

VIA ECF

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Re: Case No. 10-3270, *Viacom International Inc., et al. v. YouTube, Inc., et al.*;
Case No. 10-3342, *The Football Ass'n Premier League Ltd., et al. v. YouTube, Inc., et al.*

Plaintiffs-Appellants respectfully submit this consolidated response to YouTube's letter-brief of November 1, 2011.

I. YouTube's "Specific" Knowledge Construction of § 512(c)(1)(A) Is Untenable And Could Not Entitle YouTube To Summary Judgment In Any Event.

The Court has inquired "whether and how the red-flag knowledge provision would apply under Defendants' 'specific' knowledge construction of § 512(c)(1)(A)." YouTube's response is that the red-flag provision would apply only when "*particular* infringement would have been apparent to a reasonable person." YT Ltr. 1 (emphasis added).¹ In its view, awareness of "facts and circumstances from which infringing activity is apparent" requires essentially the same as "actual knowledge" of particular infringing material, except that one is judged objectively and one is judged subjectively.

By contrast, Plaintiffs' construction of red-flag awareness is tied precisely to the statutory text. Because awareness of "infringing activity" requires less specificity than "actual knowledge" of "infringing material," a website operator who "welcome[s]" and is aware of infringing

¹ YouTube asserts that "[a] plaintiff bears the burden of proving red-flag awareness," YT Ltr. 1, but section 512(c) is an affirmative defense and its elements must be proven by the defendant. See *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001); *In re Aims-ter Copyright Litig.*, 252 F. Supp. 2d 634, 657 (N.D. Ill. 2002), *aff'd*, 334 F.3d 643 (7th Cir. 2003); Premier League Br. 28 & n.4. Hence, summary judgment must be reversed if there is a genuine dispute of fact as to whether YouTube proved the absence of disqualifying awareness.

activity on its site – here in the range of 75-80% of views according to YouTube’s own analyses – clearly satisfies § 512(c)(1)(A)(ii) even if it avoids knowing most of the specifics. And though operators do not have an independent obligation to monitor their sites for infringement, once they have this kind of awareness of infringing activity they have a duty to act to address the problem under § 512(c)(1)(A)(iii).

A. If YouTube’s exceptionally narrow construction of the safe harbor as excluding *only* those with URL-specific awareness were correct, even a brazenly piratical site could qualify for the defense as long as it does not have specific knowledge of the infringing content on its site (including repeat infringements). YouTube could tear up its agreements with content partners, disable its digital fingerprinting system, and expand its practice of welcoming massive infringement and doing nothing until a takedown notice is received, reaping the profits all the while. JAI-173; JAI-159. Indeed, on YouTube’s view, Grokster itself could resurface as a “storage” site, allow users to post copyrighted music throughout its system for public consumption, avoid knowledge of the specific location of particular pirated music files, and respond to takedown notices, with complete immunity from copyright infringement liability under the DMCA. *Viacom Br.* 29-30. *Cf. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 927-28 (2005) (recognizing that Grokster lacked knowledge of “specific instances of infringement”).

Though YouTube asserts that its reading of the red-flag provision is “well-established,” YT Let. 3, in fact, circuit and district courts have rejected YouTube’s extreme view. *ALS Scan*, 239 F.3d at 625 (“The DMCA’s protection of an innocent service provider disappears at the moment the service provider loses its innocence, i.e., at the moment it becomes aware that a third party is using its system to infringe”); *Columbia Pictures Indus., Inc. v. Fung*, No. CV 06-5578 SVW(JCx), 2009 WL 6355911, at *18-19 (C.D. Cal. Dec. 21, 2009). At most, two other district

court cases have adopted it. This Court also should reject YouTube’s contention for each of the following three reasons:

First, YouTube’s interpretation cannot be reconciled with the statutory text, which YouTube never quotes. The statute says YouTube is ejected from the safe harbor if it is “aware of facts and circumstances from which infringing activity is apparent.” 17 U.S.C. § 512(c)(1)(A)(ii). YouTube would prefer that, instead of “infringing *activity*,” the statute mimicked the actual knowledge provision and required awareness of a “particular infringement” or “a given instance of infringement” (YT Ltr. 1) or “particular infringing material,” (*id.* at 2 n.2). But that is not the statute Congress wrote, and its “intentional” choice to use “particular language in one section of a statute and different language in another” defeats YouTube’s central contention that the knowledge and awareness provisions are alternative means of proving “the same thing,” to wit, the site operator’s knowledge that the URL-specific material identified by the plaintiff is on the site and infringing. YT Br. 32; *United States v. Peterson*, 394 F.3d 98, 107 (2d Cir. 2005); *see also Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 660 (2008). Knowledge that “the material on the system is infringing” is not “the same thing” as awareness of “infringing activity.” And Congress’s choice of the term “infringing activity” in § 512(c)(1)(A)(ii) communicates that the “red flag” knowledge provision is intended to capture circumstances where it is apparent to the service provider that infringing activity is ongoing on the site, even if it has neither subjective *nor* objective knowledge of the specific “material” that infringes. *See* Viacom Reply 10-12; Premier League Br. 13-20.

YouTube maintains that awareness that “infringing activity” is apparent nonetheless must mean URL-specific “infringing material” because the statute requires a service provider with awareness of infringing activity “to ‘expeditiously’ remove ‘the material’ that the plaintiff

alleges was infringing.” YT Let. 3. Only a service provider with specific knowledge of infringing material, YouTube insists, could “expeditiously remove” that material. YT Ltr. 4. Here again, however, YouTube’s paraphrase distorts the actual statutory language. Section 512(c)(1)(A)(iii) does *not* unequivocally command the service provider to “expeditiously remove ‘the material,’” YT Ltr. 4, but requires that it “*act[]* expeditiously to remove . . . the material.” Expeditious action toward the goal of removal is not the same as expeditious removal. Congress’s phrasing recognizes that there will be circumstances when the provider must take intermediate actions toward the ultimate end of removal. And where a service provider cannot reasonably be expected to locate and remove all infringing material, Congress’s formulation would preserve the safe harbor for the provider that swiftly takes reasonable action toward that end, even if it is not achieved in full. *Cf.* S. Rep. No. 105-190 at 44 (1998) (“Because the factual circumstances and technical parameters may vary from case to case, it is not possible to identify a uniform time limit for expeditious action.”). YouTube’s contrary reading ignores Congress’s actual words and replaces them with a different duty.

That a service provider might take steps to identify and locate infringing material in the course of taking steps expeditiously to remove it does not run afoul of § 512(m). That provision, which pertains to situations in which a service provider does not already have awareness of infringing activity, establishes that “affirmatively seeking facts indicating infringing activity” is not a condition of entry into the safe harbor. Once a service provider becomes aware of infringing activity, however, § 512(c)(1)(A) establishes that it must “act[] expeditiously”; § 512(m) does not undo that obligation. This is clearly confirmed by the legislative history which observes that, under § 512(m) “a service provider need not monitor its service or affirmatively seek facts indicating infringing activity . . . to claim this limitation on liability. . . . However, if the service

provider becomes aware of a ‘red flag’ from which infringing activity is apparent, it will lose the limitation on liability if it takes no action.” S. Rep. No. 105-190, at 44.²

Giving “infringing activity” its plain meaning would not impose liability on service providers with only “generalized awareness” (YT Ltr. 4) that some infringement on a site is likely. Under § 512(c)(1)(A)(ii), the infringing activity must be “apparent.” Though YouTube, citing one commentator, suggests that a flag must be “brightly red” and “blatantly waving” before it becomes “apparent,” the legislative history provides the more commonsense definition of “obvious.” H.R. Rep. 105-551(II), at 57-58 (1998). Where the service provider has no more than a generalized belief that some user likely has stashed infringing material somewhere on its site, the infringing activity remains only conjectural. But the obviousness threshold clearly is crossed when the service provider not only is profiting massively from infringing activity but has actually confirmed and quantified widespread infringement, concluding that, in the absence of the infringing activity, its views would sink by 80 percent or more. JAII-159-60. *See also* Ginsburg, *supra*, at 193 (“Infringement may be ‘apparent’ yet subject to verification (or contradiction)”).

Second, YouTube’s conception of the red-flag provision as applying only when a reasonable person could not deny that a particular clip is infringing, and imposing a duty to act only with respect to that particular clip, cannot be reconciled with the legislative history. Even Congress’s primary example of a “red flag” would fail YouTube’s test. In addressing the parallel red-flag provision of § 512(d), which applies to online directories, the House Report explains that Congress’s “intended objective” in including the red-flag provision was “to exclude from the

² “[S]ection 512(m)’s dispensation of service providers from ‘affirmatively seeking facts indicating infringing activity’, should not entitle the service provider to passive-aggressive ignorance.” Jane C. Ginsburg, *User-Generated Content Sites and Section 512 of the U S Copyright Act*, in *Copyright Enforcement and the Internet* 183, 193 (Irina A. Stamatoudi ed., 2010).

safe harbor sophisticated ‘pirate’ directories” that link to entire websites that obviously contain a large amount of infringing material—regardless of whether the service provider knows of the *particular* infringing material at those sites. H.R. Rep. 105-551(II), at 58. Indeed, the committee reports explain that the piratical nature of such websites typically would be obvious from “a brief and casual viewing,” *id.*, which precludes YouTube’s claim that awareness of red flags requires knowledge of *specific* infringing material at specific locations within the pirate sites.

Finally, YouTube’s construction of the red-flag provision denies it practical effect and meaning. Though the infringing character of a particular clip could, in theory, be “obvious,” yet not subjectively “known,” in practice subjective knowledge is most often proved by demonstrating a fact’s obviousness to a reasonable person. *See Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (inferring officers’ subjective deliberate indifference “from the fact that the risk of harm is obvious”). YouTube’s item-specific knowledge construction of § 512(c)(1)(A) thus would allow the awareness provision virtually no independent application, even though by its terms it applies “in the absence of such actual knowledge.” 17 U.S.C. § 512(c)(1)(A)(ii).

B. But even if YouTube’s specific-knowledge construction of § 512(c)(1)(A)(ii) were correct—and it is not—it still could not justify affirmance here. The Plaintiffs presented evidence—certainly sufficient to raise a genuine question of material fact—that YouTube *consciously avoided* the URL-specific knowledge it claims the red-flag provision requires; such willful blindness satisfies a specific knowledge standard. *Viacom Br.* 34-39; *Viacom Reply* 18-23.³

³ YouTube’s assertion that § 512(m) precludes application of the common-law axiom that willful blindness is knowledge is baseless. There is a legally significant difference between not seeking out facts, and taking “deliberate actions to avoid learning” of particular infringement. *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 (2011); *see also In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003) (“a service provider would have no obligation to seek out copyright infringement, but *it would not qualify for the safe harbor if it had turned a blind eye to ‘red flags’ of obvious infringement*”). Moreover, YouTube’s premise that the

And even setting willful blindness aside, Plaintiffs presented plentiful evidence from which a jury readily could find that YouTube was aware that it was offering infringing copies of Plaintiffs' works (*e.g.*, South Park episodes, Premier League games) including the clips in suit. YouTube's statement (at 5) that Plaintiffs "presented no evidence" that "YouTube knew of facts or circumstances making apparent the infringing nature of any of those clips" is a wish, not a plausible reading of the summary judgment record. It is undisputed that YouTube's founders were among the most active users of YouTube, and YouTube undoubtedly knew what its most-viewed and most-searched for clips were. SJAI-28; JAII-164; JAI-857. Plaintiffs' works were among them. JAII-183; JAIII-251, 366-68. And a jury readily could find that YouTube knew that the thousands of uploaded clips of Plaintiffs' copyrighted works were unauthorized and therefore infringing because Viacom and class plaintiffs told it as much, JAII-192-94; JAIII-84, as well as because Google offered to pay Viacom more than half a billion dollars for a license to its content and discussed the need to license the class plaintiffs' works as well. JAI-302, 773; JAIII-250-55, 165, 514. YouTube's implausible protestations that it did not know the copyrighted videos it was actively curating were on its site—except when it did, in which case it reasonably believed them to be authorized, despite referring to them as the "obviously copyright infringing stuff," JAII-160—do not entitle it to summary judgment.

II. YouTube's Syndication Of Content To Third-Parties Does Not Occur "By Reason Of . . . Storage At The Direction Of A User."

The § 512(c) safe harbor is only available for infringement that occurs "by reason of the storage at the direction of a user of material that resides on a system or network controlled or op-

DMCA permits—indeed, encourages—service providers to turn a blind eye to infringement cannot be reconciled with Congress's expressed intention to provide "strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements." H.R. Rep. No. 105-551(II), at 49-50, 57.

erated by the service provider.” 17 U.S.C. § 512(c)(1); SPA 42. Measured against this language—which YouTube omits from its letter brief—YouTube’s syndication of others’ content falls outside of the safe harbor because, far from being proximately caused user-directed storage, these syndication deals are the result of YouTube’s own strategic business decisions and are entirely *independent* of any action by the user.

In late 2006 and 2007, as Defendants looked for new ways to monetize YouTube’s large and growing user-base, they entered into lucrative syndication deals with mobile device providers such as Apple and Sony. SJAI-402; SJAI-235-38; District Court (“D.C.”) Sealed Hohengarten Decl. Exhs. 160-61, 163, 165-70. These were formal business contracts between large sophisticated companies. Besides giving Defendants new sources of revenue, these deals furthered Defendants’ core business strategy, which was not storing user material, but “revolutionizing entertainment.” JAI-855; JAIII-148; JAII-683. In return, the mobile device providers received a share of the advertising revenues and access to YouTube’s entire library of videos and many of the clips at issue in these lawsuits.⁴ YouTube’s users, needless to say, were not parties to these contracts and were not consulted before YouTube entered into them.

Syndication is thus much more than mere “reformatting of user submitted videos,” YT Ltr. 9, or “software functions” that facilitate access to user-stored materials, *id.* at 7. And protecting YouTube’s pursuit of syndication deals is not necessary to permit service providers to “keep pace with technological change” or to ensure that they are not “frozen in time,” YT Ltr. 9; a service provider who merely makes technological updates to keep stored materials accessible on changing technology would stay protected. In any event, syndication is just one of the myriad

⁴ Although the Verizon syndication deal involved the distribution of physical copies of YouTube videos to Verizon, the other syndication deals involved the transmission of unauthorized public performances from YouTube’s system to third party mobile devices, which is itself an act of infringement. *See, e.g., Davis v. Blige*, 505 F.3d 90, 105 n.13 (2d Cir. 2007).

actions YouTube took without any user input in order to operate an entertainment (rather than a storage) site, including maintaining multiple copies of each uploaded video in multiple formats, and adopting website features such as indexing, featuring, and suggesting related (in many cases, infringing) videos in a manner that encouraged other users to view them. Given the wide array of YouTube's non-storage activities, there is at least a material question of fact whether YouTube was a storage site eligible for the § 512(c) safe harbor.

Infringement occurring because of YouTube's independent business deals is not "by reason of storage," much less "at the direction of a user." YouTube declines to address this language, perhaps because it has no response to the established rule that the statutory phrase "by reason of" requires proximate rather than mere but-for causation. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 263-64 (1992); *Viacom Br. 53*. True, YouTube could not syndicate videos unless users had first provided them, but a user's decision to upload a video (even assuming the act of uploading constitutes storage) is in no sense the proximate cause of infringement that occurs by reason of YouTube's intervening and superseding decision to enter into independent business deals. *Townes v. City of New York*, 176 F.3d 138, 146 (2d Cir. 1999). Indeed, the legislative history specifically observes that the § 512(c) safe harbor does not reach "[i]nformation that resides on the system . . . operated by or for the service provider *through its own acts or decisions and not at the direction of a user.*" S. Rep. 105-190 at 43 (emphasis added).

YouTube's argument that its syndication must be protected because it merely "makes videos accessible" proves far too much. YT Ltr. 8. Any propagation of user-uploaded copyrighted material increases accessibility in some sense. If the DMCA immunized any act of infringement that increases access, an operator could keep the safe harbor merely by showing that its infringement enabled others to view the work, notwithstanding copyright law's grant of ex-

clusive rights to the copyright holder. This is why Congress limited the safe harbor to acts of infringement that occur “by reason of storage at the direction of the user.” No court has held that syndication constitutes such an act, and the notion has been rejected by commentators. *See* Paul Goldstein, II *Goldstein on Copyright* § 8.3.2, at 8:41-42 (3d ed. 2011) (“it is also evident that Congress did not intend the safe harbor to shield Internet services approximating on-demand music or video delivery . . .”).

According to that statutory language its plain meaning will visit no “devastating practical consequences.” YT Ltr. 8. Service providers and mobile device providers can and frequently do obtain licenses from copyright owners authorizing such syndication. Indeed, when the Apple deal was announced in May 2007, Viacom stated that it “would welcome the opportunity to license our content to Apple as we do with all distributors.” D.C. Dkt. No. 214-3 at 5. Notably, mobile licensing of content is a key revenue source for class plaintiffs. JAIII-364-65, 167.

In sum, YouTube’s users plainly did not direct YouTube to enter into lucrative revenue-sharing deals with Apple and other mobile device providers, or to make the entire library of YouTube videos—including all previously uploaded videos—available on these new media platforms. Syndication thus clearly falls outside the scope of § 512(c) and the defense is forfeited as to all copyrighted works that YouTube distributed over third party platforms.

Respectfully submitted,

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