the site, particularly in the early days of YouTube. Viacom also asserted that YouTube attained specific knowledge of various infringing works. Willful blindness stemmed from YouTube’s refusal to use community flagging features and its selective application of content scanning technology. Ultimately,<sup>149</sup> Viacom moved for partial summary judgment, arguing that the defendants were not protected by the safe harbor provision.<sup>150</sup>

1. *Viacom’s Evidence that YouTube Was Generally Aware of Facts or Circumstances from Which Infringement Was Apparent*

Viacom introduced evidence to support its claim that YouTube was generally aware of infringement. The evidence focused on estimates of the pervasiveness of infringement present on YouTube, particularly in its early days. For instance, Viacom presented an email from September 2005, wherein YouTube cofounders Steven Chen and Jawed Karim discussed the implications of removing material that was “obviously infringing.”<sup>151</sup> They feared that the removal of the material would drop site traffic from “100,000 views a day down to about 20,000 views or maybe even lower.”<sup>152</sup> That would mean that the founders of YouTube attributed eighty percent of the site’s views to copyrighted material.

Viacom also presented instant message conversations that took place in late February 2006 between YouTube co-founder Steve Chen and YouTube

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147. *Id.* at 11.

148. Daniel S. Schechter and Colin B. Vandell, *Viacom v. YouTube: Safe Harbor Protection for Online Service Providers*, (Feb. 9, 2010, 3:30 PM), LATHAM & WATKINS CLIENT ALERT, available at [http://www.lw.com/upload/pubContent/\\_pdf/pub3638\\_1.pdf](http://www.lw.com/upload/pubContent/_pdf/pub3638_1.pdf).

149. Viacom made a number of other assertions and legal arguments that are outside the scope of this Note.

150. *Viacom*, 718 F. Supp. 2d at 516.

151. Decl. of Hohengarten ¶ 233 [*Viacom*, 718 F. Supp. 2d 514] (referencing Ex. 215, JK00007416, at JK00007416).

152. *Id.*

product manager Maryrose Dunton.<sup>153</sup> Dunton reported the results of a “little exercise” she performed wherein she “went through all the most viewed/most discussed/top favorites/top rated to try and figure out what percentage is or has copyrighted material.”<sup>154</sup> The number she reached “was over 70%.”<sup>155</sup> In another instant message conversation in March of 2006, Dunton relayed to a co-worker that “the truth of the matter is, probably 75-80% of our views come from copyrighted material.”<sup>156</sup>

Other evidence included the work of Google’s due-diligence team that was assembled to analyze the percentage of professional content on YouTube’s site before the acquisition. Storm Duncan, managing director of Credit Suisse and part of Google’s YouTube acquisition due diligence team, assessed that 60 percent of the content on the site was premium or professional content.<sup>157</sup> In 2007, Credit Suisse estimated that only 10 percent of the video views of the premium content was authorized to be on YouTube.<sup>158</sup> Viacom argued that such pervasive infringement had to raise a red flag and signal that YouTube “*knew* of the infringing activity on its site and therefore had at least ‘aware[ness] of facts or circumstances from which infringing activity is apparent.’”<sup>159</sup>

## 2. *Viacom’s Evidence that YouTube Was Aware of Specific Instances of Infringement*

Viacom also introduced evidence that YouTube employees—and even founders—became aware of *specific* infringing clips. For instance, in August of 2005, YouTube founders Jawed Karim and Chad Hurley agreed between each other to keep CNN space shuttle footage on the site.<sup>160</sup> In September of

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153. Decl. of Hohengarten ¶ 205 [*Viacom*, 718 F. Supp. 2d 514] (referencing Ex. 193, GOO001-00507535, at GOO001- 00507539).

154. *Id.*

155. *Id.*

156. Decl. of Hohengarten ¶ 207 [*Viacom*, 718 F. Supp. 2d 514] (referencing Ex. 195, GOO001- 01931840, at GOO001-01931843).

157. Decl. of Hohengarten ¶ 320 [*Viacom*, 718 F. Supp. 2d 514] (referencing Ex. 289, CSSU 001863 at CSSU 001957); Decl. of Hohengarten ¶ 362 [*Viacom*, 718 F. Supp. 2d 514] (referencing Ex. 328 (Duncan 30(b)(6) Dep.) at 199:24-200:5, 207:25- 210:13).

158. Decl. of Hohengarten ¶ 323 [*Viacom*, 718 F. Supp. 2d 514] (referencing Ex. 292, CSSU 004069 at CSSU 004071).

159. Opening Brief for Plaintiffs-Appellants at 24–25, *Viacom*, 718 F. Supp. 2d 514 (No. 10-3270).

160. Viacom’s Reply to Defs.’ Counterstatement to Viacom’s Statement of Undisputed Facts in Support of Its Mot. for Partial Summary Judgment at 27, *Viacom*, 718 F. Supp. 2d 514 (No. 07-2103), stating that:

2005, according to Viacom, Jawed Karim explicitly told his employees to keep known clips from *Conan O'Brien* and *Jay Leno* up on the site.<sup>161</sup> Viacom also introduced evidence of YouTube employees sharing playlist pages of material they believed to be infringed with their friends.<sup>162</sup> Several other employees were found to be sharing YouTube links showcasing clips from various Viacom properties such as *The Daily Show*, *The Colbert Report*, and *South Park*.<sup>163</sup> YouTube founder Jawed Karim shared at least seven infringing videos with a friend.<sup>164</sup>

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On August 10, 2005, YouTube cofounder Jawed Karim responded to YouTube co-founder Chad Hurley . . . 'lets remove stuff like movies/tv shows. lets keep short news clips for now. we can become stricter over time, just not overnight. like the CNN space shuttle clip, I like. we can remove it once we're bigger and better known, but for now that clip is fine.' Steve Chen replied, 'sounds good.'

161. *Id.* at [pincite], stating that:

In a September 1, 2005 email to YouTube co-founder Steve Chen and all YouTube employees, YouTube co-founder Jawed Karim stated, 'well, we SHOULD take down any: 1) movies 2) TV shows. We should KEEP: 1) news clips 2) comedy clips (Conan, Leno, etc) 3) music videos. In the future, I'd also reject these last three but not yet.'

162. *Id.* at 75, stating that:

In a June 4, 2006 instant message conversation, YouTube product manager Matthew Liu (IM user name coda322) directed a friend to two YouTube profile playlist pages containing content that he recognized as infringing, stating, 'go watch some superman . . . dont show other people though . . . it can get taken off'; Liu's friend asked, 'why would it get taken off[?]; Liu responded, 'cuz its copyrighted . . . technically we shouldn't allow it . . . but we're not going to take it off until the person that holds the copyright . . . is like . . . you shouldnt have that . . . then we'll take it off.'

163. *Id.* at 80, stating that:

In an August 24, 2006 email to other YouTube employees, YouTube systems administrator Paul Blair provided a link to a Daily Show clip on YouTube. . . . In an October 13, 2006 email to other Google employees, Google Video Product Manager Hunter Walk provided a link to a Colbert Report clip on YouTube. . . . In a March 9, 2007 email to YouTube employees, a Google employee provided a link to a "Funny south park" video on YouTube. . . . In a March 23, 2007 email to other Google employees, a Google employee provided a link to a Daily Show clip on YouTube.

164. A series of messages from Jawed Karim were found during discovery. Decl. of Kohlman ¶ 318 [*Viacom*, 718 F. Supp. 2d 514] (referencing Ex. 52–58). He sent links to YouTube videos to his friends, with personal messages typed to the respondent. *Id.* Titles of the clips ranged from "Hahaha SNL makes fun of Paris," to "Will Arnett drops by the 1/13/2006 episode of Conan and talk about his favorite interview positions, the fate of his CBS show 'Invested Development,' his new sitcom, and much more. Plus, more L&O air

### 3. *Viacom's Evidence of Willful Blindness*

Viacom also suggested that YouTube had taken “affirmative steps to deprive itself of item-specific knowledge” in an effort to use the lack of such knowledge to qualify itself for DMCA safe harbor protection. Viacom pointed to a community-flagging feature that YouTube had initiated but abandoned. For a short period of time, YouTube allowed its users to flag videos that users identified as copyrighted work. YouTube swiftly abandoned the feature, explaining its removal was due to non-infringing content being flagged along with unlicensed copyrighted work.<sup>165</sup> Not so, according to Viacom: Viacom alleged that e-mails between Steven Chen and Jawed Karim made it clear that the decision to end the feature was motivated at least in part to avoid being served a notice that there was unlicensed material on the site—actively turning a blind eye to a possible red flag of infringement.<sup>166</sup>

Viacom also called YouTube's policies regarding video fingerprinting technology a form of turning a blind eye, and went so far as to accuse YouTube of “high-tech extortion.”<sup>167</sup> Viacom complained that “YouTube had the ability to forestall virtually all infringing activity during the upload process through the use of commercially available fingerprint filtering technology,” but refused to do so until 2007.<sup>168</sup> Furthermore, when YouTube began filtering, only select content partners who had revenue sharing

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guitar!!!” to “Vice dumbass Dick Cheney shoots his friend in the face. Jon Stewart analyzes the event.” *Id.*

165. Defendant's Opposition to Plaintiff's Motions for Partial Summary Judgment at 19, *Viacom*, 718 F. Supp. 2d 514 (No. 07-2103).

166. Viacom's Reply to Defendants' Counterstatement to Viacom's Statement of Undisputed Facts in Support of Its Motion for Partial Summary Judgment, *Viacom*, 718 F. Supp. 2d 514 (No. 07-2103), stating that:

On September 23, 2005, YouTube cofounder Chad Hurley emailed YouTube cofounders Steve Chen and Jawed Karim, stating: ‘can we remove the flagging link for ‘copyrighted’ today? we are starting to see complaints for this and basically if we don't remove them we could be held liable for being served a notice. it's actually better if we don't have the link there at all because then the copyright holder is responsible for serving us notice of the material and not the users. anyways, it would be good if we could remove this asap.

167. Memorandum of Law in Support of Viacom's Motion for Partial Summary Judgment and Inapplicability of the Digital Millennium Copyright Act Safe Harbor Defense at 2, *Viacom*, 718 F. Supp. 2d 514 (No. 07-2103).

168. Opening Brief for Plaintiffs-Appellants at 45, *Viacom*, 718 F. Supp. 2d 514 (No. 10-3270).

agreements were afforded such protection.<sup>169</sup> Viacom, of course, was not one of those partners.<sup>170</sup> Unlike registered content partners of YouTube, Viacom did not receive the benefit of the Content ID system that would have significantly reduced infringement for more than a year after negotiations broke down.<sup>171</sup>

Viacom accused YouTube of actively keeping this technology away from anyone who was not a content partner.<sup>172</sup> Viacom argued that it did not receive the benefit of the technology until May 2008—even though Viacom asked for it in February of 2007 after negotiations between the two companies broke down over content licensing deals.<sup>173</sup> Viacom did not receive notice of YouTube’s plan to afford them the Content ID protection until the first status conference between the parties in litigation.<sup>174</sup> According to Viacom, it was a “deliberate business decision not to broadly deploy these techniques and instead . . . hold content owners hostage to Defendants’ efforts to commercialize the site.”<sup>175</sup> In effect, YouTube had “consciously blinded itself to . . . specific knowledge of infringement by choosing to implement—but only selectively—commercially available digital fingerprint filtering technology.”<sup>176</sup>

#### B. YOUTUBE’S DEFENSE

YouTube rejected all of Viacom’s assertions. It painted itself as a service that was not just in full compliance of the DMCA, but also in line with the legislative intent behind it. YouTube touted itself as service that achieved a “profound impact on culture, politics, and society in this country and around the world.”<sup>177</sup> YouTube was valuable to a global society because it gave

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169. Memorandum of Law in Support of Viacom’s Motion for Partial Summary Judgment and Inapplicability of the Digital Millennium Copyright Act Safe Harbor Defense at 2, *Viacom*, 718 F. Supp. 2d 514 (No. 07-2103).

170. *Id.*

171. *Id.*

172. Viacom’s Reply to Defendants’ Counterstatement to Viacom’s Statement of Undisputed Facts in Support of Its Motion for Partial Summary Judgment at Fact 296, *Viacom*, 718 F. Supp. 2d 514 (No. 07-2103).

173. *Id.*

174. *Id.* at Fact 314.

175. Memorandum of Law in Support of Viacom’s Motion for Partial Summary Judgment and Inapplicability of the Digital Millennium Copyright Act Safe Harbor Defense at 2, *Viacom*, 718 F. Supp. 2d 514 (No. 07-2103).

176. Opening Brief for Plaintiffs-Appellants at 37, *Viacom*, 718 F. Supp. 2d 514 (No. 10-3270).

177. Memorandum of Law in Support of Defendants’ Motion for Summary Judgment at 2, *Viacom*, 718 F. Supp. 2d 514 (No. 07-2103).

elected officials new ways to communicate with the American public, enabled reporting from conflicts around the globe, gave new means of exposure for rising artists, and even aided protestors in Iran in their struggle against the government.<sup>178</sup> These accomplishments were owed to the members of Congress who realized that Internet services would be valuable and revolutionary, and embedded safe harbor into the DMCA to protect services like YouTube.<sup>179</sup> YouTube claimed that Viacom's lawsuit sought to "undo" all of these triumphs.<sup>180</sup>

YouTube defended its practice of waiting until receiving a takedown notice before removing content. According to YouTube, the "heart" of safe harbor provision was the notice-and-takedown procedure.<sup>181</sup> Thus YouTube's practice of "refraining from proactive monitoring for potential infringement is not only consistent with the DMCA, it makes perfect sense."<sup>182</sup> With the volume and complexity surrounding the rights associated with clips uploaded to YouTube, the burden was on the copyright holder, not the service provider, "to guess whether particular materials are or are not authorized."<sup>183</sup>

YouTube objected to Viacom's accusation that it was "willfully blind" to the content on its site.<sup>184</sup> YouTube claimed that § 512(c)'s knowledge requirement did not impose on it the need for any further inquiry or investigation—only to remove specific material known to be infringing through DMCA takedown notice.<sup>185</sup> Such a reading of the DMCA, according to YouTube, was consistent with both case law and legislative intent.<sup>186</sup>

YouTube also moved for summary judgment, claiming that it was clearly entitled to DMCA safe harbor protection. It argued that it met the threshold qualifications: functioning as a "service provider," having a registered DMCA agent and appropriate repeat-infringer policy, and accommodating standard technical measures.<sup>187</sup> YouTube also claimed that it did not have actual or specific knowledge of the alleged infringements and responded expeditiously

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178. *Id.* at 2–3.

179. *Id.* at 3.

180. *Id.* at 2.

181. *Id.* at 3.

182. Defendant's Opposition to Plaintiff's Motions for Partial Summary Judgment at 35, *Viacom*, 718 F. Supp. 2d 514 (No. 07-2103).

183. *Id.*

184. *Id.* at 39.

185. *Id.*

186. *Id.* at 35.

187. Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 22, *Viacom*, 718 F. Supp. 2d 514 (No. 07-2103).

to any takedown notices.<sup>188</sup> Thus, YouTube argued that it was entitled to protection under the DMCA's safe harbor clause, and was thereby immune from all allegations of liability.<sup>189</sup>

1. *YouTube's Counter to Viacom's Evidence that YouTube Was Aware of Facts or Circumstances of Infringement*

YouTube attempted to debunk Viacom's evidence and assertions in two ways. The first was to challenge each piece of evidence that Viacom claimed proved that YouTube was aware of pervasive or even specific infringement.<sup>190</sup> More generally, YouTube made the argument that it was impossible for any observer to ascertain what percentage of material on the site was infringing because there was no way of knowing if the content was authorized by the owner or not.<sup>191</sup>

YouTube blamed Viacom for much of this problem. YouTube pointed to Viacom's confusing upload policy that included promotional uploads, stealth-marketing campaigns, and contradictory leave-up policies.<sup>192</sup> YouTube argued that Viacom's "widespread use of YouTube to market and promote their content—uses that continued even in the midst of this litigation"—had defeated "any notion that the presence of [Viacom] material on YouTube

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188. *Id.* at 21–27.

189. *Viacom*, 718 F. Supp. 2d at 516.

190. For example, counsel for YouTube argued that the e-mail conversation between Steven Chen and Jawid Karim was taken out of context and that "Viacom's selective excerpt . . . distorts its meaning." Viacom's Reply to Defendants' Counterstatement to Viacom's Statement of Undisputed Facts in Support of Its Motion for Partial Summary Judgment at 12, *Viacom*, 718 F. Supp. 2d 514 (No. 07-2103). In regard to the instant message confirmation of March 2006, counsel for YouTube "disputed that the document provides any evidence of the percentage of copyrighted or infringing videos available on YouTube." *Id.* In response to the 60 percent figure, Duncan testified that someone else provided him with this information, but he did not recall who provide this information. Schapiro Opp. Ex. 212 199:22-202:8, Sept. 18, 2009. In regard to the 10 percent projection, counsel for YouTube argued that the "projection concerned only one category of authorized videos that could be monetized and reflects Google's plan to monetize only videos on YouTube subject to individually negotiation content-partnership agreements." Decl. of Schapiro [*Viacom*, 718 F. Supp. 2d 514] (referencing Ex. 212 144:5-145:9).

191. YouTube argued that "A number of other factors—including the obscurity of much of the content posted on YouTube; the complex array of licensing and co-ownership issues attending much professional content; and fair use—make it even more difficult for YouTube to determine whether a given video is illegitimate." Defendant's Opposition to Plaintiffs' Motions for Partial Summary Judgment at 36, *Viacom*, 718 F. Supp. 2d 514 (No. 07-2103).

192. Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 48, *Viacom*, 718 F. Supp. 2d 514 (No. 07-2103).

create[d] a fact or circumstance from which infringing activity is apparent.”<sup>193</sup> YouTube argued that Viacom’s actions were important to the knowledge inquiry of the DMCA because it “significantly complicate[d] the task of distinguishing between authorized and unauthorized uploads” in two ways: “(1) the sheer number of authorized video clips that Viacom (and other media companies) ha[d] allowed to flood YouTube, and (2) the opaque manner in which those clips [were] frequently placed on YouTube.”<sup>194</sup>

YouTube elaborated on the second point by presenting evidence that Viacom uploaded content to YouTube covertly, using an array of fake accounts and agents.<sup>195</sup> This was an effort to engage in “stealth marketing”—a technique that was designed to advertise to a savvy audience that disliked studio sponsored promotion by creating “the appearance of authentic grass-roots interest in the content being promoted.”<sup>196</sup> Viacom partook in a campaign of concealing its connection to many of the videos it was responsible for uploading.<sup>197</sup> The general goal of this campaign was to make the uploaded content appear as though a “fan had created it and posted it.”<sup>198</sup> Employees and agents would even go so far as to “rough up” the uploads with “time codes and other internal studio markings to make them seem illicit, even though the clips were actually part of a carefully crafted marketing initiative.”<sup>199</sup> Even major celebrities, like Andy Samberg, were involved in the purposeful leaking of material.<sup>200</sup>

Making it more difficult to ascertain whether content on YouTube was authorized were Viacom’s inconsistent and confusing upload and takedown policies. YouTube presented evidence that Viacom would “come up with new rules every few days—sometimes even changing the rules within the

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193. *Id.* at 38.

194. *Id.*

195. *Id.* at 35.

196. *Id.* at 39.

197. Techniques included hiring an army of third-party marketing agents to upload clips on its behalf; creating and using YouTube accounts that lack any discernable connection to Viacom (such as “MysticalGirl8,” “Demansr,” “tesderiw,” “GossipGirl40,” “Snackboard,” and “Keithhn”); deliberately using email addresses that “can’t be traced to [Viacom]” when registering for YouTube accounts; having Viacom employees make special trips away from the company’s premises (to places like Kinko’s) to upload videos to YouTube from computers not traceable to Viacom; and altering its own videos to make them appear stolen, like “footage from the cutting room floor, so users feel they have found something unique.” *Id.* at 40.

198. *Id.* at 39.

199. *Id.*

200. Decl. of Rubin ¶ 226 [*Viacom*, 718 F. Supp. 2d 514] (referencing Ex. 25, VIA01987927 at VIA01987927).

same day.”<sup>201</sup> Viacom would even allow material from programs that were central in the case—*The Daily Show* and *The Colbert Report*—to be uploaded because “Jon Stewart and Stephen Colbert believed that their presence on YouTube was important for their ratings as well as for their relationship with their audience.”<sup>202</sup>

Acts like these, with different uploading guidelines given to different companies and agents, created a maelstrom of confusion within Viacom over what uploads were actually authorized. This was evidenced by Viacom’s confused and contradictory takedown notices, and clips dropped from the lawsuit. In fact, clips that Viacom initially included in its complaint, but subsequently dropped from the lawsuit, were posted by Viacom or one of its agents.<sup>203</sup> YouTube concluded that Viacom’s uploading policy, “and the struggles of its own employees, agents, and lawyers to distinguish authorized from unauthorized clips,” were “fatal to Viacom’s claims about YouTube’s knowledge . . . of infringement.”<sup>204</sup>

### C. COURT IS IN SESSION

In his thirty page opinion, Judge Stanton rejected most of Viacom’s arguments and granted summary judgment to YouTube. The court focused its analysis on whether or not YouTube was protected by the DMCA’s safe harbor provision. The court bifurcated Viacom’s principle safe harbor argument—that YouTube had “‘actual knowledge’ and [was] ‘aware of facts and circumstances from which infringing activity [was] apparent,’ but failed to ‘act expeditiously’ to stop it.”<sup>205</sup> The court rejected the assertion that YouTube failed to stop the infringement expeditiously, instead pointing out that when YouTube “received specific notice that a particular item infringed a copyright, [it] swiftly removed it.”<sup>206</sup> The court continued on to insist that all of the “clips in suit are off the YouTube website, most having been removed in response to DMCA takedown notices.”<sup>207</sup>

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201. Memorandum of Law in Support of Defendants’ Motion for Summary Judgment at 39, *Viacom*, 718 F. Supp. 2d 514 (No. 07-2103).

202. *Id.* at 48.

203. Defendant’s Opposition to Plaintiffs’ Motions for Partial Summary Judgment at 5–6, *Viacom*, 718 F. Supp. 2d 514 (No. 07-2103).

204. *Id.* at 6.

205. *Viacom*, 718 F. Supp. 2d at 519.

206. *Id.*

207. *Id.*

The court then turned its attention to what it believed was the critical “red flag” question—whether the statutory phrases “‘actual knowledge’”<sup>208</sup> of infringement and awareness of “facts or circumstances from which infringing activity is apparent”<sup>209</sup> refer to either “a general awareness that there are infringements” or rather “actual or constructive knowledge of specific and identifiable infringements.”<sup>210</sup> The court concluded that the phrase referred to *actual and constructive knowledge*, not “mere knowledge of prevalence of such activity in general.”<sup>211</sup>

The court concluded that when a service provider takes down infringing material upon receipt of a takedown notice, it is given safe harbor protection under the DMCA, “even if otherwise he would be held as a contributory infringer under the general law.”<sup>212</sup> Evidently, because YouTube removed material when it was given a takedown notice, it was protected “from liability for all monetary relief for direct, vicarious and contributory infringement.”<sup>213</sup>

1. *A Legislative Approach to Safe Harbor Analysis*

The court referred to legislative history to explain its decision. Quoting broad swaths of excerpts from Committee Reports, the court concluded that the “tenor” of the reports along with an “instructive explanation of the need for specificity” made it clear that the legislation was intended to only hold service providers liable for infringing content about which the provider had specific knowledge.<sup>214</sup>

The court believed that its conclusion was “consistent with an area of the law devoted to protection of distinctive individual works, not of libraries.”<sup>215</sup> The court read the legislative history as clearly putting the burden of finding infringing material on content providers, not service providers. The court agreed with YouTube and did not want to impose a “responsibility on service providers to discover which of their users’ postings infringe a copyright” because that “would contravene the structure and operation of the DMCA.”<sup>216</sup> The opinion leaned on prior case law to make this point,

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208. 17 U.S.C. § 512(c) (2006).

209. *Id.*

210. *Viacom*, 718 F. Supp. 2d at 519.

211. *Id.* at 523.

212. *Id.* at 526.

213. *Id.*

214. *Id.* at 519.

215. *Id.*

216. *Id.* at 523.

quoting the court in *Perfect 10, Inc. v. CCBill LLC* that refused to “shift a substantial burden from the copyright owner to the provider.”<sup>217</sup>

The court validated its decision by stressing that the current DMCA structure was adequate. The court made much of the fact that the infringing works identified in the lawsuit may have only constituted “a small fraction of millions of works posted by others on the service’s platform.”<sup>218</sup> The court felt that the current “DMCA notification regime works efficiently” because, within one business day, YouTube was able to remove all 100,000 videos that Viacom requested to be removed in a mass takedown.<sup>219</sup>

## 2. Case Law Analysis of What Triggers a Red Flag

The court’s analysis of prior case law focused on the mechanics of the “red flag” test. In its discussion of cases like *CCBill LLC, UMG Records, Inc. v. Veob Networks, Inc.*, and *Corbis Corp. v. Amazon.com, Inc.*, the court came to the conclusion that “awareness of pervasive copyright-infringing, however flagrant and blatant, does not impose liability on the service provider. “It furnishes at most a statistical estimate of the chance any particular posting is infringing—and that is not a ‘red flag’ marking any particular work.”<sup>220</sup> In other words, the court viewed case law to point towards a red flag test that can be triggered only by something more than “facts and circumstances” pointing to infringement.

The court relied on *CCBill* for the initial building block of this red flag analysis. The *CCBill* court had refused to place an investigative burden on service providers to seek out infringing content when “facts and circumstances” hinted towards its existence.<sup>221</sup> The opinion next quoted the district court in *UMG Records, Inc. v. Veob Networks, Inc.*, wherein the district court interpreted *CCBill*’s refusal to force ISPs to investigate “facts and circumstances” around infringement as a proclamation that those facts and circumstances cannot be identified as red flags.<sup>222</sup>

According to the court, the only time a red flag can be triggered is when there is specific knowledge of infringement. The court relied on *Corbis Corp.*, which found that Amazon would only have been notified by a red flag if it

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217. *Id.* (quoting *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007)).

218. *Id.*

219. *Id.*

220. *Id.* at 524.

221. *Id.* at 522.

222. *Id.*

knew of infringement on a specific site, and not if it knew some sites were infringing in general.<sup>223</sup>

### III. ANALYSIS

#### A. SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED

Reflecting on the breadth of the Viacom and YouTube argument sections of this Note, it is clear that a copious amount of evidence was submitted to the court trying to prove whether or not YouTube had actual knowledge of infringement under DMCA § 512 (c). A reader would not be aware of such evidence when reading the opinion. The opinion glosses over or fails to mention most of the evidentiary back and forth between the parties. That is unfortunate because this argument between the parties raises a genuine issue of material fact relating to YouTube's knowledge of infringement.<sup>224</sup> Summary judgment should not have been granted as a matter of law and the case should have gone to a jury.<sup>225</sup>

The opinion made clear that as a matter of law, the "mere knowledge of prevalence" of infringing activity was not enough to hold service providers like YouTube accountable for the infringement of its users.<sup>226</sup> The court required specific knowledge of specific work as a matter of law.

The opinion, however, never mentioned that Viacom submitted evidence that the founders of YouTube and their employees became aware of specific infringing clips.<sup>227</sup> The court may have been subtly referencing YouTube's defense to that accusation when it stated that a "provider cannot by inspection determine whether the use has been licensed by the owner, or whether its posting is a 'fair use' of the material."<sup>228</sup> But the veracity of either side's claims on specific knowledge is not a question of law; it is a question of fact. A jury should have decided whether or not YouTube employees and

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223. *Id.* at 523.

224. The plaintiffs have since agreed with this point. *See* Opening Brief for Plaintiffs-Appellants, *Viacom*, 718 F. Supp. 2d 514 (No. 10-3270).

225. Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

226. *Viacom*, 718 F. Supp. 2d at 523.

227. *Id.* at 516.

228. *Id.* at 524. YouTube made a similar argument in defense to Viacom's specific infringement claims. *See* Defendant's Opposition to Plaintiffs' Motions for Partial Summary Judgment at 36, *Viacom*, 718 F. Supp. 2d 514 (No. 07-2103).

founders were able to tell by inspection if the owner licensed the content in question.

The court also dismissed any statistical estimate of how much infringing material was present on YouTube. According to the court, such a number “furnishes at most a statistical estimate of the chance any particular posting is infringing—and that is not a ‘red flag’ marking any *particular* work.”<sup>229</sup> The court stressed that the “the infringing works in suit may be a small fraction of millions of works posted by others on the service’s platform.”<sup>230</sup>

The court, however, underplayed *how much* of YouTube’s material could have been infringing, particularly in its early days. Viacom presented evidence that at one point YouTube relied on infringing material for 80 percent of its site traffic. YouTube brought forth evidence countering that claim. But the court never mentioned the conflict over such key evidence. The “tenor” of the legislative history does not posit that Congress thought that, as a matter of law, a website that is *overwhelmingly* full of infringing material should continue to operate under DMCA protection. This disagreement over the prevalence of massive amounts of infringement is of material fact to the case.

B. THE CONSEQUENCE OF THE COURT’S READING OF THE DMCA IS A NOTICE AND TAKEDOWN ONLY REGIME

The court’s opinion implies that red flag knowledge can only be triggered with a notice and takedown, despite the clear distinction made in the DMCA. Though the court admits that a service provider must remove content “if a service provider knows (from notice from the owner, *or* a “red flag”) of specific instances of infringement,”<sup>231</sup> any logical inference from the court’s holding suggests otherwise.

According to the court, awareness of “blatant” and “ubiquitous” infringement was not enough to trigger a red flag.<sup>232</sup> Despite arguments by Viacom and YouTube regarding the need for fingerprinting technologies, the court refused to place any such investigative duty on the service provider.<sup>233</sup> And the court’s silence on the specific instances where YouTube employees and founders may have known about specific instances of infringement suggests that they too did not count as a red flag. The court simply provided no example of how one could possibly become “aware of facts or

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229. *Viacom*, 718 F. Supp. 2d at 524 (emphasis added).

230. *Id.* at 524.

231. *Id.* at 525 (emphasis added).

232. *Id.* at 525, 528.

233. *See id.* at 529.

circumstances” that a specific item is infringing other than a notice from the true owner.

As the opinion itself suggests, this reading of the DMCA is inconsistent with legislative intent. As described earlier in this Note, Congress made clear that red flag knowledge is attainable *independently* of a takedown notice.<sup>234</sup> Takedown notices were not meant to be the *only* way a service provider could become aware of red flags. The opinion makes Congress’ intent on this matter impossible to achieve.

This portion of the ruling has already fostered unfair practices as opportunist companies are already attempting to hide behind this new takedown only regime. One such company is called Grooveshark—described by some as the “ugly” consequence of the decision.<sup>235</sup> Grooveshark scans a user’s folder and uploads it to its server, calling it user-generated content.<sup>236</sup> It then streams unlicensed music files for free.<sup>237</sup> It will only take down the music when served a takedown notice.<sup>238</sup> Grooveshark believes that this practice is legal because it comports with the safe harbor provision as interpreted in the *Viacom* decision.<sup>239</sup> Consequently Grooveshark has exasperated “whac-a-mole” costs and used them as leverage to “extract favorable licensing arrangements” from copyright owners.<sup>240</sup> Thus, Grooveshark is one example of an attempt to use “the lower court decision in *Viacom v. YouTube* as an invitation to cannibalize and leverage.”<sup>241</sup> This troublesome development was certainly not Congress’ intent.

### C. CAUGHT BETWEEN A ROCK AND A HARD PLACE—THE COURT HAD FEW CHOICES BECAUSE OF AN ANTIQUATED DMCA

The opinion seems to be a result of the court attempting to satisfy the spirit of the DMCA, without the proper means under the DMCA to do so. In the decision, the court repeatedly stressed that the purpose of the DMCA was to foster the development of the Internet. The court must have seen its stringent red flag standards as the only way to achieve this goal in the face of mounting pressure from ramped up statutory damages on one hand, and the limited tools offered to monitor websites under the DMCA on the other.

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234. H.R. REP. No. 105-551, pt. 2, at 57–58 (1998).

235. Menell, *supra* note 52.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

If the court had not set its stringent standard for red flag knowledge, then it would have been pressed against the ramped up statutory damage range for copyright infringement, which allowed for Viacom's request of \$1.65 billion dollars in damages.<sup>242</sup> Surely, the court found this number unacceptable in the "absence of billion dollar harms."<sup>243</sup> Academics have called this issue the unsaid "elephant in the room" in the case.<sup>244</sup> To undercut this "elephant," the court returned again and again to legislative intent—Congress wanted to foster services like YouTube. In many ways, the statutory damages provisions make this impossible. Though the court never took up the subject, its decision comports with the logic that in a Web 2.0 world in which a massive number of clips can be uploaded instantaneously, these damage provisions do not make sense.

The only way to protect YouTube and other internet companies from such crippling liability was to limit acquired knowledge to the DMCA takedown notification system. The court stabbed YouTube's eyes, making them blind to all other possible ways of becoming aware of infringement in order to protect YouTube. The court venerated the DMCA notification system—praising it for working "efficiently."<sup>245</sup> It complimented YouTube on taking down more than 100,000 videos in one business day after Viacom sent a mass takedown notice.<sup>246</sup> Any lower standard for red flag knowledge would have put YouTube on the hook for billions in damages, which the court felt the safe harbor was designed to protect against.

Unfortunately, takedown notices are flawed and inefficient. Examples of abuse abound, including magicians who have successfully sent takedown notices of videos debunking their tricks<sup>247</sup> and Twitter tweets unjustly removed due to DMCA takedown notices.<sup>248</sup> In the *Viacom* case alone, Viacom erroneously sent takedown notices of *other* content owners' works, causing them to be removed and prompting annoyed copyright holders to

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242. *Id.*

243. *Id.*

244. See Peter S. Menell, *Confronting the Elephant in the Room: Interpreting and Reforming Statutory Damages in the Internet Age* (Working Paper).

245. *Viacom v. YouTube*, 718 F. Supp. 2d 514, 524 (S.D.N.Y. 2010), *appeal docketed*, No. 10-3270 (2d Cir. Dec. 3, 2010).

246. *Id.*

247. Kravets, *supra* note 40.

248. Jacqui Cheng, *DMCA Abuse Extends to Twitter Posts*, ARS TECHNICA (Dec. 23, 2010, 3:15 PM), <http://arstechnica.com/tech-policy/news/2010/04/dmca-abuse-extends-to-twitter-posts.ars>.

complain about Viacom's "blatant abuse of the DMCA takedown statute."<sup>249</sup> Courts, too, have noted this problem. The district court in *Design Furnishings, Inc. v. Zen Path LLC* recognized that the policy of immediately taking down material after receiving a takedown notice "essentially shift[s]" the burden off of copyright holders to prove copyright infringement.<sup>250</sup> Rather, takedown regimes "allow anyone to effectively shut down" a site held by a service provider "simply by filing the notice."<sup>251</sup>

It is clear that content filtering works more efficiently than a DMCA takedown only regime. Content filtering affords service providers actual knowledge that a work is appearing unlicensed, and gives content providers a fast, and often times profitable, way to identify infringing material. But there was no mention of filtering technology in the opinion. Most likely the court felt restrained by prior precedent set by *Perfect 10, Inc. v. CCBill LLC*, which, as explained earlier, essentially refused to place any investigative burden on service providers to seek out infringed content. And of course content filtering is not in the DMCA—for obvious reasons, Congress did not anticipate filtering technology.

The DMCA takedown system is a blunt instrument compared to the relatively elegant tool of content filtering. Indeed, YouTube's Content ID has essentially *solved* most future disputes between YouTube and content providers.<sup>252</sup> If the DMCA can be revised to have some kind of requirement for content filtering, courts would not have to cling to the takedown procedure as the only means to protect OSPs from crippling liability. This will force emerging companies to use filtering technology, and courts will not have to make hamstrung legal judgments to protect those companies from the mechanics of the DMCA.<sup>253</sup>

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249. Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 66, *Viacom*, 718 F. Supp. 2d 514 (No. 07-2103).

250. *Design Furnishings, Inc. v. Zen Path LLC*, CIV. 2:10-02765, 2010 WL 4321568, at \*5 (E.D. Cal. Oct. 21, 2010).

251. *Id.*

252. Menell, *supra* note 52.

253. Many commentators have advised against such a requirement. See Brown, *supra* note 59, at 455; see also Hormann, *supra* note 25, at 1350. Others have tacitly accepted such a proposal. See Samuelson et al., *supra* note 27, at 41; see also Brett White, Note, *Viacom v. YouTube: A Proving Ground for DMCA Safe Harbors Against Secondary Liability*, 24 ST. JOHN'S J.L. COMM. 811, 847 (2010).

#### IV. CONCLUSION

The district court's decision is currently under review by the circuit court, and will undoubtedly be tested. In many ways the abrupt reasoning of the court, and its possible overreaching of the law to reach a just social result, may end up hurting YouTube in the end. It should be expected that the issues of specific infringement, pervasive knowledge of massive infringement, and DMCA takedown notices in lieu of other red flags will all come up in the appellate court's opinion. It should be expected that the appellate court will similarly brush up against the issues of statutory damages and the DMCA's silence on content filtering. If the reasoning of the district court is not strong enough to withstand scrutiny, YouTube may still be at risk. These problems suggest that the DMCA needs to be reformed to reflect the Web 2.0 digital landscape. Only then will hamstrung decisions like *Viacom v. YouTube* be a thing of the past. The DMCA has lasted more than a decade on the tools it provides to content owners and service providers. In order to survive the next decade, the DMCA may need to sharpen its knives.

