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United States Court of Appeals
for the
Second Circuit

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

Plaintiffs-Appellants,

– v. –

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

Defendants-Appellees.

(For Continuation of Caption See Reverse Side of Cover)

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

**BRIEF FOR *AMICUS CURIAE* MP3TUNES, INC.,
IN SUPPORT OF APPELLEES**

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THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED, on behalf of themselves and all others similarly situated, BOURNE CO., CAL IV ENTERTAINMENT, LLC, CHERRY LANE MUSIC PUBLISHING COMPANY, INC., NATIONAL MUSIC PUBLISHERS' ASSOCIATION, THE RODGERS & HAMMERSTEIN ORGANIZATION, EDWARD B. MARKS MUSIC COMPANY, FREDDY BIENSTOCK MUSIC COMPANY, dba Bienstock Publishing Company, ALLEY MUSIC CORPORATION, X-RAY DOG MUSIC, INC., FEDERATION FRANCAISE DE TENNIS, THE MUSIC FORCE MEDIA GROUP LLC, SIN-DROME RECORDS, LTD., on behalf of themselves and all others similarly situated, MURBO MUSIC PUBLISHING, INC., STAGE THREE MUSIC (US), INC., THE MUSIC FORCE LLC,

Plaintiffs-Appellants,

– and –

ROBERT TUR, dba Los Angeles News Service,
THE SCOTTISH PREMIER LEAGUE LIMITED,

Plaintiffs,

– v. –

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

Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rule of Appellate Procedure, *Amicus Curiae* MP3tunes, Inc. states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

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I. STATEMENT OF INTEREST

Amicus curiae MP3tunes, Inc. (“MP3tunes”) provides a search engine service that enables users to search for free downloads on the Internet and a locker service to store music in the cloud and play the music both at the direction of users.¹ In providing those services, MP3tunes hosts links to user-generated content, like Defendants-Appellees. MP3tunes and other service providers depend on the safe harbor provisions set forth in Section 512 of the Digital Millennium Copyright Act (“DMCA”) to provide legal certainty and limit their exposure for copyright infringement that may occur as a result of the activity of their users. Accordingly, MP3tunes has a strong interest in the proper interpretation of the DMCA safe harbor provisions, and copyright law generally, and files this brief in order to assist the Court in that effort.² All parties have consented to the filing of this *amicus curiae* brief.

II. INTRODUCTION

MP3tunes has moved to file this brief because it is concerned by Plaintiffs–Appellants’ (“Viacom”) attempt to overturn Judge Stanton’s decision in *Viacom Int’l v. YouTube*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) and the well-established,

¹ No party or its counsel authored any part of this brief or contributed money intended to fund the preparation of this brief. This brief was wholly funded by MP3tunes, Inc.

² These very issues are being litigated in *Capitol Records, LLC v. MP3tunes, Inc.*, Case No. 07-9931 (WHP), before the United States District Court for the Southern District of New York.

decade-long precedent on which Judge Stanton's decision was based. MP3tunes is also concerned because overturning Judge Stanton's decision would destroy the fundamental balance between copyright holders and Internet service providers that Congress codified within the DMCA's safe harbor provisions. Specifically, this brief addresses Viacom's attempt to reverse established precedent as to what constitutes red-flag knowledge under the DMCA.

In *Viacom*, Judge Stanton held that red-flag knowledge must "describe knowledge of specific and identifiable infringements of particular individual items" and that "[m]ere knowledge of prevalence of such activity in general is not enough." *Viacom*, 718 F. Supp. 2d at 523. Viacom claims that Judge Stanton's ruling is erroneous because red-flag knowledge merely requires a general awareness of any infringement, not an awareness of the specific infringements at issue. *Viacom* Br. 27-28. Not only is there no legal precedent for Viacom's radical reinvention of the DMCA, which would shift the burden of monitoring for copyright infringement from copyright owners to service providers, but the present realities and practices of the entertainment industry make such a solution absurd.

Viacom essentially argues that the mere presence of its content on YouTube constitutes red-flag knowledge of infringement which obligates YouTube to remove any Viacom material from YouTube. However, the stark reality is Internet marketing practices have created a climate of uncertainty wherein service providers

cannot differentiate between authorized and unauthorized content on user-generated websites.

As in the *MP3tunes* case, the facts of this case demonstrate that content owners have purposefully adopted viral or stealth marketing tactics which make it either impossible or virtually impossible to know which works on the Internet are infringing. The record evidence in this case discloses that Viacom, like the music conglomerate EMI in the *MP3tunes* case, has flooded the Internet with promotional content to the point where it is impossible to ascertain which materials are infringing and which are not. More troubling still, Viacom engages in stealth marketing practices designed to conceal that its content is authorized and to make such content appear pirated and/or posted by users.

Altering the law to require service providers to make judgments as to infringement—to determine real piracy from “fake” piracy—is neither judicious nor feasible. Viacom’s proposed general knowledge standard would require service providers to sort through the millions of copyrighted works on the Internet, conduct an investigation to determine who owns these materials, attempt to determine whether these materials have been licensed, either expressly or impliedly, and ascertain the scope or the terms of any such license. However, the vast majority of this information is not publicly available. Meanwhile, the content providers not only have access to all this information but have taken great pains to

conceal such information and create a trail of false information. Hinging service provider liability on the content providers' shell game would be absurd.

The specific knowledge standard adhered to by other jurisdictions and Judge Stanton recognizes that only copyright owners have the knowledge and the resources to accurately determine which material is infringing and which is not. The viral marketing practices of Viacom and other media conglomerates epitomize the importance of not shifting that burden to the service providers who lack the necessary information to make such determinations. Accordingly, this Court should deny this attempt to extend copyright law to such new and dangerous limits.

III. ARGUMENT

In *Viacom*, Judge Stanton held that “[m]ere knowledge of the prevalence of such [infringing] activity in general is not enough” to disqualify a service provider and that “[t]he 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.” *Viacom*, 718 F. Supp. 2d at 523. This holding is consistent with Congressional intent, established legal precedent, and the realities of the entertainment industry’s marketing practices on the Internet today. These marketing practices demonstrate that Congress and the courts got it right in enacting the safe harbor provisions of

the DMCA and placing the burden to monitor and investigate infringement on the rights holders.

A. Viacom’s General Awareness Standard Would Upend Congress’s Intent to Balance the Interests of Copyright Owners with the Nation’s Interest in Developing the Internet

Congress understood the practical realities of the Internet when it enacted the DMCA with the express intent to safeguard the development of the Internet and the technological advancement of this country. “[B]y limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and the variety and quality of services on the Internet will continue to expand.” S. Rep. No. 105-190, at 8 (1998). Indeed, Congress understood that, “without clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet.” *Id.* at 8. Thus, the safe harbor provisions of the DMCA were enacted because:

[We service providers] have no way of knowing what those trillions of bits of information are that flow over our networks. We simply cannot do it, and to be held liable for those transmissions is simply nonsense and it will tie us up in court, create more litigation and more work for lawyers, but won’t do anything to advance the construction and deployment of the Internet, nor will it protect copyright owners to any significant degree.

*Copyright Infringement Liability of Online and Internet Service Providers:
Hearing Before the Committee on the Judiciary United States Senate on S. 1146,
105th Cong. 29 (1997).*

Accordingly, Congress created a set of “safe harbors” designed to “provide greater certainty to service providers concerning their legal exposure for infringement that may occur in the course of their activities.” S. Rep. No. 105-190, at 20. Section 512(c) of the DMCA immunizes service providers unless they had “actual knowledge” of the infringement or knowledge of “facts or circumstances from which infringing activity is apparent” and failed “to act expeditiously to remove the material.” 17 U.S.C. § 512(c).

The public interest in ensuring the development of the Internet by protecting service providers from copyright lawsuits is balanced with the interests of copyright owners and their concerns regarding the potential for rampant infringement on the Internet. “Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy.” S. Rep. No. 105-190, at 8. Thus, the DMCA enables copyright owners to compel that service providers to remove any content from the service provider’s website which the content owner believes to be infringing, without an order from a court. This is an

incredible power provided to the copyright owners which should not be underestimated.

As demonstrated below, adopting Viacom’s general awareness standard would upend this balance by gutting the DMCA and exposing service providers to crippling liability.

B. Viacom’s General Knowledge Standard Is Not Supported by Law

1. Legal Precedent Dictates that Disqualifying Knowledge Must Be of Specific Infringements

Section 512(c) of the DMCA offers immunity to a service provider for the “infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.” 17 U.S.C. § 512(c). The safe harbor is available on the condition that, *inter alia*, the service provider “is not aware of facts or circumstances from which infringing activity is apparent” pursuant to subsection 512(c)(1)(A)(ii) and “upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material” pursuant to subsection 512(c)(1)(A)(ii). 17 U.S.C. § 512(c)(1)(A)(ii-iii). Common sense dictates that in order to remove the material, the service provider must have knowledge sufficient to identify the purportedly infringing material and the location of such material. The only alternative would be to shut its entire system down—hardly Congress’s intent in drafting the DMCA.

Congress explained that “[s]ubsection (c)(1)(A)(ii) can be best described as a ‘red-flag test.’” S. Rep. No. 105-190, at 44. The case *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1148 (N.D. Cal. 2008), is instructive as to the proper test for determining whether or not a service provider has red-flag knowledge of infringement under 512(c)(A)(ii). In that case the court clarified:

In determining whether a service provider has [red-flag knowledge], the question is not what a reasonable person would have deduced given all the circumstances. Instead the question is whether the service provider deliberately proceeded in the face of blatant factors of which it was aware. In other words, apparent knowledge requires evidence that a service provider turned a blind eye to red flags of obvious infringement.

Id. (internal quotations omitted) (citations omitted).

However, as Professor Nimmer has noted, it is virtually impossible to determine what is an “obvious infringement” because the service provider lacks crucial information—“from proper ownership and standing to lack of a license (express or implied), to satisfaction of notice formalities (unless excused by national origin), to the perennially murky issue of fair use, and beyond.” 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 12B.04[A][1] (2010).

Indeed, Viacom is not the first content owner to argue that the red-flag knowledge test is satisfied where a service provider is generally aware of some degree of infringement on its website. In *Corbis Corp. v. Amazon.com, Inc.*, 351

F. Supp. 2d 1090, 1108 (W.D. Wash. 2004), the plaintiff demonstrated that Amazon was aware that the Corbis celebrity photos on its website were infringing and argued that this general knowledge was sufficient to obligate Amazon to remove all Corbis' material. *Id.* However, the court expressly rejected the notion that such general knowledge was sufficient to constitute red-flag knowledge:

[t]he issue is not whether Amazon had a general awareness that a particular type of item may be easily infringed. The issue is whether Amazon actually knew that specific zShops vendors were selling items that infringed Corbis' copyrights.

Id.; *Io Group, Inc.*, 586 F. Supp. 2d at 1148 (the fact that “the works in question were professionally created and, further, that one of them contained Io's trademark” did not demonstrate knowledge of obvious infringement). Clearly, the mere presence of copyrighted material on a user-generated website does not constitute a red flag of infringement.

Knowledge of facts that give rise to a natural suspicion that a work may be infringing or come from an infringing source does not constitute “red-flag” knowledge when the infringement is neither obvious nor blatant. *See Perfect 10, Inc. v. CCBill*, 488 F. 3d 1102, 1114 (9th Cir. 2007). In *CCBill*, Perfect 10 argued that the service provider CCBill “must have been aware of apparent infringing activity” because it “provided services to ‘illegal.net’ and ‘stolencelebritypics.com’” and regularly provided services to known hacking sites.

Id. The Ninth Circuit held that such knowledge by itself was insufficient to obligate the service provider to remove the allegedly infringing material because the facts did not demonstrate obviously infringing activity. *Id.* The court explained that the description of the pictures as “illegal” or “stolen” “may be an attempt to increase [the] salacious appeal” of the pictures. *Id.*; *see also Io Group, Inc.*, 586 F. Supp. 2d at 1149 (service provider’s knowledge of source site’s advertisements for “stolen” content insufficient for red-flag knowledge); *Hendrickson v. eBay, Inc. et al.*, 165 F. Supp. 2d 1082, 1093 (C.D. Cal. 2001) (plaintiff’s letter stating that none of plaintiff’s content was authorized was not red-flag knowledge because eBay did not know which specific listings to remove); *Wolk v. Kodak Imaging Network, Inc.*, No. 10 Civ. 4135, 2011 U.S. Dist. LEXIS 27541, at *16 (S.D.N.Y. Mar. 17, 2011) (awareness from past notices regarding copyrighted works insufficient to demonstrate red-flag knowledge that later, subsequent listings of those same works were infringing).

More recently, the Central District of California has clarified why “there is no case law suggesting that a provider’s general awareness of infringement, without more, is enough to preclude application of section 512(c).” *See Arista Records, LLC v. Myxer, Inc.*, No. 08-03935, slip op. at 43 (C. D. Cal. Apr. 1, 2011). In *Myxer Inc.*, the defendant Myxer allowed users to upload songs to be turned into ring tones and categorized available songs as “Most Popular,” “Recent

Downloads,” or “Just Shared.” *Id.* at 40. Arista argued this categorization evinced the requisite red-flag knowledge because “Top 40 songs are inevitably copyrighted.” *Id.* The court observed that Top 40 songs available on the Internet are not obviously infringing because “performers may waive copyright in the hope that it will encourage the playing of their music and create a following that they can convert to customers of their subsequent works.” *Id.* The court accordingly denied plaintiffs’ motion for summary judgment on the issue of red-flag knowledge. *Id.* Thus, the fact that content that is available on a user-generated site is obviously owned by a large entertainment company is not a red flag for obvious infringement.

As has been pointed out in the *amicus* brief filed by the Consumer Electronics Association, adopting Viacom’s proposed general awareness standard would effectively shut down websites that host user-generated content, such as YouTube, Facebook, Twitter, Myspace, Craigslist, eBay, and MP3tunes, as it would expose them to the threat of crippling liability. *See* Brief of *Amicus Curiae* Consumer Electronics Association in Support of Appellees and Affirmance at 4, 25-27, 34. Furthermore, Viacom’s radical change to copyright law would expose search engines like Google, Yahoo, and Bing to crippling liability because the standard for Section 512(c)’s safe harbor for storage services would apply equally to Section 512(d)’s safe harbor for search engines. *See Viacom Int’l Inc.*, 718 F.

Supp. 2d at 523 (noting the knowledge tests for sections 512(c) and 512(d) are identical). Quite simply, the remarkable developments of the Internet in this country, which were fostered by the DMCA, would come to an abrupt end.

2. Viacom’s General Knowledge Standard Would Overturn the DMCA’s Fundamental Principle that Service Providers Bear the Burden of Monitoring and Investigating Infringement

“The purpose of the DMCA is to relieve Internet service providers of the duty of patrolling the Internet for copyright infringements that are not immediately apparent or of which they have no actual knowledge.” *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1322 (11th Cir. 2006). Accordingly, the DMCA explicitly provides that “[n]othing in this section shall be construed to condition [safe harbor protection] on—(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity” 17 U.S.C. § 512(m).

“If investigation of ‘facts and circumstances’ is required to identify material as infringing, then those facts and circumstances are not ‘red flags’.” *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1108 (CD Cal. 2009) (“[A] service provider need not monitor its service or affirmatively seek facts indicating infringing activity . . . in order to claim this limitation on liability.”); *CCBill*, 488 F. 3d at 1114 (“We do not place the burden of determining whether photographs are actually illegal on a service provider.”); *Viacom Int’l Inc.*, 718 F. Supp. 2d at 523 (“[t]he 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. We decline to shift the burden from the copyright owner to the provider.”); *Corbis Corp.*, 351 F. Supp. 2d at 1101 (service providers “need not make difficult judgments as to whether conduct is or is not infringing”).

Adopting Viacom’s general awareness standard would drastically alter copyright law to require service providers to monitor the Internet and to conduct investigations to determine whether or not the millions of copyrighted works that flow over their networks are infringing. This was simply not the intent of the DMCA. When Congress enacted the DMCA, it was well aware that service providers simply cannot be burdened with the duty to monitor the Internet and investigate possible infringements. Not only does the sheer volume of available content make it impossible for service providers to make judgments as to whether a work is infringing, but service providers simply do not have access to information needed for such a determination, such as the ownership of the work, the existence of relevant licenses and the scope and duration of any such licenses. As the DMCA foresaw, only the content owner is capable of making such a determination. Simply put, Viacom’s proposed change to DMCA precedent is not only legally baseless, but wholly unfeasible.

C. The Use of Stealth Marketing Campaigns by Content Owners Makes a Determination of Infringement Impossible

The media companies routinely place their content on the Internet. Not only have media companies made such materials available, but they have made extensive efforts to conceal the authorized nature of these materials to make this material seem pirated. In light of the entertainment industry's shenanigans, a formal take-down notice is actually the only way a service provider can identify actual infringing material in order to comply with the DMCA.

Accordingly, the legal precedent holding that red-flag knowledge is not possible without a DMCA compliant notification from the copyright owner identifying the specific material to be removed is just and sensible. *See Wolk*, 2011 U.S. Dist. LEXIS 27541 at *14 (“[w]ithout receiving notices identifying and locating each instance of infringement, Photobucket did not have ‘actual knowledge’ of the complained of infringements or ‘aware[ness] of facts or circumstances from which infringing activity is apparent.’”); *UMG Recordings Inc.*, 665 F. Supp. 2d at 1110 (“notices that fail to comply substantially with § 512(c)(3)(A) ‘shall not be considered . . . in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent’”); *Hendrickson*, 165 F. Supp. 2d at 1082 (“The DMCA expressly provides that if the copyright holder’s attempted notification fails to ‘comply substantially’ with the elements of notification described in

subsection (c)(3), that notification shall not be considered when evaluating whether the service provider had actual or constructive knowledge of the infringing activity under the first prong set forth in Section 512(c)(1)").

1. Stealth Marketing in the Entertainment Industry

Copyright owners regularly make their works available on the Internet for promotional purposes. For example, MTV CEO, Judy McGrath, told reporters that the company intentionally allowed users to upload South Park videos to YouTube because it drove more attention and potential viewers to the show. DE 211-5 at 61 (Shapiro Ex. 61). As a result, it is impossible to determine whether a work is infringing or not merely by its presence on the Internet. As a former Director of Business Affairs for Sony Music testified in the *MP3tunes* case, it is common practice in the music industry, and has been for many years, for music companies to give away free music to increase exposure. *See MP3tunes, Inc.*, Case No. 07-9931 (WHP), DE 221-13 at 4 (Gordon Decl.). Mr. Gordon documented how media companies virally market their content on a wide array of websites from: promotional freebies that are circulated on standard retail websites like Amazon.com, Walmart and iTunes; social networking websites like Facebook, Myspace, and Bebo; media websites like Google and AOL; music websites like Spin and MTV; record label sites like EMI; to artist's own websites. *See id.* at 4-6. Similarly, the record evidence in this case demonstrates that Viacom and other

entertainment companies made extensive use of YouTube to virally promote their copyrighted works. *See, e.g.*, DE 226-2, at 72 (Rubin Ex 17) (“we’ve uploaded a boatload of clips onto YouTube for distribution.”). Indeed, the Vice President for Interactive Marketing at Paramount Vantage was quoted by the Wall Street Journal: “[a]s a marketer you almost can’t find a better place than YouTube to promote your movie.” *Garage Band: With NBC Pact, YouTube Site Tries to Build a Lasting Business -Internet Video Service Sketches A Path to Profitability*, WALL STREET JOURNAL, June 27, 2006.

Secrecy is a fundamental ingredient for success in stealth marketing. In order to generate interest and exposure, the source of the marketing must be concealed so that the message is perceived as coming from a fan—not the company marketing the product. The marketing agent must look and sound like a peer of their target audience without any direct interest or ulterior motive in endorsing the product. In the *MP3tunes* case, the record showed considerable evidence that EMI and other copyright owners attempted to hide the fact that they made their copyrighted works available because taste makers are hesitant to accept music directly from major labels because they want to avoid creating an impression that their tastes are dictated by large media corporations. *See MP3tunes, Inc.*, Case No. 07-9931 (WHP), DE 221-13 at 4 (Gordon Decl.); *see also Sony Screws Up*, BUSINESS WEEK, December 19, 2006 *available at*

http://www.businessweek.com/innovate/content/dec2006/id20061219_590177.htm?campaign_id=bier_innc.g3a.rssd12190 (detailing how Sony faced considerable backlash when it was revealed that the blog alliwantforxmasisapsp.com was a stealth marketing campaign created by Sony's marketing team).

For example, the Wall Street Journal exposed one such stealth marketing campaign by the Walt Disney Company in connection with the artist Marié Digby. *See Download This: YouTube Phenom Has a Big Secret*, WALL STREET JOURNAL ONLINE, Sept. 6, 2007 (available at <http://online.wsj.com/article/SB118903788315518780.html>). Initially, Ms. Digby appeared to be an amateur musician who was “discovered” by a major label after posting home videos of her acoustic rendition of the popular R&B hit “Umbrella” and receiving more than 2.3 million views on YouTube. *See id.* In a press release, Walt Disney Co.'s Hollywood Records declared: “Breakthrough YouTube Phenomenon Marié Digby Signs With Hollywood Records.” *Id.* However, the *Wall Street Journal* later uncovered that Ms. Digby had actually signed a recording contract with the label 18 months earlier. *Id.* The stealth/viral marketing campaign was an elaborate hoax designed to create “buzz” around Ms. Digby.

Indeed, even the local radio stations helped spread fake story of Ms. Digby's alleged "discovery" based on her YouTube videos. *Id.*³

Knowing that so much content has been made available on the Internet for promotional purposes, Viacom's claim that a service provider should be able to determine which material on the Internet is obviously infringing and which is not is certainly not offered with a straight face.

2. Viacom's Stealth Marketing Campaigns

The record evidence demonstrated that Viacom, like other large entertainment media conglomerates, engaged in extensive subterfuge to market their properties in a stealth manner, including: (1) perpetuating fake "leaks" of unauthorized videos to YouTube; (2) paying third parties to post "unauthorized" videos on YouTube so that the content appears to come from a different source than Viacom; (3) creating fake usernames and accounts to post, view and comment

³ According to one insider, Disney has been stealth marketing the new Muppet Movie (due for release in November 2011) since 2009 through a series of viral videos released through YouTube. See <http://www.movieline.com/2011/03/disney-has-been-virally-marketing-jason-segels-hard-to-make-muppets-for-18-months.php> See also Sonia K. Katyal, *Stealth Marketing and Antibranding: The Love that Dare Not Speak Its Name*, 58 BUFF. L. REV. 795 (2010) also available at http://www.buffalolawreview.org/past_issues/58_4/Katyal.pdf; Piracy Fight Shuts Down Music Blog, New York Times December 13, 2010 available at <https://www.nytimes.com/2010/12/14/business/media/14music.html> ("But if you've ever been in a marketing meeting at a record label, it's 'Hey, can you leak this to the blogs?' Leak is now a marketing verb."). For a parody on the stealth marketing practices of movie studios, see http://www.youtube.com/watch?v=oUrmOW3mw2c&feature=player_embedded.

on videos; (4) using off-site third-party computers to avoid having IP addresses traced back to the media company; and (5) deliberately altering videos so that the videos look “bootlegged” or “hijacked.”

Indeed, even if service providers bore the substantial burden of monitoring and investigating for potential infringements, it would be impossible for them to make such determinations because not only are the media companies like Viacom and EMI actively attempting to hide the fact that they authorized and released this content but they are also actively trying to make the content appear infringing.

Viacom and other media companies create “fake leaks” in an effort to have content go “viral.” When a VH1 employee asked whether videos posted to YouTube should come from VH1, the response was “I think that would be fine but was the idea to make it seem like it was leaked? If so I don’t think we should post it as coming from VH1.” DE 226-2 at 33 (Rubin Ex 6).

Media companies go to such great lengths to make authorized videos look infringing because such “leaking” campaigns have been wildly successful:

The leaked Perez video received a lot of initial pick-up from the TMZ feature on Friday. However the video truly went viral this weekend before it was removed from YouTube. . . . From the email account I used (GossipGirl140) to upload the video I received over 1,000 comments between Saturday and Sunday and I am sure tons of views. . . . Since the removal, another YouTube-er has re-posted the behind the scenes video, so the video continues to stay viral. I think the video was an incredible assts [sic] in keeping ‘buzz’ going on the show, I would recommend that in the future we leak during the week to better

track its spread – especially if we choose to use YouTube where Viacom material will be removed.”

DE 226-4 at 32 (Rubin Ex. 107).

The record is replete with instances where Viacom employees attempted to make promotional material look like unauthorized, infringing content:

- “THIS MUST BE VIRAL AND NOT DIRECTLY CONNECTED TO US!” Id.
- “[It] should definitely not be associated with the studio – [it] should appear as if a fan created and posted it.” D.E. 226-4 at 16 (Rubin Ex 26) (A Paramount executive instructing an employee)
- “Dana wants the clip to look as though it was leaked out by production instead of purposely placed by Spike or the UFC.” DE 226-2 at 62 (Rubin Ex 14)
- “i think a time code cut that is not color corrected, cleared, etc. is the way to go...leak on youtube?” DE 226-4 at 21(Rubin Ex. 25) (Paramount email discussing leaking unfinished cuts of movie before official website has launched).
- “Noone can know that Fanscape or MTV is involved in this.” DE 207-8 at 60 (Schapiro Ex 33)
- Viacom executives approving Warner Brothers’ request to “leak” the upcoming episode of Jamie Kennedy’s Blowin’ Up (a work at issue) onto YouTube. DE 226-2 at 40 (Rubin Ex. 8)
- MTV employee discussing “leaking” clips to YouTube and other “user-generated content sights [sic].” DE 226-2 at 59 (Rubin Ex. 13).

In an effort to further bolster the deception that its videos were bootlegged or hijacked, Viacom executives have employees go so far as to deliberately alter or modify the content of their videos to make them appear pirated. Such efforts include adding time codes, not blurring out information that would typically be blurred out on official footage, and using rough cuts or film clips from the cutting room floors:

- “In light of the fact that the goal is to make [the video] look ‘hijacked’ we won’t blur the round number on the clock. Steve actually suggest we throw (if technically possible) visual time code on it to add to the ‘hijacked’ effect.” DE 226-2 at 62 (Rubin Ex 14);
- “It’s also completely finished footage so maybe we want to “rough it up” with some time code before we release it virally?” DE 226-4 at 5 (Rubin Ex 20) (email from the Creative Director of Motion Picture Interactive Marketing at Paramount requesting a movie clip be altered before posting on YouTube);
- Instructions to use “footage from the cutting room floor, so users feel they have found something unique.” DE 226-2 at 16 (Rubin Ex 4);

Media companies do not stop at creating anonymous email addresses to conceal their identities. Indeed, as evidenced in the record, Viacom even went as far as instructing its employees to use public computers at Kinkos and FedEx so that the IP address associated with the released videos could not be traced back to the studio. DE 211-4 page 33 (Schapiro Ex 48) (employee ready to go to Kinkos when video is ready for uploading); DE 211-4 at 38 (Schapiro Ex 49) (employee discussing uploading through official Paramount account or through Kinkos); DE 211-4 page 30 (Schapiro Ex. 47 (158:19-159:5) (same)).

In addition to its own internal stealth marketing efforts, Viacom contracts with *at least 18* third-party agents to post Viacom owned content on YouTube and to assist with their stealth/viral marketing efforts, one of whom Viacom paid almost half a million dollars. DE 207-8 at 60 (Shapiro Ex. 39). As a result of this elaborate and well-executed subterfuge, it is virtually impossible for anyone other than the content owners to know if material posted is authorized or unauthorized

content. The following are a few of the many examples of media companies instructing third-party marketing firms to leak copyrighted content so that the content appears infringing:

- Senior VP of Interactive Marketing at Paramount requesting a clip from Norbit movie be posted on YouTube “(from scott of course) NOT WITH A PARAMOUNT LOGO OR ASSOCIATION” DE 226-4 at 2 (Rubin Ex 19);
- Paramount employees discussing how Iced Marketing uploaded Norbit (a work at issue) to YouTube using “a separate account that doesn’t have any other Paramount video” and providing instructions as to what descriptions to use so that the videos do not “raise suspicion” that they come from the studio and not an actual user. DE 226-4 at 11 (Rubin Ex 22);
- Email from MTV to its marketing agent Fanscape stating that it is to upload viral videos to YouTube: “if u can do it the in cognito way. :).” DE 226-5 at 5 (Rubin Ex 29);
- “If we are trying to be ‘under the radar’ we will not upload videos to the Fanscapevideos YouTube account but will create a different one.” DE 226-5 at 9 (Rubin Ex 30).

Because it is no longer a secret that Viacom and other large media corporations engage in such systematic efforts to deceive the public into believing that their released content is infringing, the mere presence of copyrighted material on YouTube, or on any other user-generated website, cannot constitute a red flag for infringement. Service providers cannot differentiate infringing material from authorized material. Only copyright owners have access to this information. Accordingly, Viacom’s plea to adopt a general awareness standard is not only hypocritical, but wholly unfeasible.

3. Even Viacom Fails to Distinguish between its Authorized Works and Infringements

Indeed, Viacom's massive stealth marketing efforts have caused even Viacom itself to improperly distinguish between authorized and unauthorized works. The record evidences numerous instances wherein Viacom's enforcement agents or legal team removed content that was authorized by Viacom to be posted on YouTube:

- Email from Paramount Executive to YouTube: "We need your help with something. All of the Last Kiss content that we uploaded has somehow been removed-not per our approval. How can we get this back up? How does this happen?" and YouTube response: "It was taken down due to an infringement notification that we received from baytsp." DE 226-6 at 50 (Rubin Ex 44);
- Counter notification from WiredSet in response to MTV's takedown notice: "We were hired by MTV to do online marketing around the show with a key tool being uploading and syndicating clips from each show via YouTube. We were authorized by MTV to use their videos on YouTube." DE 226-6 at 54 (Rubin Ex 45);
- DMCA takedown notice from BayTSP requesting removal of videos, counter notice from WiredSet explaining that they have two copyright strikes on their account and that they were authorized to post the video on YouTube, and response email from BayTSP withdrawing their takedown request. DE 226-6 at 57-71 (Rubin Ex 46-48);
- Email from Spike TV (Viacom) to YouTube: "I know you're removing Viacom material, but you've suspended our account [m]istakenly. We entered into an agreement last year with YouTube for an [o]fficial Spike channel. All of those clips were legal." DE 226-7 at 62 (Rubin Ex 54);
- "All three of our Fanscape YouTube Channels have been disabled. We have copyright infringements from Viacom or MTV related companies (i.e. record labels) that we need to take care of as soon as possible. If we can't keep a YouTube channel live then it makes it very difficult to blast out the MTV videos provided by you to promote new/existing shows. We of course are currently working around the

problem and using alternative UGC sites – but as I’m sure you are aware, they simply aren’t as popular as YouTube.” DE 226-8 at 16 (Ex 65);

- “This is the second time in as many months that our channels have been disabled. I do understand that YouTube is not to blame for these disruptions and instead it more [sic] systemic of what occurs in big companies like our clients where one department isn’t aware of what another department is doing . . .” DE 226-8 at 13 (Ex 64);
- “I just received this copyright violation from Viacom. It is very old content, but we need to get it cleared up so our channel isn’t pulled down again. Is there anyway we can make sure legal doesn’t pull down any videos on the fanscapevideos channel? This is happening quite often now” DE 226-8 at 21 (Ex. 66).
- Email from enforcement manager at the MPAA questioning whether videos on YouTube from “Mission Impossible 3” were improperly leaked. Paramount confirmed that the scenes were posted by Paramount as part of its “normal online activity before the release of the film.” DE 226-2 at 38 (Rubin Ex 7);
- “Viacom is cease-and-desisting the content from MTV off YouTube and has caused our account to be disabled, making all of the MTV videos we have on that account inaccessible.” DE 226-8 at 3 (Ex 60);
- “Our YouTube profile was recently mistakenly closed due to a copyright infringement issue with one of my clients (Comedy Central).” DE 226-7 at 57 (Rubin Ex 53).

Viacom’s enforcement agents were not the only ones unable to identify which material was infringing and which was not. Other media companies have sent takedown notices to YouTube mistakenly demanding that authorized content be removed:

- JibJab Media to YouTube: “I have a bit of an embarrassing situation that I hope you can help us resolve. Due to lack of internal communication, our very own Operations Department filed copyright complaints against the video content in our very own YouTube channel (<http://youtube.com/jibjab>).” DE 227-2 at 3 (Ex 81);
- “We did it yet again! We issued a take-down on a video that was living in one of our channels.” DE 227-2 at 6 (Ex 82).

- Warner Brothers communication to YouTube: “Can you please reinstate the YouTube account warnerbrosonline? I believe we sent notices to YouTube regarding warnerbrosonline and we would like to retract the notices.” DE 227 at 30 (Ex 72);
- Roadrunner Records to YouTube in email entitled “Accidental Takedown Notice”: “We accidentally sent notice for a video one of our bands has on their own account,” and asking if YouTube could “please reinstate it?” DE 227 at 41 (Ex 75).

If media titans with enormous resources like Viacom and EMI cannot monitor their own copyrighted works and keep track of whether the posting of a work is authorized or not, it is absurd to expect service providers, which are not privy to even a fraction of such information, to make these distinctions. The DMCA case law (including Judge Stanton’s decision) recognize this absurdity. As the DMCA and the case law interpreting it make clear, the only possible way to police copyright infringement on the Internet is to leave it to the copyright owner to monitor for infringement of their works by using the take-down procedures enacted by Congress in the DMCA. Overturning this established precedent and adopting Viacom’s proposed general awareness standard would impose a dangerous uncertainty to copyright law, clogging the courts with litigation and effectively shutting down the Internet.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) for the Federal Rules of Appellate Procedure, I certify as follows.

1. This brief complies with the type-volume limitations set forth in Rule 2(a)(7)(B)(iii). According to the word count contained in Plaintiff-Appellant's counsel's word processing system, this Brief contains 6,186 words.
2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6).

Dated this 7th day of April, 2011.

By: /s/ _____

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