

SPA-1

10-3270

10-3342

IN THE
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,

(caption continued on inside cover)

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

SPECIAL APPENDIX

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SPA-2

v.

YOUTUBE, INC., YOUTUBE, LLC, GOOGLE, INC.,
Defendants-Appellees.

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,

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

v.

YOUTUBE, INC., YOUTUBE, LLC, GOOGLE, INC.,
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

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

Plaintiffs, 07 Civ. 2103 (LLS)

-against-

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

Defendants,

-----X

THE FOOTBALL ASSOCIATION PREMIER
LEAGUE LIMITED, et al., on
behalf of themselves and all
others similarly situated,

Plaintiffs,

OPINION AND ORDER

-against-

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

Defendants.

-----X

07 Civ. 3582 (LLS)

Defendants move for summary judgment that they are entitled to the Digital Millennium Copyright Act's ("DMCA"), 17 U.S.C. § 512(c), "safe harbor" protection against all of plaintiffs' direct and secondary infringement claims, including claims for "inducement" contributory liability, because they had insufficient notice, under the DMCA, of the particular infringements in suit.

Plaintiffs cross-move for partial summary judgment that defendants are not protected by the statutory "safe harbor" provision, but "are liable for the intentional infringement of thousands of Viacom's copyrighted works, . . . for the vicarious infringement of those works, and for the direct infringement of those works . . . because: (1) Defendants had 'actual knowledge' and were 'aware of facts and circumstances from which infringing activity [was] apparent,' but failed to 'act[] expeditiously' to stop it; (2) Defendants 'receive[d] a financial benefit directly attributable to the infringing activity' and 'had the right and ability to control such activity;' and (3) Defendants' infringement does not result solely from providing 'storage at the direction of a user' or any other Internet function specified in section 512." (See the parties' Notices of Motion).

Resolution of the key legal issue presented on the parties' cross-motions requires examination of the DMCA's "safe harbor" provisions, 17 U.S.C. § 512(c), (m) and (n) which state:

(c) Information residing on systems or networks at direction of users.—

(1) In general.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for 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, if the service provider—

(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

(2) **Designated agent.**—The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) Other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, in both electronic and hard copy formats, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

(3) Elements of notification.-

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(B)(i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

* * *

(m) Protection of privacy.—Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on—

(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i); or

(2) a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.

(n) Construction.—Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a

service provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.

Defendant YouTube, owned by defendant Google, operates a website at <http://www.youtube.com> onto which users may upload video files free of charge. Uploaded files are copied and formatted by YouTube's computer systems, and then made available for viewing on YouTube. Presently, over 24 hours of new video-viewing time is uploaded to the YouTube website every minute. As a "provider of online services or network access, or the operator of facilities therefor" as defined in 17 U.S.C. § 512(k)(1)(B), YouTube is a service provider for purposes of § 512(c).

From plaintiffs' submissions on the motions, a jury could find that the defendants not only were generally aware of, but welcomed, copyright-infringing material being placed on their website. Such material was attractive to users, whose increased usage enhanced defendants' income from advertisements displayed on certain pages of the website, with no discrimination between infringing and non-infringing content.

Plaintiffs claim that "tens of thousands of videos on YouTube, resulting in hundreds of millions of views, were taken unlawfully from Viacom's copyrighted works without

authorization" (Viacom Br., Dkt. No. 186, p. 1), and that "Defendants had 'actual knowledge' and were 'aware of facts or circumstances from which infringing activity [was] apparent,' but failed to do anything about it." (Id. at 4) (alteration in original).

However, defendants designated an agent, and when they received specific notice that a particular item infringed a copyright, they swiftly removed it. It is uncontroverted that all the clips in suit are off the YouTube website, most having been removed in response to DMCA takedown notices.

Thus, the critical question is whether the statutory phrases "actual knowledge that the material or an activity using the material on the system or network is infringing," and "facts or circumstances from which infringing activity is apparent" in § 512(c)(1)(A)(i) and (ii) mean a general awareness that there are infringements (here, claimed to be widespread and common), or rather mean actual or constructive knowledge of specific and identifiable infringements of individual items.

1.

Legislative History

The Senate Committee on the Judiciary Report, S. Rep. No. 105-190 (1998), gives the background at page 8:

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. Legislation implementing the treaties provides this protection and creates the legal platform for launching the global digital on-line marketplace for copyrighted works. It will facilitate making available quickly and conveniently via the Internet the movies, music, software, and literary works that are the fruit of American creative genius. It will also encourage the continued growth of the existing off-line global marketplace for copyrighted works in digital format by setting strong international copyright standards.

At the same time, 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. In the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability. For example, service providers must make innumerable electronic copies by simply transmitting information over the Internet. Certain electronic copies are made in order to host World Wide Web sites. Many service providers engage in directing users to sites in response to inquiries by users or they volunteer sites that users may find attractive. Some of these sites might contain infringing material. In short, by limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.

It elaborates:

There have been several cases relevant to service provider liability for copyright infringement. Most have approached the issue from the standpoint of contributory and vicarious liability. Rather than embarking upon a wholesale clarification of these doctrines, the Committee decided to leave current law in its evolving state and, instead, to create a series of "safe harbors," for certain common activities of

service providers. A service provider which qualifies for a safe harbor, receives the benefit of limited liability.

Id. at 19 (footnote omitted).

The Senate Judiciary Committee Report and the House Committee on Commerce Report, H.R. Rep. No. 105-551, pt. 2 (1998), in almost identical language describe the DMCA's purpose and structure (Senate Report at 40-41, House Report at 50):

New section 512 contains limitations on service providers' liability for five general categories of activity set forth in subsections (a) through (d) and subsection (f). As provided in subsection (k), section 512 is not intended to imply that a service provider is or is not liable as an infringer either for conduct that qualifies for a limitation of liability or for conduct that fails to so qualify. Rather, the limitations of liability apply if the provider is found to be liable under existing principles of law.

The limitations in subsections (a) through (d) protect qualifying service providers from liability for all monetary relief for direct, vicarious and contributory infringement. Monetary relief is defined in subsection (j)(2) as encompassing damages, costs, attorneys' fees, and any other form of monetary payment. These subsections also limit injunctive relief against qualifying service providers to the extent specified in subsection (i). To qualify for these protections, service providers must meet the conditions set forth in subsection (h), and service providers' activities at issue must involve a function described in subsection (a), (b), (c), (d) or (f), respectively. The liability limitations apply to networks "operated by or for the service provider," thereby protecting both service providers who offer a service and subcontractors who may operate parts of, or an entire, system or network for another service provider.

They discuss the "applicable knowledge standard"

(Senate Report at 44-45, House Report at 53-54):

Subsection (c)(1)—In general.—Subsection (c)(1)(A) sets forth the applicable knowledge standard. This standard is met either by actual knowledge of infringement or in the absence of such knowledge by awareness of facts or circumstances from which infringing activity is apparent. The term "activity" is intended to mean activity using the material on the system or network. The Committee intends such activity to refer to wrongful activity that is occurring at the site on the provider's system or network at which the material resides, regardless of whether copyright infringement is technically deemed to occur at that site or at the location where the material is received. For example, the activity at an online site offering audio or video may be unauthorized public performance of a musical composition, a sound recording, or an audio-visual work, rather than (or in addition to) the creation of an unauthorized copy of any of these works.

Subsection (c)(1)(A)(ii) can best be described as a "red flag" test. As stated in subsection (1), a service provider need not monitor its service or affirmatively seek facts indicating infringing activity (except to the extent consistent with a standard technical measure complying with subsection (h)), in order to claim this limitation on liability (or, indeed any other limitation provided by the legislation). However, if the service provider becomes aware of a "red flag" from which infringing activity is apparent, it will lose the limitation of liability if it takes no action. The "red flag" test has both a subjective and an objective element. In determining whether the service provider was aware of a "red flag," the subjective awareness of the service provider of the facts or circumstances in question must be determined. However, in deciding whether those facts or circumstances constitute a "red flag"—in other words, whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances—an objective standard should be used.

Subsection (c)(1)(A)(iii) provides that once a service provider obtains actual knowledge or awareness of facts or circumstances from which infringing material or activity on the service provider's system or network is apparent, the service provider does not lose the limitation of liability set forth in subsection (c) if it acts expeditiously to remove or disable access to the infringing material. 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.

Subsection (c)(1)(B) sets forth the circumstances under which a service provider would lose the protection of subsection (c) by virtue of its benefit from the control over infringing activity. In determining whether the financial benefit criterion is satisfied, courts should take a common-sense, fact-based approach, not a formalistic one. In general, a service provider conducting a legitimate business would not be considered to receive a "financial benefit directly attributable to the infringing activity" where the infringer makes the same kind of payment as non-infringing users of the provider's service. Thus, receiving a one-time set-up fee and flat periodic payments for service from a person engaging in infringing activities would not constitute receiving a "financial benefit directly attributable to the infringing activity." Nor is subparagraph (B) intended to cover fees based on the length of the message (per number of bytes, for example) or by connect time. It would however, include any such fees where the value of the service lies in providing access to infringing material.

and at Senate Report 45, House Report 54:

Section 512 does not require use of the notice and take-down procedure. A service provider wishing to benefit from the limitation on liability under subsection (c) must "take down" or disable access to infringing material residing on its system or network of which it has actual knowledge or that meets the "red flag" test, even if the copyright owner or its agent does not notify it of a claimed infringement. On the other hand, the service provider is free to refuse to "take down" the material or site, even after receiving a notification of claimed infringement from

the copyright owner; in such a situation, the service provider's liability, if any, will be decided without reference to section 512(c). For their part, copyright owners are not obligated to give notification of claimed infringement in order to enforce their rights. However, neither actual knowledge nor awareness of a red flag may be imputed to a service provider based on information from a copyright owner or its agent that does not comply with the notification provisions of subsection (c)(3), and the limitation of liability set forth in subsection (c) may apply.

The reports continue (Senate Report at 46-47, House Report at 55-56):

Subsection (c)(3)(A)(iii) requires that the copyright owner or its authorized agent provide the service provider with information reasonably sufficient to permit the service provider to identify and locate the allegedly infringing material. An example of such sufficient information would be a copy or description of the allegedly infringing material and the URL address of the location (web page) which is alleged to contain the infringing material. The goal of this provision is to provide the service provider with adequate information to find and address the allegedly infringing material expeditiously.

* * *

Subsection (c)(3)(B) addresses the effect of notifications that do not substantially comply with the requirements of subsection (c)(3). Under this subsection, the court shall not consider such notifications as evidence of whether the service provider has actual knowledge, is aware of facts or circumstances, or has received a notification for purposes of subsection (c)(1)(A). However, a defective notice provided to the designated agent may be considered in evaluating the service provider's knowledge or awareness of facts and circumstances, if (i) the complaining party has provided the requisite information concerning the identification of the

copyrighted work, identification of the allegedly infringing material, and information sufficient for the service provider to contact the complaining party, and (ii) the service provider does not promptly attempt to contact the person making the notification or take other reasonable steps to assist in the receipt of notification that substantially complies with paragraph (3)(A). If the service provider subsequently receives a substantially compliant notice, the provisions of paragraph (1)(C) would then apply upon receipt of the notice.

When discussing section 512(d) of the DMCA which deals with information location tools, the Committee Reports contain an instructive explanation of the need for specificity (Senate Report at 48-49, House Report at 57-58):

Like the information storage safe harbor in section 512(c), a service provider would qualify for this safe harbor if, among other requirements, it "does not have actual knowledge that the material or activity is infringing" or, in the absence of such actual knowledge, it is "not aware of facts or circumstances from which infringing activity is apparent." Under this standard, 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.

For instance, the copyright owner could show that the provider was aware of facts from which infringing activity was apparent if the copyright owner could prove that the location was clearly, at the time the directory provider viewed it, a "pirate" site of the type described below, where sound recordings, software, movies or books were available for unauthorized downloading, public performance or public display. Absent such "red flags" or actual knowledge, a directory provider would not be similarly aware merely because it saw one or more well known photographs of a celebrity at a site devoted to that person. The provider could not be expected, during the course of its brief cataloguing visit, to determine whether the photograph was still protected by copyright or was in the public domain; if the

photograph was still protected by copyright, whether the use was licensed; and if the use was not licensed, whether it was permitted under the fair use doctrine.

The important intended objective of this standard is to exclude sophisticated "pirate" directories—which refer Internet users to other selected Internet sites where pirate software, books, movies, and music can be downloaded or transmitted—from the safe harbor. Such pirate directories refer Internet users to sites that are obviously infringing because they typically use words such as "pirate," "bootleg," or slang terms in their uniform resource locator (URL) and header information to make their illegal purpose obvious to the pirate directories and other Internet users. Because the infringing nature of such sites would be apparent from even a brief and casual viewing, safe harbor status for a provider that views such a site and then establishes a link to it would not be appropriate. Pirate directories do not follow the routine business practices of legitimate service providers preparing directories, and thus evidence that they have viewed the infringing site may be all that is available for copyright owners to rebut their claim to a safe harbor.

In this way, the "red flag" test in section 512(d) strikes the right balance. The common-sense result of this "red flag" test is that online editors and catalogers would not be required to make discriminating judgments about potential copyright infringement. If, however, an Internet site is obviously pirate, then seeing it may be all that is needed for the service provider to encounter a "red flag." A provider proceeding in the face of such a red flag must do so without the benefit of a safe harbor.

Information location tools are essential to the operation of the Internet; without them, users would not be able to find the information they need. Directories are particularly helpful in conducting effective searches by filtering out irrelevant and offensive material. The Yahoo! Directory, for example, currently categorizes over 800,000 online locations and serves as a "card catalogue" to the World Wide Web, which over 35,000,000 different users visit each month. Directories such as Yahoo!'s usually are created by people visiting sites to categorize them. It is precisely the human judgment

and editorial discretion exercised by these cataloguers which makes directories valuable.

This provision is intended to promote the development of information location tools generally, and Internet directories such as Yahoo!'s in particular, by establishing a safe-harbor from copyright infringement liability for information location tool providers if they comply with the notice and takedown procedures and other requirements of subsection (d). The knowledge or awareness standard should not be applied in a manner which would create a disincentive to the development of directories which involve human intervention. Absent actual knowledge, awareness of infringement as provided in subsection (d) should typically be imputed to a directory provider only with respect to pirate sites or in similarly obvious and conspicuous circumstances, and not simply because the provider viewed an infringing site during the course of assembling the directory.

The tenor of the foregoing provisions is that the phrases "actual knowledge that the material or an activity" is infringing, and "facts or circumstances" indicating infringing activity, describe knowledge of specific and identifiable infringements of particular individual items. Mere knowledge of prevalence of such activity in general is not enough. That is consistent with an area of the law devoted to protection of distinctive individual works, not of libraries. To let knowledge of a generalized practice of infringement in the industry, or of a proclivity of users to post infringing materials, impose responsibility on service providers to discover which of their users' postings infringe a copyright would contravene the structure and operation of the DMCA. As

stated in Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1113 (9th Cir. 2007):

The 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 a substantial burden from the copyright owner to the provider

That makes sense, as the infringing works in suit may be a small fraction of millions of works posted by others on the service's platform, whose provider cannot by inspection determine whether the use has been licensed by the owner, or whether its posting is a "fair use" of the material, or even whether its copyright owner or licensee objects to its posting. The DMCA is explicit: it shall not be construed to condition "safe harbor" protection on "a service provider monitoring its service or affirmatively seeking facts indicating infringing activity" Id. § 512(m)(1); see Senate Report at 44, House Report at 53.

Indeed, the present case shows that the DMCA notification regime works efficiently: when Viacom over a period of months accumulated some 100,000 videos and then sent one mass take-down notice on February 2, 2007, by the next business day YouTube had removed virtually all of them.

2.

Case Law

In CCBill LLC, supra, the defendants provided web hosting and other services to various websites. The plaintiff argued that defendants had received notice of apparent infringement from circumstances that raised "red flags": websites were named "illegal.net" and "stolencelebritypics.com," and others involved "password-hacking." 488 F.3d at 1114 (internal quotation marks omitted). As to each ground, the Ninth Circuit disagreed, stating "We do not place the burden of determining whether photographs are actually illegal on a service provider"; and "There is simply no way for a service provider to conclude that the passwords enabled infringement without trying the passwords, and verifying that they enabled illegal access to copyrighted material. We impose no such investigative duties on service providers." Id.

The District Court in UMG Recordings, Inc. v. Veoh Networks, Inc., 665 F. Supp. 2d 1099, 1108 (C.D. Cal. 2009), concluded that "CCBill teaches that if investigation of 'facts and circumstances' is required to identify material as infringing, then those facts and circumstances are not 'red flags.'" That observation captures the reason why awareness of pervasive copyright-infringing, however flagrant and blatant,

does not impose liability on the service provider. It furnishes at most a statistical estimate of the chance any particular posting is infringing – and that is not a “red flag” marking any particular work.

In Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1108 (W.D. Wash. 2004) the court stated that “The 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.” It required a “showing that those sites contained the type of blatant infringing activity that would have sent up a red flag for Amazon.” Id. at 1109. Other evidence of “red flags” was unavailing, for it “provides no evidence from which to infer that Amazon was aware of, but chose to ignore, red flags of blatant copyright infringement on specific zShops sites.” Id.

A similar recent decision of the Second Circuit involved analogous claims of trademark infringement (and therefore did not involve the DMCA) by sales of counterfeit Tiffany merchandise on eBay, Inc.’s website. In Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93 (2d Cir. April 1, 2010) the Court of Appeals affirmed the dismissal of trademark infringement and dilution claims against eBay’s advertising and listing practices. The sellers on eBay offered Tiffany sterling silver

jewelry of which a significant portion (perhaps up to 75%) were counterfeit, although a substantial number of Tiffany goods sold on eBay were authentic. (Id. at 97-98). The particular issue was "whether eBay is liable for contributory trademark infringement - i.e., for culpably facilitating the infringing conduct of the counterfeiting vendors" (id. at 103) because "eBay continued to supply its services to the sellers of counterfeit Tiffany goods while knowing or having reason to know that such sellers were infringing Tiffany's mark." (Id. at 106). Tiffany alleged that eBay knew, or had reason to know, that counterfeit Tiffany goods were being sold "ubiquitously" on eBay, and the District Court had found that eBay indeed "had *generalized* notice that some portion of the Tiffany goods sold on its website might be counterfeit" (id.; emphasis in original). Nevertheless, the District Court (Sullivan, J.) dismissed, holding that such generalized knowledge was insufficient to impose upon eBay an affirmative duty to remedy the problem. It held that "for Tiffany to establish eBay's contributory liability, Tiffany would have to show that eBay 'knew or had reason to know of specific instances of actual infringement' beyond those that it addressed upon learning of them." (Id. at 107).

The Court of Appeals held (Id.):

We agree with the district court. For contributory trademark infringement liability to lie, a service provider must have more than a general knowledge or reason to know that its service is being used to sell counterfeit goods. Some contemporary knowledge of which particular listings are infringing or will infringe in the future is necessary.

And at p. 110:

eBay appears to concede that it knew as a general matter that counterfeit Tiffany products were listed and sold through its website. Tiffany, 576 F.Supp.2d at 514. Without more, however, this knowledge is insufficient to trigger liability under Inwood.^[1]

Although by a different technique, the DMCA applies the same principle, and its establishment of a safe harbor is clear and practical: if a service provider knows (from notice from the owner, or a "red flag") of specific instances of infringement, the provider must promptly remove the infringing material. If not, the burden is on the owner to identify the infringement. General knowledge that infringement is "ubiquitous" does not impose a duty on the service provider to monitor or search its service for infringements.

¹ See Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 102 S. Ct. 2182 (1982).

3.

The Grokster Case

Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) and its progeny Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124 (S.D.N.Y. 2009) (dismissing DMCA defense as sanction for spoliation and evasive discovery tactics), Columbia Pictures Industries, Inc. v. Fung, No. 06 Civ. 5578, 2009 U.S. Dist. LEXIS 122661 (C.D. Cal. Dec. 21, 2009), and Arista Records LLC v. Lime Group LLC, No. 06 Civ. 5936 (KMW), ___ F. Supp. 2d ___, 2010 WL 2291485 (S.D.N.Y. May 25, 2010), which furnish core principles heavily relied on by plaintiffs and their supporting amici, have little application here. Grokster, Fung, and Lime Group involved peer-to-peer file-sharing networks which are not covered by the safe harbor provisions of DMCA § 512(c). The Grokster and Lime Group opinions do not even mention the DMCA. Fung was an admitted copyright thief whose DMCA defense under § 512(d) was denied on undisputed evidence of "'purposeful, culpable expression and conduct' aimed at promoting infringing uses of the websites" (2009 U.S. Dist. LEXIS 122661, at *56).

Grokster addressed the more general law of contributory liability for copyright infringement, and its application to the particular subset of service providers

protected by the DMCA is strained. In a setting of distribution of software products that allowed computer-to-computer exchanges of infringing material, with the expressed intent of succeeding to the business of the notoriously infringing Napster (see 545 U.S. at 923-26) the Grokster Court held (id. at 919, 936-37):

. . . that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.

On these cross-motions for summary judgment I make no findings of fact as between the parties, but I note that plaintiff Viacom's General Counsel said in a 2006 e-mail that ". . . the difference between YouTube's behavior and Grokster's is staggering." Ex. 173 to Schapiro Opp. Affid., Dkt. No. 306, Att. 4. Defendants asserted in their brief supporting their motion (Dkt. No. 188, p.60) and Viacom's response does not controvert (Dkt. No. 296, p.29, ¶ 1.80) that:

It is not remotely the case that YouTube exists "solely to provide the site and facilities for copyright infringement." . . . Even the plaintiffs do not (and could not) suggest as much. Indeed, they have repeatedly acknowledged the contrary.

The Grokster model does not comport with that of a service provider who furnishes a platform on which its users post and access all sorts of materials as they wish, while the provider is unaware of its content, but identifies an agent to receive complaints of infringement, and removes identified

material when he learns it infringes. To such a provider, the DMCA gives a safe harbor, even if otherwise he would be held as a contributory infringer under the general law. In this case, it is uncontroverted that when YouTube was given the notices, it removed the material. It is thus protected "from liability for all monetary relief for direct, vicarious and contributory infringement" subject to the specific provisions of the DMCA. Senate Report at 40, House Report at 50.

4.

Other Points

(a)

Plaintiffs claim that the replication, transmittal and display of videos on YouTube fall outside the protection § 512(c)(1) of the DMCA gives to "infringement of copyright by reason of the storage at the direction of a user of material" on a service provider's system or network. That confines the word "storage" too narrowly to meet the statute's purpose.

In § 512(k)(1)(B) a "service provider" is defined as "a provider of online services or network access, or the operator of facilities therefor," and includes "an entity offering the transmission, routing, or providing of connections

for digital online communications." Surely the provision of such services, access, and operation of facilities are within the safe harbor when they flow from the material's placement on the provider's system or network: it is inconceivable that they are left exposed to be claimed as unprotected infringements. As the Senate Report states (p. 8):

In the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability. . . . In short, by limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.

As stated in Io Group, Inc. v. Veoh Networks, Inc., 586 F. Supp. 2d 1132, 1148 (N.D. Cal. 2008), such "means of facilitating user access to material on its website" do not cost the service provider its safe harbor. See also UMG Recordings, Inc. v. Veoh Networks, Inc., 620 F. Supp. 2d 1081, 1089 (C.D. Cal. 2008):

Although Veoh correctly observes that the language of § 512(c) is "broad," it does not venture to define its outermost limits. It is unnecessary for this Court to do so either, because the critical statutory language really is pretty clear. Common sense and widespread usage establish that "by reason of" means "as a result of" or "something that can be attributed to" So understood, when copyrighted content is displayed or distributed on Veoh it is "as a result of" or "attributable to" the fact that users uploaded the content to Veoh's servers to be accessed by other means. If providing access could trigger liability without the possibility of DMCA immunity, service providers would be greatly

deterred from performing their basic, vital and salutary function—namely, providing access to information and material for the public.

To the extent defendants' activities go beyond what can fairly be characterized as meeting the above-described collateral scope of "storage" and allied functions, and present the elements of infringements under existing principles of copyright law, they are not facially protected by § 512(c). Such activities simply fall beyond the bounds of the safe harbor and liability for conducting them must be judged according to the general law of copyright infringement. That follows from the language of § 512(c)(1) that "A service provider shall not be liable . . . for infringement of copyright by reason of the storage" However, such instances have no bearing on the coverage of the safe harbor in all other respects.

(b)

The safe harbor requires that the service provider "not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity" § 512(c)(1)(B). The "right and ability to control" the activity requires knowledge of it, which must be item-specific. (See Parts 1 and 2 above.) There may be arguments whether revenues

from advertising, applied equally to space regardless of whether its contents are or are not infringing, are "directly attributable to" infringements, but in any event the provider must know of the particular case before he can control it. As shown by the discussion in Parts 1 and 2 above, the provider need not monitor or seek out facts indicating such activity. If "red flags" identify infringing material with sufficient particularity, it must be taken down.

(c)

Three minor arguments do not singly or cumulatively affect YouTube's safe harbor coverage.

(1) YouTube has implemented a policy of terminating a user after warnings from YouTube (stimulated by its receipt of DMCA notices) that the user has uploaded infringing matter (a "three strikes" repeat-infringer policy). That YouTube counts as only one strike against a user both (1) a single DMCA take-down notice identifying multiple videos uploaded by the user, and (2) multiple take-down notices identifying videos uploaded by the user received by YouTube within a two-hour period, does not mean that the policy was not "reasonably implemented" as required by § 512(i)(1)(A). In Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1105 (W.D. Wash. 2004), in

evaluating whether Amazon complied with § 512(i), the Court stated that even DMCA-compliant notices "did not, in themselves, provide evidence of blatant copyright infringement." In UMG Recordings, Inc. v. Veoh Networks, Inc., 665 F. Supp. 2d 1099, 1116, 1118 (C.D. Cal. 2009), the Court upheld Veoh's policy of terminating users after a second warning, even if the first warning resulted from a take-down notice listing multiple infringements. It stated:

As the Corbis court noted, "[t]he key term, 'repeat infringer,' is not defined. . . . The fact that Congress chose not to adopt such specific provisions when defining a user policy indicates its intent to leave the policy requirements, and the subsequent obligations of the service providers, loosely defined." Corbis, 351 F.Supp.2d at 1100-01. This Court finds that Veoh's policy satisfies Congress's intent that "those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access." H.R. Rep. 105-551(II), at 61.

Id. at 1118. (alteration and omission in original).

(2) In its "Claim Your Content" system, YouTube used Audible Magic, a fingerprinting tool which removed an offending video automatically if it matched some portion of a reference video submitted by a copyright owner who had designated this service. It also removed a video if the rights-holder operated a manual function after viewing the infringing video. YouTube assigned strikes only when the rights-holder manually requested the video to be removed. Requiring the rights-holder to take

that position does not violate § 512(i)(1)(A). See UMG Recordings, 665 F. Supp. 2d at 1116-18 (automated Audible Magic filter “does not meet the standard of reliability and verifiability required by the Ninth Circuit in order to justify terminating a user’s account”); see also Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1112 (9th Cir. 2007) (“We therefore do not require a service provider to start potentially invasive proceedings if the complainant is unwilling to state under penalty of perjury that he is an authorized representative of the copyright owner, and that he has a good-faith belief that the material is unlicensed.”).

YouTube’s initial hesitation in counting such rights-holder requests as strikes was reasonable: the six month delay was needed to monitor the system’s use by rights-holders, and for engineering work to assure that strikes would be assigned accurately.

(3) Plaintiffs complain that YouTube removes only the specific clips identified in DMCA notices, and not other clips which infringe the same works. They point to the provision in § 512(c)(3)(A)(ii) that a notification must include “Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.” This “representative list”

reference would eviscerate the required specificity of notice (see discussion in Parts 1 and 2 above) if it were construed to mean a merely generic description ("all works by Gershwin") without also giving the works' locations at the site, and would put the provider to the factual search forbidden by § 512(m). Although the statute states that the "works" may be described representatively, 512(c)(3)(A)(ii), the subsection which immediately follows requires that the identification of the infringing material that is to be removed must be accompanied by "information reasonably sufficient to permit the service provider to locate the material." 512(c)(3)(A)(iii). See House Report at 55; Senate Report at 46: "An example of such sufficient information would be a copy or description of the allegedly infringing material and the so-called "uniform resource locator" (URL) (i.e., web site address) which allegedly contains the infringing material." See also UMG Recordings, 665 F. Supp. 2d at 1109-10 (DMCA notices which demanded removal of unspecified clips of video recordings by certain artists did not provide "'information reasonably sufficient to permit the service provider to locate [such] material.'" (alteration in original)).

4.

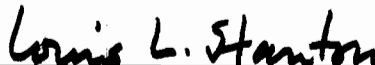
Conclusion

Defendants are granted summary judgment that they qualify for the protection of 17 U.S.C. § 512(c), as expounded above, against all of plaintiffs' claims for direct and secondary copyright infringement. Plaintiffs' motions for judgment are denied.

The parties shall meet and confer about any issues requiring judicial attention remaining in these cases, and submit a report (jointly, if possible) by July 14, 2010.

So ordered.

Dated: June 23, 2010
New York, New York



Louis L. Stanton
U.S.D.J.

SPA-34

ORIGIN

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 8/10/10

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

Plaintiffs,

v.
YOUTUBE INC., YOUTUBE, LLC, and
GOOGLE, INC.,

Defendants.

Case No. 1:07-cv-02103 (LLS)
(Related Case No. 1:07-cv-03582 (LLS))
ECF Case

FINAL JUDGMENT

YouTube Inc., YouTube, LLC, and Google Inc. ("Defendants"), having moved for summary judgment that they are protected by the safe-harbor provisions of the Digital Millennium Copyright Act, 17 U.S.C. § 512 et seq., for all of Plaintiffs' direct and secondary copyright infringement claims, and such motion having come before the Honorable Louis L. Stanton, United States District Judge, and the Court thereafter, on June 23, 2010 having rendered its ~~Memorandum Decision~~ ^{Opinion} and Order granting the Defendants' motion for summary judgment; and

LLS

Plaintiffs having moved for partial summary judgment on certain of their claims for relief and against Defendants' DMCA defense, and said motion having come before the Honorable Louis L. Stanton, United States District Judge, and the Court thereafter, on June 23, 2010 having rendered its ~~Memorandum Decision~~ ^{Opinion} and Order denying Plaintiffs' motion; and

LLS

SPA-35

Plaintiffs having affirmed: (i) that all of their remaining claims for relief in this case are disposed of by the June 23, 2010 Order; (ii) that they do not seek injunctive relief in this action pursuant to 17 U.S.C. § 512(j); and (iii) that there are no claims for relief that still remain to be adjudicated, it is

ORDERED, ADJUDGED AND DECREED that for reasons set forth in the Court's ^{Opinion} ~~Memorandum Decision~~ and Order dated June 23, 2010, judgment is entered for Defendants and against Plaintiffs on all of Plaintiffs' claims. 663

New York, New York
August 9, 2010

SO ORDERED:

Louis L. Stanton
Hon. Louis L. Stanton
United States District Judge

Entered:

Ruby S. Krasnick
Clerk of Court

By: 2
Deputy Clerk of Court

SPA-36

ORIGINAL

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

-against-

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

Defendants.
----- X

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 8/10/10

07 Civ. 3582 (LLS)
(related case 07 Civ. 2103 (LLS))

ECF Case

FINAL JUDGMENT

YouTube Inc., YouTube, LLC, and Google Inc. ("Defendants"), having moved for summary judgment that they are protected by the safe-harbor provisions of the Digital Millennium Copyright Act, 17 U.S.C. § 512 et seq., for all of Plaintiffs' direct and secondary copyright infringement claims, and such motion having come before the Honorable Louis L. Stanton, United States District Judge, and the Court thereafter, on June 23, 2010 having rendered its ~~Memorandum Decision~~ ^{Opinion} and Order granting the Defendants' motion for summary judgment; and

LLS

Plaintiffs having moved for partial summary judgment against the Defendants' DMCA defense, and said motion having come before the Honorable Louis L. Stanton, United States District Judge, and

SPA-37

Opinion

LLS

the Court thereafter, on June 23, 2010 having rendered its ~~Memorandum Decision~~ and Order denying Plaintiffs' motion; and

Plaintiffs having affirmed: (i) that all of their remaining claims for relief in this case are disposed of by the June 23, 2010 Order; (ii) that they do not seek injunctive relief in this action pursuant to 17 U.S.C. § 512(j); and (iii) that there are no claims for relief that still remain to be adjudicated, it is

ORDERED, ADJUDGED AND DECREED that for reasons set forth in the Court's

Opinion

LLS

~~Memorandum Decision~~ and Order dated June 23, 2010, judgment is entered for Defendants and against Plaintiffs on all of Plaintiffs' claims.

New York, New York
August 9, 2010

SO ORDERED:

Louis L. Stanton

Hon. Louis L. Stanton
United States District Judge

Entered:

Ruby S. Kravich

Clerk of Court

By:

[Signature]

Deputy Clerk of Court

The bill deliberately avoids making any sort of outright, unqualified prohibition against copyright in works prepared under Government contract or grant. There may well be cases where it would be in the public interest to deny copyright in the writings generated by Government research contracts and the like; it can be assumed that, where a Government agency commissions a work for its own use merely as an alternative to having one of its own employees prepare the work, the right to secure a private copyright would be withheld. However, there are almost certainly many other cases where the denial of copyright protection would be unfair or would hamper the production and publication of important works. Where, under the particular circumstances, Congress or the agency involved finds that the need to have a work freely available outweighs the need of the private author to secure copyright, the problem can be dealt with by specific legislation, agency regulations, or contractual restrictions.

The prohibition on copyright protection for United States Government works is not intended to have any effect on protection of these works abroad. Works of the governments of most other countries are copyrighted. There are no valid policy reasons for denying such protection to United States Government works in foreign countries, or for precluding the Government from making licenses for the use of its works abroad.

The effect of section 105 is intended to place all works of the United States Government, published or unpublished, in the public domain. This means that the individual Government official or employee who wrote the work could not secure copyright in it or restrain its dissemination by the Government or anyone else, but it also means that, as far as the copyright law is concerned, the Government could not restrain the employee or official from disseminating the work if he or she chooses to do so. The use of the term "work of the United States Government" does not mean that a work falling within the definition of that term is the property of the U.S. Government.

LIMITED EXCEPTION FOR NATIONAL TECHNICAL
INFORMATION SERVICE

At the House hearings in 1975 the U.S. Department of Commerce called attention to its National Technical Information Service (NTIS), which has a statutory mandate, under Chapter 23 [§1151 et seq.] of Title 15 of the U.S. Code, to operate a clearinghouse for the collection and dissemination of scientific, technical and engineering information. Under its statute, NTIS is required to be as self-sustaining as possible, and not to force the general public to bear publishing costs that are for private benefit. The Department urged an amendment to section 105 that would allow it to secure copyright in NTIS publications both in the United States and abroad, noting that a precedent exists in the Standard Reference Data Act (15 U.S.C. §290(e) [§290e]).

In response to this request the Committee adopted a limited exception to the general prohibition in section 105, permitting the Secretary of Commerce to "secure copyright for a limited term not to exceed five years, on behalf of the United States as author or copyright owner" in any NTIS publication disseminated pursuant to 15 U.S.C. Chapter 23 [§1151 et seq.]. In order to "secure copyright" in a work under this amendment the Secretary would be required to publish the work with a copyright notice, and the five-year term would begin upon the date of first publication.

Proposed Saving Clause. Section 8 of the statute now in effect [section 8 of former title 17] includes a saving clause intended to make clear that the copyright protection of a private work is not affected if the work is published by the Government. This provision serves a real purpose in the present law because of the ambiguity of the undefined term "any publication of the United States Government." Section 105 of the bill, however, uses the operative term "work of the United States Government" and defines it in such a way that privately written works are clearly excluded from the prohibition; accordingly, a saving clause becomes superfluous.

Retention of a saving clause has been urged on the ground that the present statutory provision is frequently cited, and that having the provision expressly stated in the law would avoid questions and explanations. The committee here observes: (1) there is nothing in section 105 that would relieve the Government of its obligation to secure permission in order to publish a copyrighted work; and (2) publication or other use by the Government of a private work would not affect its copyright protection in any way. The question of use of copyrighted material in documents published by the Congress and its Committees is discussed below in connection with section 107.

Works of the United States Postal Service. The intent of section 105 [this section] is to restrict the prohibition against Government copyright to works written by employees of the United States Government within the scope of their official duties. In accordance with the objectives of the Postal Reorganization Act of 1970 [Pub. L. 91-375, which enacted title 39, Postal Service], this section does not apply to works created by employees of the United States Postal Service. In addition to enforcing the criminal statutes proscribing the forgery or counterfeiting of postage stamps, the Postal Service could, if it chooses, use the copyright law to prevent the reproduction of postage stamp designs for private or commercial non-postal services (for example, in philatelic publications and catalogs, in general advertising, in art reproductions, in textile designs, and so forth). However, any copyright claimed by the Postal Service in its works, including postage stamp designs, would be subject to the same conditions, formalities, and time limits as other copyrightable works.

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

(Pub. L. 94-553, title I, §101, Oct. 19, 1976, 90 Stat. 2546; Pub. L. 101-318, §3(d), July 3, 1990, 104 Stat. 288; Pub. L. 101-650, title VII, §704(b)(2), Dec. 1, 1990, 104 Stat. 5134; Pub. L. 104-39, §2, Nov. 1, 1995, 109 Stat. 336; Pub. L. 106-44, §1(g)(2), Aug. 5, 1999, 113 Stat. 222; Pub. L. 107-273, div. C, title III, §13210(4)(A), Nov. 2, 2002, 116 Stat. 1909.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

General Scope of Copyright. The five fundamental rights that the bill gives to copyright owners—the exclusive rights of reproduction, adaptation, publication, performance, and display—are stated generally in sec-

tion 106. These exclusive rights, which comprise the so-called “bundle of rights” that is a copyright, are cumulative and may overlap in some cases. Each of the five enumerated rights may be subdivided indefinitely and, as discussed below in connection with section 201, each subdivision of an exclusive right may be owned and enforced separately.

The approach of the bill is to set forth the copyright owner’s exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow. Thus, everything in section 106 is made “subject to sections 107 through 118”, and must be read in conjunction with those provisions.

The exclusive rights accorded to a copyright owner under section 106 are “to do and to authorize” any of the activities specified in the five numbered clauses. Use of the phrase “to authorize” is intended to avoid any questions as to the liability of contributory infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance.

Rights of Reproduction, Adaptation, and Publication. The first three clauses of section 106, which cover all rights under a copyright except those of performance and display, extend to every kind of copyrighted work. The exclusive rights encompassed by these clauses, though closely related, are independent; they can generally be characterized as rights of copying, recording, adaptation, and publishing. A single act of infringement may violate all of these rights at once, as where a publisher reproduces, adapts, and sells copies of a person’s copyrighted work as part of a publishing venture. Infringement takes place when any one of the rights is violated: where, for example, a printer reproduces copies without selling them or a retailer sells copies without having anything to do with their reproduction. The references to “copies or phonorecords,” although in the plural, are intended here and throughout the bill to include the singular (1 U.S.C. §1).

Reproduction.—Read together with the relevant definitions in section 101, the right “to reproduce the copyrighted work in copies or phonorecords” means the right to produce a material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form from which it can be “perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” As under the present law, a copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation. Wide departures or variations from the copyrighted work would still be an infringement as long as the author’s “expression” rather than merely the author’s “ideas” are taken. An exception to this general principle, applicable to the reproduction of copyrighted sound recordings, is specified in section 114.

“Reproduction” under clause (1) of section 106 is to be distinguished from “display” under clause (5). For a work to be “reproduced,” its fixation in tangible form must be “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” Thus, the showing of images on a screen or tube would not be a violation of clause (1), although it might come within the scope of clause (5).

Preparation of Derivative Works.—The exclusive right to prepare derivative works, specified separately in clause (2) of section 106, overlaps the exclusive right of reproduction to some extent. It is broader than that right, however, in the sense that reproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form.

To be an infringement the “derivative work” must be “based upon the copyrighted work,” and the definition

in section 101 refers to “a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” Thus, to constitute a violation of section 106(2), the infringing work must incorporate a portion of the copyrighted work in some form; for example, a detailed commentary on a work or a programmatic musical composition inspired by a novel would not normally constitute infringements under this clause.

Use in Information Storage and Retrieval Systems.—As section 117 declares explicitly, the bill is not intended to alter the present law with respect to the use of copyrighted works in computer systems.

Public Distribution.—Clause (3) of section 106 establishes the exclusive right of publication: The right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” Under this provision the copyright owner would have the right to control the first public distribution of an authorized copy or phonorecord of his work, whether by sale, gift, loan, or some rental or lease arrangement. Likewise, any unauthorized public distribution of copies or phonorecords that were unlawfully made would be an infringement. As section 109 makes clear, however, the copyright owner’s rights under section 106(3) cease with respect to a particular copy or phonorecord once he has parted with ownership of it.

Rights of Public Performance and Display. *Performing Rights and the “For Profit” Limitation.*—The right of public performance under section 106(4) extends to “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works and sound recordings” and, unlike the equivalent provisions now in effect, is not limited by any “for profit” requirement. The approach of the bill, as in many foreign laws, is first to state the public performance right in broad terms, and then to provide specific exemptions for educational and other nonprofit uses.

This approach is more reasonable than the outright exemption of the 1909 statute. The line between commercial and “nonprofit” organizations is increasingly difficult to draw. Many “non-profit” organizations are highly subsidized and capable of paying royalties, and the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad “not for profit” exemption could not only hurt authors but could dry up their incentive to write.

The exclusive right of public performance is expanded to include not only motion pictures, including works recorded on film, video tape, and video disks, but also audiovisual works such as filmstrips and sets of slides. This provision of section 106(4), which is consistent with the assimilation of motion pictures to audiovisual works throughout the bill, is also related to amendments of the definitions of “display” and “perform” discussed below. The important issue of performing rights in sound recordings is discussed in connection with section 114.

Right of Public Display.—Clause (5) of section 106 represents the first explicit statutory recognition in American copyright law of an exclusive right to show a copyrighted work, or an image of it, to the public. The existence or extent of this right under the present statute is uncertain and subject to challenge. The bill would give the owners of copyright in “literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works”, including the individual images of a motion picture or other audiovisual work, the exclusive right “to display the copyrighted work publicly.”

Definitions. Under the definitions of “perform,” “display,” “publicly,” and “transmit” in section 101, the

concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus, for example: a singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set. Although any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a "performance" or "display" under the bill, it would not be actionable as an infringement unless it were done "publicly," as defined in section 101. Certain other performances and displays, in addition to those that are "private," are exempted or given qualified copyright control under sections 107 through 118.

To "perform" a work, under the definition in section 101, includes reading a literary work aloud, singing or playing music, dancing a ballet or other choreographic work, and acting out a dramatic work or pantomime. A performance may be accomplished "either directly or by means of any device or process," including all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented.

The definition of "perform" in relation to "a motion picture or other audiovisual work" is "to show its images in any sequence or to make the sounds accompanying it audible." The showing of portions of a motion picture, filmstrip, or slide set must therefore be sequential to constitute a "performance" rather than a "display", but no particular order need be maintained. The purely aural performance of a motion picture sound track, or of the sound portions of an audiovisual work, would constitute a performance of the "motion picture or other audiovisual work"; but, where some of the sounds have been reproduced separately on phonorecords, a performance from the phonorecord would not constitute performance of the motion picture or audiovisual work.

The corresponding definition of "display" covers any showing of a "copy" of the work, "either directly or by means of a film, slide, television image, or any other device or process." Since "copies" are defined as including the material object "in which the work is first fixed," the right of public display applies to original works of art as well as to reproductions of them. With respect to motion pictures and other audiovisual works, it is a "display" (rather than a "performance") to show their "individual images nonsequentially." In addition to the direct showings of a copy of a work, "display" would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system.

Under clause (1) of the definition of "publicly" in section 101, a performance or display is "public" if it takes place "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." One of the principal purposes of the definition was to make clear that, contrary to the decision in *Metro-Goldwyn-Mayer Distributing Corp. v. Wyatt*, 21 C.O.Bull. 203 (D.Md.1932), performances in "semipublic" places such as clubs, lodges, factories, summer camps, and schools are "public performances" subject to copyright control. The term "a family" in this context would include an individual living alone, so that a gathering confined to the individual's social acquaintances would normally be regarded as private. Routine meetings of businesses and governmental personnel

would be excluded because they do not represent the gathering of a "substantial number of persons."

Clause (2) of the definition of "publicly" in section 101 makes clear that the concepts of public performance and public display include not only performances and displays that occur initially in a public place, but also acts that transmit or otherwise communicate a performance or display of the work to the public by means of any device or process. The definition of "transmit"—to communicate a performance or display "by any device or process whereby images or sound are received beyond the place from which they are sent"—is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a "transmission," and if the transmission reaches the public in my [any] form, the case comes within the scope of clauses (4) or (5) of section 106.

Under the bill, as under the present law, a performance made available by transmission to the public at large is "public" even though the recipients are not gathered in a single place, and even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission. The same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as the occupants of hotel rooms or the subscribers of a cable television service. Clause (2) of the definition of "publicly" is applicable "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."

AMENDMENTS

2002—Pub. L. 107-273 substituted "122" for "121" in introductory provisions.

1999—Pub. L. 106-44 substituted "121" for "120" in introductory provisions.

1995—Par. (6), Pub. L. 104-39 added par. (6).

1990—Pub. L. 101-650 substituted "120" for "119" in introductory provisions.

Pub. L. 101-318 substituted "119" for "118" in introductory provisions.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104-39 effective 3 months after Nov. 1, 1995, see section 6 of Pub. L. 104-39, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1990 AMENDMENTS

Amendment by Pub. L. 101-650 applicable to any architectural work created on or after Dec. 1, 1990, and any architectural work, that, on Dec. 1, 1990, is unconstructed and embodied in unpublished plans or drawings, except that protection for such architectural work under this title terminates on Dec. 31, 2002, unless the work is constructed by that date, see section 706 of Pub. L. 101-650, set out as a note under section 101 of this title.

Section 3(e)(3) of Pub. L. 101-318 provided that: "The amendment made by subsection (d) [amending this section] shall be effective as of November 16, 1988."

§ 106A. Rights of certain authors to attribution and integrity

(a) RIGHTS OF ATTRIBUTION AND INTEGRITY.—Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—

(1) shall have the right—

- (A) to claim authorship of that work, and
- (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

Federal court by any person, including any governmental or nongovernmental entity, for a violation of any of the exclusive rights of a copyright owner provided by sections 106 through 122, for importing copies of phonorecords in violation of section 602, or for any other violation under this title.

(b) REMEDIES.—In a suit described in subsection (a) for a violation described in that subsection, remedies (including remedies both at law and in equity) are available for the violation to the same extent as such remedies are available for such a violation in a suit against any public or private entity other than a State, instrumentality of a State, or officer or employee of a State acting in his or her official capacity. Such remedies include impounding and disposition of infringing articles under section 503, actual damages and profits and statutory damages under section 504, costs and attorney's fees under section 505, and the remedies provided in section 510.

(Added Pub. L. 101-553, §2(a)(2), Nov. 15, 1990, 104 Stat. 2749; amended Pub. L. 106-44, §1(g)(6), Aug. 5, 1999, 113 Stat. 222; Pub. L. 107-273, div. C, title III, §13210(4)(C), Nov. 2, 2002, 116 Stat. 1909.)

AMENDMENTS

2002—Subsec. (a). Pub. L. 107-273 substituted “122” for “121”.

1999—Subsec. (a). Pub. L. 106-44 substituted “121” for “119”.

EFFECTIVE DATE

Section effective with respect to violations that occur on or after Nov. 15, 1990, see section 3 of Pub. L. 101-553, set out as an Effective Date of 1990 Amendment note under section 501 of this title.

§ 512. Limitations on liability relating to material online

(a) TRANSITORY DIGITAL NETWORK COMMUNICATIONS.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily ac-

cessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content.

(b) SYSTEM CACHING.—

(1) LIMITATION ON LIABILITY.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which—

(A) the material is made available online by a person other than the service provider;

(B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person; and

(C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A),

if the conditions set forth in paragraph (2) are met.

(2) CONDITIONS.—The conditions referred to in paragraph (1) are that—

(A) the material described in paragraph (1) is transmitted to the subsequent users described in paragraph (1)(C) without modification to its content from the manner in which the material was transmitted from the person described in paragraph (1)(A);

(B) the service provider described in paragraph (1) complies with rules concerning the refreshing, reloading, or other updating of the material when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available, except that this subparagraph applies only if those rules are not used by the person described in paragraph (1)(A) to prevent or unreasonably impair the intermediate storage to which this subsection applies;

(C) the service provider does not interfere with the ability of technology associated with the material to return to the person described in paragraph (1)(A) the information that would have been available to that person if the material had been obtained by the subsequent users described in paragraph (1)(C) directly from that person, except that this subparagraph applies only if that technology—

(i) does not significantly interfere with the performance of the provider's system or network or with the intermediate storage of the material;

(ii) is consistent with generally accepted industry standard communications protocols; and

(iii) does not extract information from the provider's system or network other than the information that would have been available to the person described in paragraph (1)(A) if the subsequent users had gained access to the material directly from that person;

(D) if the person described in paragraph (1)(A) has in effect a condition that a person must meet prior to having access to the material, such as a condition based on payment of a fee or provision of a password or other information, the service provider permits access to the stored material in significant part only to users of its system or network that have met those conditions and only in accordance with those conditions; and

(E) if the person described in paragraph (1)(A) makes that material available online without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in subsection (c)(3), except that this subparagraph applies only if—

(i) the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled; and

(ii) the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled.

(c) INFORMATION RESIDING ON SYSTEMS OR NETWORKS AT DIRECTION OF USERS.—

(1) IN GENERAL.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for 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, if the service provider—

(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

(2) DESIGNATED AGENT.—The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, in both electronic and hard copy formats, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

(3) ELEMENTS OF NOTIFICATION.—

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(B)(i) Subject to clause (ii), a notification from a copyright owner or from a person au-

thorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

(d) INFORMATION LOCATION TOOLS.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider—

(1)(A) does not have actual knowledge that the material or activity is infringing;

(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

(e) LIMITATION ON LIABILITY OF NONPROFIT EDUCATIONAL INSTITUTIONS.—(1) When a public or other nonprofit institution of higher education is a service provider, and when a faculty member or graduate student who is an employee of such institution is performing a teaching or research function, for the purposes of subsections (a) and (b) such faculty member or graduate student shall be considered to be a person other than the institution, and for the purposes of subsections (c) and (d) such faculty member's or graduate student's knowledge or awareness of his or her infringing activities shall not be attributed to the institution, if—

(A) such faculty member's or graduate student's infringing activities do not involve the provision of online access to instructional materials that are or were required or recommended, within the preceding 3-year period, for a course taught at the institution by such faculty member or graduate student;

(B) the institution has not, within the preceding 3-year period, received more than two notifications described in subsection (c)(3) of claimed infringement by such faculty member or graduate student, and such notifications of claimed infringement were not actionable under subsection (f); and

(C) the institution provides to all users of its system or network informational materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright.

(2) For the purposes of this subsection, the limitations on injunctive relief contained in subsections (j)(2) and (j)(3), but not those in (j)(1), shall apply.

(f) MISREPRESENTATIONS.—Any person who knowingly materially misrepresents under this section—

(1) that material or activity is infringing, or

(2) that material or activity was removed or disabled by mistake or misidentification,

shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

(g) REPLACEMENT OF REMOVED OR DISABLED MATERIAL AND LIMITATION ON OTHER LIABILITY.—

(1) NO LIABILITY FOR TAKING DOWN GENERALLY.—Subject to paragraph (2), a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

(2) EXCEPTION.—Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (c)(1)(C), unless the service provider—

(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;

(B) upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and

(C) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

(3) CONTENTS OF COUNTER NOTIFICATION.—To be effective under this subsection, a counter notification must be a written communication provided to the service provider's designated agent that includes substantially the following:

(A) A physical or electronic signature of the subscriber.

(B) Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.

(C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.

(D) The subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.

(4) LIMITATION ON OTHER LIABILITY.—A service provider's compliance with paragraph (2) shall not subject the service provider to liability for copyright infringement with respect to the material identified in the notice provided under subsection (c)(1)(C).

(h) SUBPOENA TO IDENTIFY INFRINGER.—

(1) REQUEST.—A copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.

(2) CONTENTS OF REQUEST.—The request may be made by filing with the clerk—

(A) a copy of a notification described in subsection (c)(3)(A);

(B) a proposed subpoena; and

(C) a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.

(3) CONTENTS OF SUBPOENA.—The subpoena shall authorize and order the service provider receiving the notification and the subpoena to expeditiously disclose to the copyright owner

or person authorized by the copyright owner information sufficient to identify the alleged infringer of the material described in the notification to the extent such information is available to the service provider.

(4) BASIS FOR GRANTING SUBPOENA.—If the notification filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider.

(5) ACTIONS OF SERVICE PROVIDER RECEIVING SUBPOENA.—Upon receipt of the issued subpoena, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A), the service provider shall expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification.

(6) RULES APPLICABLE TO SUBPOENA.—Unless otherwise provided by this section or by applicable rules of the court, the procedure for issuance and delivery of the subpoena, and the remedies for noncompliance with the subpoena, shall be governed to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena duces tecum.

(i) CONDITIONS FOR ELIGIBILITY.—

(1) ACCOMMODATION OF TECHNOLOGY.—The limitations on liability established by this section shall apply to a service provider only if the service provider—

(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and

(B) accommodates and does not interfere with standard technical measures.

(2) DEFINITION.—As used in this subsection, the term "standard technical measures" means technical measures that are used by copyright owners to identify or protect copyrighted works and—

(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;

(B) are available to any person on reasonable and nondiscriminatory terms; and

(C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

(j) INJUNCTIONS.—The following rules shall apply in the case of any application for an injunction under section 502 against a service provider that is not subject to monetary remedies under this section:

(1) SCOPE OF RELIEF.—(A) With respect to conduct other than that which qualifies for

the limitation on remedies set forth in subsection (a), the court may grant injunctive relief with respect to a service provider only in one or more of the following forms:

(i) An order restraining the service provider from providing access to infringing material or activity residing at a particular online site on the provider's system or network.

(ii) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(iii) Such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular online location, if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose.

(B) If the service provider qualifies for the limitation on remedies described in subsection (a), the court may only grant injunctive relief in one or both of the following forms:

(i) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is using the provider's service to engage in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(ii) An order restraining the service provider from providing access, by taking reasonable steps specified in the order to block access, to a specific, identified, online location outside the United States.

(2) CONSIDERATIONS.—The court, in considering the relevant criteria for injunctive relief under applicable law, shall consider—

(A) whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider under this subsection, would significantly burden either the provider or the operation of the provider's system or network;

(B) the magnitude of the harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement;

(C) whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations; and

(D) whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.

(3) NOTICE AND EX PARTE ORDERS.—Injunctive relief under this subsection shall be available only after notice to the service provider and an opportunity for the service provider to ap-

pear are provided, except for orders ensuring the preservation of evidence or other orders having no material adverse effect on the operation of the service provider's communications network.

(k) DEFINITIONS.—

(1) SERVICE PROVIDER.—(A) As used in subsection (a), the term “service provider” means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

(B) As used in this section, other than subsection (a), the term “service provider” means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

(2) MONETARY RELIEF.—As used in this section, the term “monetary relief” means damages, costs, attorneys' fees, and any other form of monetary payment.

(l) OTHER DEFENSES NOT AFFECTED.—The failure of a service provider's conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing under this title or any other defense.

(m) PROTECTION OF PRIVACY.—Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on—

(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i); or

(2) a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.

(n) CONSTRUCTION.—Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.

(Added Pub. L. 105-304, title II, §202(a), Oct. 28, 1998, 112 Stat. 2877; amended Pub. L. 106-44, §1(d), Aug. 5, 1999, 113 Stat. 222.)

REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (h)(6), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

CODIFICATION

Another section 512 was renumbered section 513 of this title.

AMENDMENTS

1999—Subsec. (e). Pub. L. 106-44, §1(d)(1)(A), substituted “Limitation on Liability of Nonprofit Educational Institutions” for “Limitation on liability of nonprofit educational institutions” in heading.

Subsec. (e)(2). Pub. L. 106-44, §1(d)(1)(B), struck out par. heading "Injunctions".

Subsec. (j)(3). Pub. L. 106-44, §1(d)(2), substituted "Notice and ex parte orders" for "Notice and Ex Parte Orders" in heading.

EFFECTIVE DATE

Pub. L. 105-304, title II, §203, Oct. 28, 1998, 112 Stat. 2886, provided that: "This title [enacting this section and provisions set out as a note under section 101 of this title] and the amendments made by this title shall take effect on the date of the enactment of this Act [Oct. 28, 1998]."

§ 513. Determination of reasonable license fees for individual proprietors

In the case of any performing rights society subject to a consent decree which provides for the determination of reasonable license rates or fees to be charged by the performing rights society, notwithstanding the provisions of that consent decree, an individual proprietor who owns or operates fewer than 7 non-publicly traded establishments in which nondramatic musical works are performed publicly and who claims that any license agreement offered by that performing rights society is unreasonable in its license rate or fee as to that individual proprietor, shall be entitled to determination of a reasonable license rate or fee as follows:

(1) The individual proprietor may commence such proceeding for determination of a reasonable license rate or fee by filing an application in the applicable district court under paragraph (2) that a rate disagreement exists and by serving a copy of the application on the performing rights society. Such proceeding shall commence in the applicable district court within 90 days after the service of such copy, except that such 90-day requirement shall be subject to the administrative requirements of the court.

(2) The proceeding under paragraph (1) shall be held, at the individual proprietor's election, in the judicial district of the district court with jurisdiction over the applicable consent decree or in that place of holding court of a district court that is the seat of the Federal circuit (other than the Court of Appeals for the Federal Circuit) in which the proprietor's establishment is located.

(3) Such proceeding shall be held before the judge of the court with jurisdiction over the consent decree governing the performing rights society. At the discretion of the court, the proceeding shall be held before a special master or magistrate judge appointed by such judge. Should that consent decree provide for the appointment of an advisor or advisors to the court for any purpose, any such advisor shall be the special master so named by the court.

(4) In any such proceeding, the industry rate shall be presumed to have been reasonable at the time it was agreed to or determined by the court. Such presumption shall in no way affect a determination of whether the rate is being correctly applied to the individual proprietor.

(5) Pending the completion of such proceeding, the individual proprietor shall have the right to perform publicly the copyrighted musical compositions in the repertoire of the per-

forming rights society by paying an interim license rate or fee into an interest bearing escrow account with the clerk of the court, subject to retroactive adjustment when a final rate or fee has been determined, in an amount equal to the industry rate, or, in the absence of an industry rate, the amount of the most recent license rate or fee agreed to by the parties.

(6) Any decision rendered in such proceeding by a special master or magistrate judge named under paragraph (3) shall be reviewed by the judge of the court with jurisdiction over the consent decree governing the performing rights society. Such proceeding, including such review, shall be concluded within 6 months after its commencement.

(7) Any such final determination shall be binding only as to the individual proprietor commencing the proceeding, and shall not be applicable to any other proprietor or any other performing rights society, and the performing rights society shall be relieved of any obligation of nondiscrimination among similarly situated music users that may be imposed by the consent decree governing its operations.

(8) An individual proprietor may not bring more than one proceeding provided for in this section for the determination of a reasonable license rate or fee under any license agreement with respect to any one performing rights society.

(9) For purposes of this section, the term "industry rate" means the license fee a performing rights society has agreed to with, or which has been determined by the court for, a significant segment of the music user industry to which the individual proprietor belongs.

(Added Pub. L. 105-298, title II, §203(a), Oct. 27, 1998, 112 Stat. 2831, §512; renumbered §513, Pub. L. 106-44, §1(c)(1), Aug. 5, 1999, 113 Stat. 221.)

AMENDMENTS

1999—Pub. L. 106-44 renumbered section 512 of this title as this section.

EFFECTIVE DATE

Section effective 90 days after Oct. 27, 1998, see section 207 of Pub. L. 105-298, set out as an Effective Date of 1998 Amendments note under section 101 of this title.

CHAPTER 6—MANUFACTURING REQUIREMENTS AND IMPORTATION

Sec.	
601.	Manufacture, importation, and public distribution of certain copies.
602.	Infringing importation of copies or phonorecords.
603.	Importation prohibitions: Enforcement and disposition of excluded articles.

§ 601. Manufacture, importation, and public distribution of certain copies

(a) Prior to July 1, 1986, and except as provided by subsection (b), the importation into or public distribution in the United States of copies of a work consisting preponderantly of nondramatic literary material that is in the English language and is protected under this title is prohibited unless the portions consisting of such material

CERTIFICATE OF SERVICE & CM/ECF FILING

10-3270, 10-3342

Viacom International v. YouTube, Inc.

I hereby certify that I caused the foregoing Special Appendix to be served on counsel for Defendants-Appellees via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1:

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on this 3rd day of December 2010.

Notary Public:

/s/ Nadia R. Oswald-Hamid

Sworn to me this

December 3, 2010

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