

# 13-1720-cv

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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VIACOM INTERNATIONAL INC., COMEDY PARTNERS, COUNTRY MUSIC  
TELEVISION, INC., PARAMOUNT PICTURES CORPORATION,  
BLACK ENTERTAINMENT TELEVISION LLC,

—against— *Plaintiffs-Appellants,*

YOUTUBE, INC., YOUTUBE, LLC, GOOGLE INC.,

*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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## REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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## **INTRODUCTION**

Google and YouTube (“YouTube”) are asking the Court to accept their slanted view of the record and then make fundamental changes to the carefully-balanced approach to the DMCA that the Court took in the prior appeal. As YouTube did in the district court, it urges this Court to approach the right-and-ability-to-control and willful-blindness inquiries in a manner that would render them nearly meaningless and leave copyright owners with the sole remedy of policing the entire Internet and sending take-down notices.

This Court, however, has already held that proof of *Grokster* inducement can establish right and ability to control – an interpretation of the DMCA later adopted by the Ninth Circuit. The Court should reject YouTube’s continued claim that the DMCA shields service providers who operate websites with the clear intent to encourage and profit from widespread infringement (and thus engage in *Grokster* inducement) as long as they (1) avoid sending messages to users affirmatively encouraging infringement, and (2) respond to takedown notices.

The Court has also held that willful blindness constitutes knowledge under the DMCA. YouTube contends there is no willful blindness where a service provider has knowledge of a high probability of infringement of a particular copyright owner’s works and takes deliberate steps to avoid learning the details – such as by refusing to use an existing filtering system to protect anyone but

licensed content partners. Instead, YouTube says, willful blindness can exist only as to a specific clip of which a service provider is expressly aware. But that is not what this Court held and it would make no sense to adopt such a rule now.

If this Court, like the district court, were to accept YouTube's arguments, it would leave websites free to welcome infringement subject only to the highly-imperfect takedown-notice procedure. As a result, either YouTube itself would stop the filtering that it has used to protect copyrights since 2008 – after stalling for years in order to build up its traffic – or other operators would set out to become unfiltered YouTube-like havens for infringing content. Thus, far from maintaining Congress's careful balance of competing interests, such a ruling would tilt the scales dramatically in favor of service providers who intentionally profit from operating an unlicensed forum for users to view or exchange copyrighted works. This would be contrary to Congressional intent and should not be the result of this long-running case.

## **ARGUMENT**

### **I. YouTube's Efforts To Rebut Viacom's Evidence Are Improper And Implausible.**

Given the Court's actual rulings in the prior appeal, there should have been no doubt that the evidence adduced by Viacom precluded a grant of summary judgment for YouTube. That evidence – which had to be viewed most favorably to Viacom as the party *opposing* the summary-judgment motion of a defendant who

bears the burden of proof on its §512(c) affirmative defense<sup>1</sup> – was more than sufficient to create a triable issue as to whether YouTube operated the website with intent to induce infringement, and thus had the right and ability to control infringement, and whether YouTube was willfully blind to specific infringing clips, and thus is charged with knowledge of them. *See Disney Enters., Inc. v. Hotfile Corp.*, No. 11-20427, slip op. at 57 (S.D. Fla. Sept. 20, 2013) (ECF No. 534) (service provider’s “actual or red flag knowledge of infringement” could not be resolved on summary judgment).

One problem with YouTube’s factual discussion, YT Br. 7-13, is that it completely ignores other incriminating evidence, including the following:

- Numerous documents show the founders knew from YouTube’s inception that users were uploading vast quantities of infringing clips, including from Viacom-owned shows. Viacom Br. 5.
- When the Supreme Court decided *Grokster*, Chad Hurley recognized the threat to YouTube, telling his co-founders “we need views, [but] I’m a little concerned with the recent Supreme Court ruling on copyrighted material.” Viacom Br. 6-7.

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<sup>1</sup> YouTube (YT Br. 24) mistakenly relies on *Gallo v. Prudential Residential Services, Ltd. Partnership*, 22 F.3d 1219 (2d Cir. 1994), which addressed the summary-judgment burden *when the non-moving party bears the burden of proof at trial*. *Id.* at 1223-24 (citing *Celotex v. Catrett*, 477 U.S. 317, 325 (1986)).



- Throughout the summer of 2005, the founders searched for ways to continue exploiting infringing videos, including “comedy clips,” a Viacom specialty, while trying to “avoid the copyright bastards.” Viacom Br. 7.
- The founders ultimately adopted a policy of keeping the “obviously copyright infringing stuff” unless and until they received a takedown notice. Viacom Br. 7-9.
- In February 2006, YouTube manager Maryrose Dunton reported to co-founder Steve Chen that “over 70%” of the “most viewed/most discussed/top favorites/top rated” videos on YouTube were “copyrighted material,” and a month later estimated that “probably 75-80% of our views come from copyrighted material.” Viacom Br. 10-11.
- Credit Suisse told Google’s board that most of YouTube’s views were infringing, just before Google acquired YouTube for \$1.65 billion. Viacom Br. 14.
- Google viewed Viacom’s content as so valuable to YouTube that it offered over \$590 million for a license, which it never received. Viacom Br. 17.

Even the documents YouTube does discuss belie its claims of innocent intent and underscore why summary judgment on its defense was inappropriate. YouTube claims, for example, that when Chen advocated building up YouTube's numbers "through whatever tactics, however evil," he was not referring to copyright infringement but instead advocated stealing content from competitor MySpace. YT Br. 7; JAV-1173. But Chen's actual intent is played out in numerous internal emails advocating leaving all infringing content on YouTube absent a takedown notice in order to attract users. *E.g.*, JAV-1323-24, 1335, 1337, 1340-41.

Similarly, YouTube does not genuinely dispute the email in which co-founder Jawed Karim bragged that a cease-and-desist letter from a copyright owner was a badge of YouTube's success. Instead, YouTube tries to obfuscate its significance by claiming YouTube complied with the letter. YT Br. 7-8. And YouTube asserts that a September 3, 2005 email exchange among YouTube's three co-founders with the subject line "copyrighted material!!!" is really about "amateur videos," when any rational reading of the document shows otherwise. YT Br. 8-9; JAV-1323-25. In the exchange, Karim proposes to remove "the obviously copyright infringing stuff" including "movies and tv shows," and Chen's *immediate* response is that "if we remove all that content we go from 100,000 views a day down to about 20,000 views or even lower." JAV-1323-24. YouTube

also falsely asserts that Chen and Karim agreed to take down “clips from TV shows and movies,” YT Br. 9, when in fact Chen agreed to remove only “whole movies” and “entire TV shows,” and keep “everything else,” JAV-1323.

YouTube claims it stopped community flagging for copyright infringement because it was ineffective, YT Br. 9-10, but the contemporaneous evidence shows that YouTube killed it to avoid “be[ing] held liable for being served a notice,” JAV-1341. As for YouTube’s training manual highlighting Viacom’s *Daily Show* as an example of content YouTube’s reviewers should “approve,” YouTube tries to avoid its obvious import by claiming that it does not expressly refer to copyright infringement. YT Br. 10. But it shows that YouTube was aware of the prevalence of *Daily Show* clips on its site and instructed reviewers to approve them.

YouTube asserts that an email in which Dunton torpedoed an automated anti-infringement tool because she “hate[d] making it easier for these a-holes” is irrelevant because the tool had already been implemented. YT Br. 10-11. But that implausible claim is contradicted by Dunton’s testimony that she was discussing possible implementation of the tool with company engineers because “it was a feature that people within the company . . . wanted to build in.” JAVIII-1959.

In order to distract from internal documents showing that YouTube offered Audible Magic filtering only to licensing partners, YouTube claims Audible Magic was ineffective and in any event Viacom had not loaded its reference fingerprints

into the filter. YT Br. 11-12. But YouTube’s provision of Audible Magic to its licensing partners, including other television and movie studios – and its promises that the filter would swiftly identify and remove upwards of 95% of infringing content – contradicts the claim of ineffectiveness. Viacom Br. 36. And if YouTube had offered Audible Magic to Viacom, then Viacom – just like YouTube’s licensing partners – would have provided its reference fingerprints to YouTube. That is exactly what happened once YouTube finally provided filtering to Viacom in May 2008 after this lawsuit was well under way.<sup>2</sup>

YouTube raises a frivolous hearsay objection to the testimony of MPAA’s Dean Garfield, YT Br. 12 n.4, who testified that YouTube told him it would not filter MPAA-member content because infringing clips were a “major lure” for users. JAXI-2678; JAVIII-1981. His testimony goes to YouTube’s state of mind and is a party-opponent admission. Fed. R. Evid. 801(d)(2)(A)-(B) & 803(3).

YouTube tries to downplay the many internal Google documents discussing the massive infringement on YouTube (*e.g.*, describing YouTube as a “rogue

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<sup>2</sup> YouTube does not dispute that only site-operators can filter out pirated content *before* it becomes public. Viacom Br. 12. Site operators are also uniquely positioned to prevent piracy because only they have access to non-public portions of their sites (*e.g.*, “private videos”), and only they can efficiently filter each new upload against a centralized database of reference fingerprints. *See, e.g., Private Videos, available at* <https://support.google.com/youtube/answer/157177?hl=en>; *How Content ID Works, available at* <https://support.google.com/youtube/answer/2797370?hl=en>.

enabler’ of content theft”) by claiming that the Google employees who made these comments later “all testified that, after the acquisition, they learned that YouTube’s copyright policies were robust and that YouTube was filled with authorized videos that content owners had uploaded or deliberately left up.” YT Br. 13. But the cited evidence does not support that claim and cannot whitewash Google executives’ contemporaneous assessments.

Finally, YouTube claims that Karim’s March 2006 memo to YouTube’s board of directors is irrelevant because Karim had become an “independent contractor.” YT Br. 42. But Karim gave the memo *to YouTube’s entire board*, thereby transferring the knowledge in it to them. JAXI-2581.

This mountain of evidence, when analyzed in accordance with this Court’s instructions in the last appeal, plainly should have precluded summary judgment for YouTube.

## **II. Defendants Profited Directly From Infringing Activity They Had The Right And Ability To Control.**

### **A. YouTube Had The Ability To Control Infringing Activity That Pervaded Its Website.**

YouTube argues that a provider can intentionally design its service in a manner that encourages infringement but still enjoy safe-harbor protection so long as it avoids directly “assisting users in acts of infringement” or expressly “communicating an inducing message” to users. YT Br. 47. This Court has

already rejected that very argument, making clear in *Viacom II* that proof of *Grokster* inducement demonstrates the “right and ability to control” infringing activity. SPA60. And the Ninth Circuit explicitly agreed. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1030 (9th Cir. 2013) (“‘Substantial influence’ may include, as the Second Circuit suggested . . . purposeful conduct, as in *Grokster*.”). A service provider 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,” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 545 U.S. 913, 936-37 (2005), cannot claim to lack the right and ability to control the very infringement it deliberately fostered.

Attempting to find a foothold in *Viacom II*, YouTube contends that *Grokster* inducement cannot demonstrate the “right and ability to control,” because this Court noted that the DMCA “‘protects a defendant from all affirmative claims for monetary relief,’” including inducement. YT Br. 46 (quoting SPA65). But YouTube rips that statement from its context. Rather than holding that *Grokster* inducement is insufficient to remove a defendant from the safe harbor (which would have made the opinion internally contradictory), this passage merely noted that *where the safe harbor is satisfied*, it protects a defendant from all claims for money damages.

YouTube also distorts *Grokster* in contending that a service provider loses the safe harbor only if it “clearly and directly encourag[es] users to infringe.” YT Br. 47. *Grokster* held the necessary intent could be demonstrated in other ways, such as through internal communications. 545 U.S. at 938. As *Grokster* explained, “[w]hether the messages were communicated [to users] is not ... the point .... The function of the message in the theory of inducement is to prove by a defendant’s own statements that his unlawful purpose disqualifies him from claiming protection.” *Id.* Thus, “[p]roving that a message was sent out ... is the preeminent *but not exclusive* way of showing that active steps were taken with the purpose of bringing about infringing acts.” *Id.* (emphasis added).

Contrary to YouTube’s claim (YT Br. 48 n.15), the Ninth Circuit in *Columbia Pictures Industries, Inc. v. Fung*, 710 F.3d 1020 (9th Cir. 2013), similarly made clear that the infringer’s wrongful intent in distributing a device or service is all that matters. That court *rejected* Fung’s argument that *Grokster* requires “two separate elements – the improper object *and* ‘clear expression or other affirmative steps taken to foster infringement.’” 710 F.3d at 1034. It explained that “‘clear expression or other affirmative steps’ is not a separate requirement, but rather, an explanation of how the improper object must be proven.” *Id.* Thus, while YouTube notes that *Fung* “described the existence of an inducing message as a ‘crucial requirement,’” YT Br. 48, YouTube omits the

immediately preceding statement that an express message is “not the exclusive means of proving inducement.” *Fung*, 710 F.3d at 1036.

Finally, YouTube contends that even if *Grokster* provides the relevant standard, Viacom must show that YouTube induced each “specific act[] of infringement.” YT Br. 44. Once again, *Grokster* refutes YouTube’s claim, expressly rejecting clip-specific causation: “It is not only that encouraging a particular consumer to infringe a copyright can give rise to secondary liability for the infringement that results. Inducement liability goes beyond that, and the distribution of a product can itself give rise to liability where evidence shows that the distributor intended and encouraged the product to be used to infringe.” 545 U.S. at 940 n.13.

Following *Grokster*, *Fung* held that clip-specific causation is unnecessary because “it is the overall relationship between the service provider and infringing users that matters” to the inducement – and thus the “right and ability to control” – inquiry. *Fung*, 710 F.3d at 1046 (internal quotation marks omitted). Thus, “where the § 512(c)(1)(B) safe harbor requirements are not met, the service provider loses protection with regard to any infringing activity using the service.” *Id.*

Here, to support the district court’s grant of summary judgment under the appropriate standards, YouTube would have to show that a jury could not reasonably conclude that YouTube distributed its service “with the object of



promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement.” *Grokster*, 545 U.S. at 936-37.<sup>3</sup> But YouTube barely attempts to make that showing.

Instead, YouTube tries to remake the governing standards and inappropriately contests Viacom’s interpretation of the record evidence. YT Br. 50-52. It argues, for example, that “far from taking ‘active steps’ to promote infringement, YouTube indisputably took a number of affirmative measures to combat it.” YT Br. 49. But again, as *Fung* explained, “active” or “affirmative” steps are merely one means of proving intent, unnecessary where, as here, intent is demonstrated by defendants’ own internal statements and admissions.<sup>4</sup> In any event, the record contains ample evidence that defendants took active steps to *foster* infringement: disabling community flagging for copyright infringement; gerrymandering YouTube’s filtering system so that even though it analyzed *every*

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<sup>3</sup> YouTube complains that Viacom’s argument would cause a service provider to lose the benefit of the safe harbor at summary judgment where the plaintiff’s *prima facie Grokster* case survives (assuming at least a jury issue regarding direct financial benefit). That is the very nature of seeking early disposition through summary judgment. The plaintiff would still have to prove *Grokster* inducement at trial, and if it does (and the service provider receives a direct financial benefit), then the safe-harbor defense fails.

<sup>4</sup> YouTube’s repeated reliance on *Capitol Records, LLC v. Vimeo, LLC*, No. 09-cv-10101(RA), -- F. Supp. 2d --, 2013 WL 5272932 (S.D.N.Y. Sept. 18, 2013), is misplaced, because the record in *Vimeo* was devoid of any such incriminating internal communications. *Id.* at \*31; YT Br. 48-51.

*single clip* on YouTube for infringement of content partners' copyrights, Viacom's works were left unprotected; and discontinuing Google's policy of reviewing videos at upload and blocking those that blatantly infringe copyrights. Viacom Br. 31-32. As *Grokster* teaches, actions like these, including the failure to filter, are strong evidence of inducement. 545 U.S. at 939.<sup>5</sup>

YouTube finally offers a confused argument about the prevalence of infringement on the website. It says the site is today "dominated by non-infringing material," YT Br. 50 (avoiding the relevant question of what it was like prior to May 2008), but then turns around and argues that "*Viacom's* guesses about the amount of 'copyrighted' or 'premium' content on YouTube" – even though based on YouTube's own contemporaneous estimates – are irrelevant, YT Br. 51 (emphasis added). The evidence shows that YouTube believed 75%-80% of views were of infringing content,<sup>6</sup> and "the staggering scale of infringement makes it more likely that [YouTube] condoned illegal use, and provides the backdrop

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<sup>5</sup> Given *Viacom II's* reliance on *Grokster*, YouTube is wrong in asserting that a court cannot consider a service provider's selective withholding of filtering as part of an inducement analysis under the right-and-ability-to-control prong. YT Br. 55.

<sup>6</sup> Thus, even if YouTube had a substantial number of non-infringing videos prior to May 2008, the infringing videos are the ones users flocked to YouTube to see, and it was the growth in views and viewers that the founders, advertisers, and potential acquirers cared about. Viacom Br. 5-8, 14.

against which all of [its] actions must be assessed.” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 985 (C.D. Cal. 2006).

YouTube is also excluded from the safe harbor because, like the defendant in *Cybernet*, it exercised the right and ability to control infringement through a monitoring program that was available and functioning, except where YouTube made the decision to exclude a content owner’s works from the filter. Viacom Br. 9-13, 15-17, 34-37. YouTube creates a straw man in arguing that it should not be held accountable for controlling the site by virtue of removing hate speech and other undesirable content. YouTube was *also* filtering for copyright infringement but refused to use this same technology to protect Viacom absent a licensing deal on terms dictated by YouTube. JAXI-2725-40; JAIV-890; JAV-1152. If YouTube had sufficient control over infringement to use that control as a sword in contract negotiations, it had the right and ability to control infringement for purposes of the DMCA. After all, YouTube was filtering *every clip posted on its website* for infringement of its licensing partners’ content, while refusing to do the same for Viacom. It is difficult to imagine a starker example of editorial control. Viacom Br. 34-36.

Ultimately, YouTube’s position boils down to this: Because §512(m) provides that safe-harbor protection cannot be conditioned on “a service provider monitoring its service or affirmatively seeking facts indicating infringing activity,”

YouTube is entitled to *selectively* monitor for infringement, and thereby profit from infringing activity of which it is well aware and which it is fully capable of preventing. YT Br. 55-56. But nothing in §512(m) precludes a court from considering a service provider's actual, selective exercise of control, and the service provider's intentions in engaging in it. And for good reason. Under YouTube's view of the law, a service provider could affirmatively exploit its right and ability to control copyrighted content – for example, by using its control as leverage in contract negotiations – and simultaneously claim that it is entitled to safe-harbor protection because it *lacks* the right and ability to control that very same infringement. This Court should reject that absurd result.

**B. YouTube Received Enormous Financial Benefits Directly Attributable To The Infringing Activity.**

Aware it cannot prevail under the well-established common-law “direct financial benefit” standard, YouTube invents a new rule that finds no support in the statute, legislative history, or case law. YouTube would immunize service providers no matter how much advertising revenue they derive from intentionally-induced piracy, as long as they do not overtly “favor infringement,” such as by charging a higher rate for ads placed next to infringing material. YT Br. 57.

Although YouTube begins its analysis with the legislative history (which it misconstrues, as explained below), YT Br. 56, the proper starting point is the statute, which refers to a “financial benefit directly attributable to the infringing

activity.” 17 U.S.C. § 512(c)(1)(B). That phrase echoes the long-recognized common-law vicarious-liability standard for a “direct financial interest in the exploitation of copyrighted materials.” *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963); *see also Grokster*, 545 U.S. at 930 n.9 (“vicarious liability” applies when defendant “profits directly from the infringement”); *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (vicarious liability applies to “a direct financial interest” in infringing activity).

YouTube provides no reason to depart from the “general rule” that “when ‘Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of those terms.’” *Viacom II*, SPA58 (quoting *Neder v. United States*, 527 U.S. 1, 21 (1999)). There is no statutory “internal[] inconsisten[cy]” with respect to the financial-benefit prong that would justify a departure from the common law. SPA59.

Accordingly, DMCA cases consistently recognize that §512(c)(1)(B)’s financial-benefit prong is congruent with the common-law vicarious-liability standard. *Viacom Br.* 38-39. Even the *Veoh* case YouTube relies on holds that “[a]s to the phrase ‘direct financial benefit,’ the DMCA does not dictate a departure from the common law standard.” *UMG Recordings, Inc. v. Veoh*

*Networks, Inc.*, 665 F. Supp. 2d 1099, 1116 (C.D. Cal. 2009), *aff'd in part sub nom. UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013). Yet YouTube contends that the Ninth Circuit “went astray” in *CCBill* in adopting the common-law standard and goes on to claim – without support – that “[t]his Court has not followed that aspect of *CCBill*.” YT Br. 59.

The law in this and other Circuits is clear that the common-law direct-financial-benefit standard is met where infringing material “draws” customers, thereby increasing the defendant’s revenues. *Viacom* Br. 39-40; *Shapiro*, 316 F.2d at 306; *Gershwin*, 443 F.2d at 1163. Only by ignoring *Shapiro* and *Gershwin* could YouTube assert that this Court does not follow the common-law draw standard. YT Br. 57.

YouTube’s attempts to distort legislative history in its favor are baseless. The “draw” standard is entirely consistent with the “common-sense, fact-based approach” Congress intended. H.R. Rep. No. 105-551(II), at 54 (1998); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1181 (C.D. Cal. 2002). The inapposite legislative history YouTube relies on – concerning services that charge users a flat periodic fee – in no way supports a departure from the common law. YT Br. 56, 58. That passage has nothing to do with websites, like YouTube, that obtain their revenues from *advertising* and that use infringing material to attract viewers and thereby increase ad revenue. *Ellison v. Robertson*, 357 F.3d

1072, 1079 (9th Cir. 2004) (distinguishing same portion of legislative history). That is a paradigmatic direct financial interest. *Fung*, 710 F.3d at 1045; *Cybernet*, 213 F. Supp. 2d at 1181; *Arista Records LLC v. Lime Group LLC*, 784 F. Supp. 2d 398, 435 (S.D.N.Y. 2011).

YouTube does not even argue that it can prevail under the draw standard. The record is replete with evidence that the massive infringement of popular television shows and movies on YouTube – including Viacom’s works-in-suit – acted as a draw to YouTube’s users, thereby substantially increasing YouTube’s revenues and its value to potential acquirers like Google. Viacom Br. 40-41. And throughout 2005 and 2006, until Google’s lawyers discontinued the practice in January 2007 “for legal reasons,” YouTube even posted ads directly alongside copyrighted material. *Id.* This alone satisfies the financial-benefit requirement.

### **III. Defendants Had Actual Knowledge And Awareness Of Rampant Infringement Of Viacom Shows.**

#### **A. Defendants Failed To Satisfy Their Burden Of Showing They Lacked Actual Knowledge Or Awareness Of Viacom’s Clips-In-Suit.**

YouTube concedes that the §512(c) safe harbor is an affirmative defense that it has the “overall burden” of establishing. YT Br. 27. Yet YouTube argues that to meet its burden, it need only satisfy certain threshold requirements. As to the safe harbor’s central elements – knowledge, control, and financial benefit – YouTube claims that Viacom must *disprove* YouTube’s entitlement. YT. Br. 28-29.

That inversion of the burden is directly contrary to this Court’s holding in *Viacom II* that “[t]o qualify for protection under any of the safe harbors, a party must meet a set of threshold criteria” and “[b]eyond [those] criteria, a service provider must satisfy the requirements of a particular safe harbor.” SPA42.<sup>7</sup> Moreover, YouTube’s position finds no support in the statute or case law and contradicts the “longstanding convention” that a defendant asserting an affirmative defense must prove all its elements. *Viacom Br.* 45.<sup>8</sup> That YouTube must prove that it lacked disqualifying knowledge does not justify reversing the burden, given that YouTube – like other defendants who must prove lack of knowledge as an affirmative defense – has “unique access to evidence” and “know[s] precisely what information was brought to [its] attention,” and what it did not know. *United States v. 194 Quaker Farms Road*, 85 F.3d 985, 990 (2d Cir. 1986) (upholding civil forfeiture statute placing burden of proving innocent-owner defense –

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<sup>7</sup> YouTube tries to obfuscate this holding by pointing to other statements in *Viacom II* regarding the parties’ burdens on their then-pending cross-motions for summary judgment on YouTube’s affirmative defense and Viacom’s affirmative claims. YT Br. 24-26, 28 & n.6. The present appeal, however, concerns only YouTube’s renewed summary judgment motion on its affirmative defense.

<sup>8</sup> Viacom has consistently argued that YouTube bears the burden of proof on all elements of its DMCA affirmative defense. *E.g.*, Opening Brief for Plaintiffs-Appellants, No. 10-3270, 2010 WL 5066007, at \*22 (2d Cir. Dec. 3, 2010).



including lack of knowledge – on claimant).<sup>9</sup> A lack-of-knowledge defense is commonplace in the law, and there is no reason to treat it differently under the DMCA. Viacom Br. 45 n.15; *e.g.*, 15 U.S.C. § 1115(b)(5) (lack-of-knowledge element of innocent-use defense to trademark infringement); 11 U.S.C. §§ 549(c), 550(b)(1) (lack-of-knowledge defense to bankruptcy trustee’s action to avoid transfer or recover property); 15 U.S.C. § 78r(a) (lack-of-knowledge defense to misleading statements regarding securities).<sup>10</sup> Furthermore, reversing the burden would incentivize a service provider to withhold or “lose” evidence of its own knowledge (as YouTube did here) and then claim entitlement to the safe harbor because the plaintiff cannot meet its burden.<sup>11</sup>

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<sup>9</sup> YouTube misrepresents cited cases in claiming “this Court has declined in various contexts to impose the ‘unfair requirement’ of proving a negative on parties seeking summary judgment.” YT Br. 28 n.7. In *BBS Norwalk One, Inc. v. Raccolta, Inc.*, 117 F.3d 674, 677 (2d Cir. 1997), the court *rejected* defendants’ argument against having to prove a negative as part of their collateral-estoppel affirmative defense and vacated the district court’s grant of summary judgment because defendants had failed to meet their “heavy burden” under Rule 56.

<sup>10</sup> YouTube is plainly wrong in arguing that an affirmative defense must be independent of the essential elements of the plaintiff’s affirmative case. YT Br. 28-29. As Congress is well aware when crafting legislation, it is in the very nature of many lack-of-knowledge affirmative defenses that they negate an essential element of the plaintiff’s case. That does not render them superfluous or otherwise justify inverting the burden of proof.

<sup>11</sup> Viacom Br. 4 n.3 (two of YouTube’s three co-founders “lost” all of their emails for the 18-month period critical to this litigation); *see* YT Br. 32 n.10 (blaming Viacom for failing to show which clips Karim watched in preparing his memo to

[Footnote continued on next page]

In contending that “all relevant case law” supports its position, YT Br. 26, YouTube completely ignores the directly contrary statement in *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619 (4th Cir. 2001). Viacom Br. 43; YT Br. 27. And it distorts the cases it does discuss.<sup>12</sup> See *Veoh*, 665 F. Supp. 2d at 1108 (“Veoh has provided substantial evidence that it fulfilled the requirements of section 512(c)(1)(A)”); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1107 (W.D. Wash. 2004) (“Amazon must show that it (1) does not have actual knowledge . . . and (2) is not aware of facts or circumstances from which infringing activity is apparent”); *Obodai v. Demand Media, Inc.*, No. 11-Civ-2503, 2012 WL 2189740, at \*1 (S.D.N.Y. June 13, 2012) (“defendant has come forward with evidence that entitles it to safe harbor”), *aff’d sub nom. Obodai v. Cracked Entm’t Inc.*, 522 F. App’x 41 (2d Cir. 2013).<sup>13</sup>

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YouTube’s board, while failing to disclose YouTube’s refusal to produce Karim’s viewing records for that exact period, JAX-2439(¶20)).

<sup>12</sup> YouTube notes that in *Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 724 (S.D.N.Y. 2012), the court ultimately granted summary judgment to the service provider, but the key point is that the court *expressly* placed the burden of proof on the service provider to show its lack of knowledge. *Id.* at 746.

<sup>13</sup> YouTube’s reliance on an unpublished order in *Perfect10, Inc. v. Amazon.com, Inc.*, No. CV-05-4753, slip op. at 8 (C.D. Cal. Nov. 4, 2008) (ECF. No. 221), is misplaced. That case concerned the §512(a) safe harbor, which does not contain a lack-of-knowledge requirement. YT Br. 27.

YouTube also omits a key contradictory passage from the Nimmer treatise stating that the service provider bears the burden and must “offer competent testi-

[Footnote continued on next page]

Recognizing it cannot meet its burden under *Celotex*, YouTube argues for a lower burden of showing that it “probably lacked knowledge.” YT Br. 30. But the very treatise YouTube cites contradicts YouTube’s argument and makes clear – in passages YouTube omits – that where the party that must prove a negative is in possession of the essential evidence, no lowering of the burden is warranted and instead “a peculiar clearness of proof is demanded.” 31A C.J.S. *Evidence* §§ 200, 203 (2013).

YouTube does not come close to meeting its burden. It certainly cannot rely on its general policy of not “pre-screening” videos before they appear on the site (YT Br. 30), because the evidence shows that YouTube’s co-founders and personnel reviewed countless clips – including Viacom clips – after they appeared on the site. As a fallback, YouTube points to its viral marketing allegations (YT Br. 31), but those are hotly disputed, and all inferences must be drawn in Viacom’s favor. Moreover, Viacom offered at the highest level to work with YouTube on

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mony that it lacked actual knowledge,” which the plaintiff can attempt to rebut. 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §12B.04[A][3] at 12B-77 n.211 (2012); YT Br. 27 (quoting two other passages from Nimmer). Nimmer is internally inconsistent on this issue and does not address or give reason to depart from the general rule that a defendant must prove each element of its affirmative defense.

automatically separating authorized clips from pirated clips, but YouTube refused all such cooperation. Viacom Br. 18.

Lastly, YouTube makes frivolous objections to evidence that its “army of content reviewers” reviewed and approved more than 3,000 specific Viacom clips-in-suit. YT Br. 31-32; Viacom Br. 46-47; JAI-174-75. Viacom did not waive that evidence below. It was presented to the district court in opposition to YouTube’s renewed summary judgment motion, and YouTube addressed it only in a footnote in its reply brief. YouTube SJ Reply Br., 2013 WL 1750824, at n.13.<sup>14</sup> YouTube had the opportunity to analyze its administrative review and approval practices and records and proffer declarations or other competent evidence showing it lacked knowledge of these infringing clips. It chose not to.

#### **B. YouTube Was Willfully Blind To Infringement.**

To avoid the conclusion that it was willfully blind to infringement of Viacom’s works, YouTube seeks to narrow the doctrine to the point of meaninglessness. It says willful blindness exists only if and when a service provider has already become aware of a specific clip. Thus, if a service provider is

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<sup>14</sup> The chart summarizes data that has been part of the record since the close of fact discovery and thus is not outside the summary judgment record – an objection YouTube did not even make in the district court. Furthermore, YouTube can hardly complain that an attorney prepared the chart, given YouTube’s reliance on similar charts and “analyses” prepared by its attorneys. JAXIII-3140(¶18), 3142-51, 3238-42; JAXVI-4026(¶8); JAXXII-5539-48, 5556-67.

aware of massive infringement of a copyright owner's works, but scrupulously avoids learning the location of specific clips of those works, then, according to YouTube, willful blindness has no application. Stated differently, a service provider would benefit precisely because it blinded itself to the facts that YouTube claims the service provider must already know to trigger the doctrine. YouTube's argument would nullify this Court's willful-blindness holding in *Viacom II*.

The willful-blindness doctrine endorsed in *Viacom II* is not a form of "generalized knowledge." YT Br. 21, 35. As the Supreme Court made clear in *Global-Tech Appliances, Inc. v. SEB S.A.*, the scope of the willful-blindness doctrine is appropriately limited by twin requirements that there be (1) a subjective belief in a high probability of the facts in dispute, and (2) deliberate actions to avoid confirming those facts. 131 S. Ct. 2060, 2070-71 (2011). These dual requirements, common in countless willful-blindness contexts beyond copyright law, restrict liability to situations where the service provider manifests culpable intent by taking deliberate action to avoid confirming its subjective awareness of the high probability of infringement of a copyright owner's works. *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 109 (2d Cir. 2010); *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003). Thus, the "assumption underlying the DMCA" that a service provider will inevitably "host some infringing material," is not at issue. YT Br. 35. The question under *Global-Tech*, *Viacom II*, and *Tiffany* is

whether YouTube was subjectively aware of a high probability of infringement of Viacom's copyrighted works and took deliberate steps to avoid learning the specifics.

YouTube once again relies on §512(m), mistakenly asserting that it allows a service provider aware of a high probability of infringement of a copyright owner's works to deliberately decline to take "basic investigatory steps" or make a "follow-up inquiry," even to the point of excluding the copyright owner from a filtering system that is scanning every clip on the site for infringement of other copyright owners' works. YT Br. 36. But §512(m) has a limited scope: it forecloses only the imposition of an "affirmative" or "broad common law duty to monitor," *Viacom II*, SPA55. As this Court held, §512(m) is irrelevant where a service provider already is aware of a high probability of infringement and takes deliberate actions to avoid confirming that infringement. SPA56. In such a case, the service provider is not being penalized for failing to engage in affirmative monitoring to locate infringement that might be occurring somewhere on its service; instead, it is being charged with knowledge for deliberately choosing not to investigate *in the face of its own awareness of a high probability of infringement of a copyright owner's works*.

It would make no sense to find willful blindness when a service provider knows the location of a likely infringing clip and deliberately declines to examine

it, but not when a service provider deliberately prevents itself from becoming aware of that clip's location in the first place. Such a rule would undermine the purpose of willful blindness, which is to prevent wrongdoers from escaping liability by burying their heads in the sand when they believe it is highly likely that illegal conduct is occurring. *Global-Tech*, 131 S. Ct. at 2068-69. Thus, the fact that YouTube blinded itself to *both* the location of infringing clips and their infringing nature does not vitiate the willful blindness doctrine. It merely underscores the deliberate efforts YouTube took to avoid guilty knowledge.

Contrary to YouTube's contrived reading, *Tiffany* emphatically rejects YouTube's restrictive interpretation of willful blindness. Neither this Court nor the district court applied willful blindness only after determining whether eBay was already aware of a particular transaction or listing. To the contrary, this Court "agree[d] with the district court that if eBay had reason to suspect that counterfeit Tiffany goods were being sold through its website, and intentionally shielded itself from *discovering the offending listings or the identity of the sellers* behind them, eBay might very well have been charged with knowledge of those sales." 600 F.3d at 109; *see id.* ("When it has reason to suspect users of its service are *infringing a protected mark* [e.g., Tiffany], *it may not shield itself from learning of the particular infringing transactions by looking the other way.*" (emphasis added)). The district court exonerated eBay because when it did obtain knowledge of

counterfeiting, “it took reasonable steps to investigate and stop that wrongdoing through general anti-fraud measures,” which eBay implemented “as soon as it was reasonably capable of doing so,” including a “fraud engine” designed to filter out counterfeit listings that eBay updated weekly. *Tiffany (N.J.) Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 476-77, 514-15 (S.D.N.Y. 2008), *aff’d in part, rev’d in part*, 600 F.3d 93 (2d Cir. 2010).

The contrast with this case is striking. Here, the evidence shows that beginning in April 2006, the MPAA alerted YouTube to MPAA member content (including Paramount content) that was being infringed on the site on a massive scale and urged YouTube to deploy filtering, but YouTube delayed and ultimately refused. JAXI-2662(¶¶223-29). During licensing negotiations with Viacom in mid and late 2006 and again in early 2007, YouTube discussed the highly-popular MTV, Comedy Central, and other Viacom content on its site, and specifically offered to provide filtering to protect that content, but only in exchange for a license. JAXI-2662(¶207). When Viacom would not accept YouTube’s terms, Viacom again urged YouTube to protect Viacom’s works with filtering, and offered to provide information that would enable the filter to automatically separate out legitimate marketing material, JAXI-2664(¶209), but Viacom was rebuffed because YouTube knew how valuable Viacom’s works were as a lure to users and because it wanted to use filtering to entice content owners to sign license



agreements. Nothing in *Tiffany* begins to compare with that kind of abusive conduct.

Indeed, almost from its inception, YouTube was subjectively aware of a high probability of infringement of Viacom's most popular television shows, which are referenced in specific emails and in Jawed Karim's March 2006 memo to YouTube's board of directors. Viacom Br. 5, 11-12; SPA20. YouTube's co-founders were particularly aware of the prevalence of "comedy clips," a Viacom specialty, among the blatantly infringing clips that according to YouTube's own estimates accounted for 75%-80% percent of site traffic. Viacom Br. 7, 10-11. The significance of Viacom's shows on YouTube was so well known to appellees that they offered Viacom a licensing deal valued at a minimum of \$590 million. Viacom Br. 17.<sup>15</sup>

Given this awareness, YouTube's deliberate efforts to avoid guilty knowledge cannot be passed off as a mere "fail[ure] to take affirmative steps." YT Br. 39. The record reveals that YouTube systematically manipulated the technologies at its disposal – community flagging and filtering – in a clear effort to avoid learning of particular infringements of Viacom's works, which it knew were

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<sup>15</sup> In contrast, Vimeo was aware of the presence of copyrighted music generally, but not plaintiffs' works, and "there [was] no evidence that Vimeo took affirmative steps to blind itself to infringement on a wholesale basis." *Vimeo*, 2013 WL 5272932, at \*20-22.

occurring on a massive scale. Viacom Br. 54-55. Under this Court's holding in *Viacom II*, that is sufficient to impute knowledge to YouTube.<sup>16</sup>

But there is more. Although YouTube addresses it only in a footnote, its actual review and approval of over 3,000 Viacom clips-in-suit is clear evidence that YouTube deliberately closed its eyes to infringement in order to avoid guilty knowledge. Viacom Br. 10, 53; YT Br. 42 n.13. Moreover, Karim's report to YouTube's board underscores the company's willful blindness, given that hundreds of clips of the very Viacom shows named in the memo remained on YouTube for months. Viacom Br. 11-12, 55. Using Karim's memo, YouTube could have located and removed those videos using simple searches. The only reasonable inference is that YouTube did not do so because those clips, like the many other clips-in-suit, acted as a lure for users.

Finally, YouTube claims it is entitled to summary judgment because Viacom cannot show which clips-in-suit YouTube would have discovered if,

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<sup>16</sup> YouTube's citations to *Vimeo* and *Io* are misplaced. YT Br. 40. Vimeo did not selectively deploy fingerprinting technologies – it did not deploy them at all. Pls.' Mem. of Law in Support of Motion for Partial Summary Judgment, at 43-44, *Capitol Records, LLC v. Vimeo LLC*, No. 09-Civ.-10101(RA) (S.D.N.Y. Jan. 14, 2013) (ECF No. 69). Although Veoh discontinued community flagging for copyright infringement, there was no evidence that Veoh did so *in order to avoid knowledge of infringement*. *Io Grp., Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1150 (N.D. Cal. 2008).

counterfactually, it had agreed to include Viacom's works in its Audible Magic filtering system, or if it had not disabled community flagging. YT Br. 41. That argument carries no weight. YouTube made the deliberate decision not to deploy those technologies because it did not want to identify the specific infringing clips of Viacom content that it subjectively believed were flooding its site. YouTube cannot use its own willful blindness to shield itself from liability – that is the very result the willful-blindness doctrine is designed to prevent.

### **CONCLUSION**

Because YouTube cannot satisfy either of two required elements for application of the DMCA safe harbor, this Court should reverse the judgment below and remand the case to a different district court judge for trial.

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Respectfully Submitted,

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Dated: November 8, 2013 By: /s/ Scott B. Wilkens  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on November 8, 2013, a true and correct copy of the foregoing Reply Brief for Plaintiffs-Appellants was served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h).

Dated: November 8, 2013 By: /s/ Scott B. Wilkens  
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