

Subject to Protective Order – HIGHLY CONFIDENTIAL

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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))

VIACOM’S REPLY MEMORANDUM OF LAW IN SUPPORT OF
VIACOM’S MOTION FOR PARTIAL SUMMARY JUDGMENT

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Defs. Opp. Mem.	Defendants' Opposition to Plaintiffs' Motions for Partial Summary Judgment, April 30, 2010.
Viacom CSUF	Viacom's Counter-Statement in Response to Defendants' Local Rule 56.1 Statement in Support of Defendants' Motion for Summary Judgment; filed April 30, 2010.
Defs. CVSUF	Defendants' Counterstatement to Viacom's Statement of Undisputed Facts in Support of its Motion for Partial Summary Judgment; filed April 30, 2010.
RSUF	Viacom's Reply to Defendants' Counterstatement to Viacom's Statement of Undisputed Facts in Support of its Motion for Partial Summary Judgment; filed June 4, 2010.
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King Decl.	Declaration of David King in Support of Defendants' Motion for Summary Judgment; filed March 5, 2010.
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PRELIMINARY STATEMENT

Viacom’s copyrighted works were infringed on YouTube on a massive scale. The immense commercial value of those works is evidenced by Defendants’ proposal to pay Viacom at least \$592 million for a license. Yet, lacking a license, YouTube simply expropriated this intellectual property – using it as involuntary start-up capital that fueled the explosive growth of its user base. The issue before the Court is who bears responsibility for this “infringement on a gigantic scale,” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 940-41 (2005) – the victim, or the party who intentionally caused and benefitted from it?

Defendants are liable under *Grokster* for intentionally facilitating this rampant infringement. *Grokster*’s legal standard is clear, as are the key undisputed facts. The same is true with regard to vicarious and direct liability. Those liability doctrines, which “plac[e] responsibility where it can and should be effectively exercised,” *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 308 (2d Cir. 1963), are no less applicable to Internet business enterprises than they are to traditional media.

Nor does the DMCA exonerate Defendants’ intentional, profit-driven facilitation of infringement. For Defendants to prevail, the Court would have to rule that the DMCA trumps both *Grokster* and the long-established doctrine of vicarious copyright liability. Defendants’ untenable theory is that the DMCA replaced the entire edifice of copyright law with a pure takedown notice mechanism, permitting Defendants to intentionally build their business on a flood of infringing clips that could never be stopped by after-the-fact takedown notices.

Defendants try in vain to manufacture disputes of fact concerning their intent and their conduct. But as numerous post-*Grokster* decisions have recognized, a voluminous record and professions of innocent intent do not preclude summary judgment where the evidence demonstrates that defendants intentionally built a business based on copyright infringement.

ARGUMENT

I. DEFENDANTS ARE LIABLE UNDER *GROKSTER*.

A. *Grokster* Liability Arose From Operating YouTube With The Intent and Effect of Fostering Massive Infringement.

Because Defendants indisputably operated YouTube with the intent to facilitate the massive infringement that in fact resulted, Defendants are forced to argue that *Grokster* liability requires something more – some additional conduct or encouraging message – above and beyond intentionally operating YouTube with the object and result of fostering widespread infringement. That is an incorrect reading of *Grokster*. But even if Defendants’ reading were correct, it would not matter. Their unlawful intent manifested itself in numerous additional actions calculated to increase the infringing use of YouTube while attempting to avoid responsibility for it.

As Defendants note, *Grokster*’s holding is “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.” *Grokster*, 545 U.S. at 919. The elements of a *Grokster* claim are thus (1) “distribut[ion of] a device” (or operation of a service) (2) with the “object” or intent that it be used to infringe – an intent that can be “shown by clear expression or other affirmative steps” – and (3) “resulting acts of infringement by third parties.” As if further to emphasize the point, the Supreme Court restated these elements of a claim near the end of the decision, *id.* at 940:

In addition to [1] intent to bring about infringement and [2] distribution of a device suitable for infringing use, the inducement theory of course requires [3] evidence of actual infringement by recipients of the device, the software in this case.

Thus, the elements of a *Grokster* claim do not include additional conduct encouraging infringement, beyond operating YouTube itself with the intent to cause infringement and actually causing infringement. That does not mean, however, that *Grokster* imposes liability for

“‘passive’ inducement” or “some amorphous bad purpose,” a straw man raised by Defendants. Defs. Opp. Mem. 83. There is nothing “passive” or “amorphous” about running a website like YouTube with wrongful intent that results in actual rampant infringement, any more than a warehouse that fences stolen goods is engaged in passive activity. Like the Internet services that have been found liable in other cases under *Grokster* (including recent decisions of this Court by Judges Baer and Wood), Defendants intentionally caused widespread infringement through the powerful engine of the YouTube website, which made it possible instantaneously to copy, perform, and distribute audio-visual works on a global scale unimaginable before the digital era – massive infringement that Defendants intended to foster. *Grokster* recognized that under basic legal principles, one who operates an infringement-facilitating business with the intent of causing infringement must be held liable for the infringement that actually results. *See Grokster*, 545 U.S. at 929 (“The argument for imposing indirect liability in this case is, however, a powerful one, given the number of infringing downloads that occur every day”).

Moreover here, Defendants’ wrongful intent manifested itself in numerous specific actions calculated to increase the number of infringing videos on YouTube. An online service provider can readily operate a user-generated video website without fostering infringement by taking simple measures to limit piracy on the site – as the stark contrast between YouTube and Google Video illustrates. However, as the undisputed evidence demonstrates, at every turn in operating YouTube, Defendants made affirmative decisions to blind themselves to infringement and to disable, refuse to implement, or selectively deploy readily available means of curtailing infringement. Those were concrete acts for the very purpose of making YouTube (unlike Google Video) into a haven for infringement – and they succeeded. Similarly, Defendants set up their system to highlight “favorite” videos, knowing they were at least 70% infringing, to attract users

inclined to infringe to the site. *Infra* at 9; *see In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003) (featuring copyrighted works on website is “invitation to infringement”); *Arista Records LLC v. Lime Group LLC*, __ F. Supp. 2d __, 2010 WL 1914816, at *18 (S.D.N.Y. 2010) (search function induced by “facilitat[ing] searches for copyrighted digital recordings”). YouTube’s founders and employees also uploaded infringing videos, shared infringing videos, and encouraged users to leave infringing videos on YouTube. Viacom Opp. Mem. 12-13.

Thus, even if *Grokster* required some conduct beyond operating a website with intent to facilitate infringement, that requirement would be met here. But in fact, *Grokster* rejected any such requirement. Instead, Defendants’ additional infringement-inducing conduct functions here as proof of their unlawful intent, which may be “shown” either by “clear expression” or by “affirmative steps taken to foster infringement.” *Grokster*, 545 U.S. at 919; *see also id.* at 938 (“unequivocal indications of unlawful purpose”). Defendants’ argument confuses what must be proved (*Grokster* intent and the resulting infringement) with the forms that proof may take.

Defendants go even further astray when they contend that “clear expressions” of intent must consist of an overt “inducing message” encouraging infringement. *Grokster* rejects that squarely: “Whether the messages were communicated is not to the point on this record. The function of the message in the theory of inducement is to prove by a defendant’s own statement that his unlawful purpose disqualifies him from claiming protection.” *Id.* at 938.

Similarly, *Grokster* explained that the alternative way of proving intent through “affirmative steps taken to foster infringement” includes acts of commission or omission present here: (1) providing a device or service that caters to a marketplace “demand for copyright infringement”; (2) using infringement to attract traffic and thereby generate advertising revenues; or (3) failing to deploy (and even disabling) “filtering tools or other mechanisms to diminish

infringing activity.” *Id.* at 939-40. The Supreme Court did not choose these examples casually. They reflect the fact that a website can induce copyright infringement by intentionally offering an engine of infringement (whether peer-to-peer software or the YouTube service) to tap into an existing demand for infringement from which it will profit and which it refuses to do anything to stop. In such circumstances, an overt “inducement” in the sense of an additional message inviting users to commit piracy is completely superfluous, as the Supreme Court expressly held.

Cases applying *Grokster* have uniformly adhered to this analysis. Consider *Grokster* itself on remand. The court recognized that “[s]ince there is no dispute that StreamCast did distribute an infringement-enabling technology, the inquiry focuses on the defendant’s intent, which can be shown by evidence of the defendant’s expression or conduct,” and “Plaintiffs need not prove that StreamCast undertook specific actions, beyond product distribution, that caused specific acts of infringement.” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 985 (C.D. Cal. 2006). Similarly, *Fung* stated: “Importantly, liability may attach even if the defendant does not induce specific acts of infringement. Instead, the court may ‘infer[] a patently illegal objective from statements and actions showing what [the defendant’s] objective was.’” *Columbia Pictures Indus., Inc. v. Fung*, No. CV 06-5578, 2009 WL 6355911, at *10 (C.D. Cal. Dec. 21, 2009). Both cases found liability on summary judgment.

Just three weeks ago, Judge Wood followed this exact template in also finding *Grokster* liability on summary judgment against the LimeWire (“LW”) service. Judge Wood first found “overwhelming evidence that LW engaged in purposeful conduct that fostered infringement: LW created and distributes LimeWire, which users employ to commit a substantial amount of infringement.” *Lime Group*, 2010 WL 1914816, at *16. Thus, distribution of the product and the resulting infringement satisfied two of *Grokster*’s elements. The court therefore turned to the

third element – intent – so that *Grokster* liability hinged on whether “LW intended to encourage infringement by distributing LimeWire.” *Id.* Once again, Judge Wood held, consistent with *Grokster*, that direct evidence of solicitation or a separate inducing message need not be shown to prove the requisite intent. *Id.* at *15-*16.

Academic literature also recognizes *Grokster*’s clear holding. As Columbia Law Professor Ginsburg observed, “if it can be shown that the distributor intended users to employ the device in order to infringe copyright, then the distributor will be liable as a matter of basic tort principles,” and thus *Grokster* “ruled that bad intent, if proved, sufficed to establish liability for infringements thus induced.” Jane C. Ginsburg, *Separating the Sony Sheep from the Grokster Goats*, 50 Ariz. L. Rev. 577, 583, 584 (2008); *see also, e.g.*, G. Frischling & M. Bitton, *Grokking Grokster*, 34 AIPLA Q.J. 265, 266 (2006) (*Grokster* adopted “the view that sale of a product that enables infringement, coupled with culpable subjective intent, can give rise to inducement liability” for the resulting large-scale infringement).¹

B. There Is No Genuine Dispute as to Defendants’ *Grokster* Liability.

It is uncontested that (1) Defendants actively operated the YouTube website that enables infringement on a hitherto unimaginable scale, and (2) massive infringement actually resulted, establishing two of the *Grokster* elements, 545 U.S. at 940. Thus, as in *Lime Group*, 2010 WL 1914816, at *16, and *Grokster*, 454 F. Supp. 2d at 985, the only conceivable question concerns the third element: whether Defendants operated YouTube with the intent to foster infringement.

Faced with a mountain of incriminating “clear expressions” and “other affirmative steps” showing their intent, Defendants raise a barrage of evidentiary objections and strain to create

¹ The existence of noninfringing uses is also no defense under *Grokster*. Viacom Opp. Mem. 16-17. Hence, the extended discussion by Defendants (and the aptly named “Sideshow” amici) of legitimate uses of YouTube is irrelevant. The focus must be on the massive infringing use.

triable issues of fact by impeaching their own documents and challenging (or usually disregarding) the words their founders and senior executives actually used. Of course, the defendants in *Grokster*, *Fung*, *Usenet*, and *Lime Group* all tried the same tactic – to no avail. As shown by those cases – which all found *Grokster* liability on summary judgment based on voluminous records comparable to that here – it is not enough for Defendants to deny their intent or to contest some of the facts in the overall evidentiary record. A “summary judgment motion is intended to ‘smoke out’ the facts so that the judge can decide if anything remains to be tried.” *W.S.A., Inc. v. ACA Corp.*, No. 94 Civ. 1493, 1998 WL 635536, at *3 (S.D.N.Y. Sept. 15, 1998). “[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Thus, “[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Scott v. Harris*, 550 U.S. 372, 380 (2007) (disregarding, at summary judgment stage, party’s sworn account about how he drove a vehicle because it was contradicted by a videotape of events).

1. Expression and Conduct Demonstrating Defendants’ *Grokster* Intent Are Not Materially and Genuinely Disputed.

Viacom’s Reply SUF (RSUF), filed herewith, explains why there is no genuine dispute of material fact about Defendants’ *Grokster* intent. To highlight the point, we will focus here on a sample of ten key documents from Defendants’ own files that show their intent both through “clear expression” and “other affirmative steps.” *Grokster*, 545 U.S. at 919. In some cases, Defendants do not even offer an explanation for the damaging texts as written. When they try to do so, they do little more than nibble around the edges of the compelling admissions in the

documents. They ask the Court to overlook inconvenient words (such as “copyright infringement” or “copyrighted material”), to disregard highly inculpatory statements as not meaning what they plainly say, or to ignore things like a formal fairness opinion rendered by the third-party investment bank Google hired to advise it on a potential \$1.8 billion acquisition as “back of the envelope” estimates. Those stratagems do not create genuine, material factual disputes about the intent of Defendants’ founders and management.

Document 1: A September 3, 2005, email chain between YouTube’s founders unambiguously documents their decision not to remove “obviously copyright infringing stuff” because they believed doing so would reduce site traffic by 80%. RSUF ¶ 54. Defendants now claim that this email chain was not about copyright infringement at all, but rather about prank videos. Defs. Opp. Mem. 13-14.² We urge the Court to read the entire email chain (Hohengarten Ex. 215). Its subject line is “copyrighted material!!!,” it launches with Hurley telling the other founders “aaahhhhh, the site is starting to get out of control with copyrighted material,” and it refers to “copyright,” “infringement,” and the DMCA multiple additional times. Chen twice says site traffic would drop by 80% if copyrighted material were removed. The second time is in direct response to Karim’s proposal that they “just remove the obviously copyright infringing stuff,” to which Chen replies, “ya, i know that if remove all that content. we go from 100,000 views a day down to about 20,000 views or maybe even lower.” *Id.* (emphasis added). The document says what it says, and no reasonable jury could accept that it is not discussing infringement. *See Scott*, 550 U.S. at 380. Nor does it matter whether Chen’s 80%

² Defendants assert “stupid videos” refers to prank videos, not infringement. Defs. Opp. Mem. 13-14. But Defendants have admitted the founders expressly referred to “StupidVideos” as a site “that did not respect copyright” and thus as synonymous with infringement. RSUF ¶ 29. In any event, the September 3 email with repeated references to “copyright” speaks for itself.

was a mere estimate. The issue is the founders' intent, and they decided to leave infringing material on the site precisely because they believed it drew most of their traffic.

Document 2: Defendants claim Chen's statement to investor and board member Roelof Botha that the founders would operate YouTube so users could search for and find "truckloads of adult and copyrighted content" was really referring to the Flickr website, not YouTube. RSUF ¶ 60. In their opposition brief, Defendants place the quotation of this email in Viacom's opening brief and Chen's full statement side by side and assert that Viacom's edits changed the meaning. Defs. Opp. Mem. 11. But Defendants' side-by-side comparison just proves Viacom's point. The email plainly shows that the plan was for YouTube, "similar to flickr," to have "truckloads of . . . copyrighted content." No reasonable factfinder could conclude that Chen and Botha were engaging in some abstract discussion about another website as Defendants now intimate.

Document 3: Defendants do not contest that in an instant message between Chen and YouTube Product Manager Maryrose Dunton, Dunton reported the results of a "little exercise" in which she "went through all the most viewed/most discussed/top favorites/top rated to try and figure out what percentage is or has copyrighted material. it was over 70%., . . . [and] after I found that 70%, I went and flagged it all for review." RSUF ¶ 95. Later she amplified that "the truth of the matter is, probably 75-80% of our views come from copyrighted material." RSUF ¶ 104. Defendants also do not contest that Dunton was being sarcastic when she said she flagged the copyrighted videos; in fact, she did nothing. RSUF ¶ 96. Although Defendants fill their CVSUF with other quotes from Dunton's deposition, that material does nothing to alter the uncontested facts and her quantification of the vast extent of piracy on the site. *Id.*

Document 4: Defendants do not contest that in another exchange, YouTube engineer Matt Rizzo told Dunton that implementing a new email alert tool to protect copyright owners

“isn’t hard” and would only “take another day or w/e [weekend] . . . but I still don’t understand why we have to cater to these guys,” to which Dunton said “[I] hate this feature. I hate making it easier for these a-holes,” “ok, forget about the email alerts stuff,” and “we’re just trying to cover our asses so we don’t get sued.” RSUF ¶ 114.³

Document 5: Defendants do not contest that Hurley emailed Chen and Karim on September 23, 2005, saying: “can we remove the flagging link for ‘copyrighted’ today? we are starting to see some complaints for this and basically if we don’t remove them we could be held liable for being served a notice. it’s actually better if we don’t have the link there at all because then the copyright holder is responsible for serving us notice of the material and not the users. anyways, it would be good if we could remove this asap.” RSUF ¶ 64. Defendants now offer post-litigation statements asserting that community flagging for copyright did not work very well. But they cannot point to one contemporaneous document suggesting that that was why it was terminated. Hurley’s email says otherwise and again squarely exhibits *Grokster* intent: he directed the disabling of community flagging “asap” so that the site would not be put on notice of infringement and could instead keep the burden on copyright owners.⁴

Document 6: Defendants do not contest that Karim distributed a memorandum to the YouTube board of directors in March 2006 stating “As of today episodes and clips of the following well-known [Viacom] shows can still be found: . . . South Park, MTV Cribs, Daily Show, Reno 911, Dave Chapelle”; describing this content as “blatantly illegal”; and noting that

³ Defendants now claim YouTube had already implemented the feature discussed in Document 4 at the time of the IM exchange. But the IM unambiguously speaks about and rejects a feature to be implemented in the future, not something that already existed. RSUF ¶¶ 112, 115. In any event, the recognition and intentional disregard of copyright violations again speaks for itself.

⁴ Defendants’ further claim that they decided to remove community flagging as part of a decision to become a “DMCA compliant” site is nonsensical. Nothing in the DMCA even arguably requires stripping the site of protections against piracy.

users still uploaded entire TV shows in segments or uploaded “the ‘juiciest’ bits.” RSUF ¶¶ 109-111. YouTube’s board was thus put on clear notice of pervasive infringement on the site.⁵

Document 7: Defendants do not contest that in July 2005, Chen emailed Hurley and Karim saying, “jawed [*i.e.* Karim], please stop putting stolen videos on the site. We’re going to have a tough time defending the fact that we’re not liable for the copyrighted material on the site because we didn’t put it up when one of the co-founders is blatantly stealing content from another site and trying to get everyone to see it.” RSUF ¶ 40. Defendants now say the videos were taken from aviation websites, but the source of the unauthorized copyrighted material is irrelevant to the founders’ state of mind as expressed by Chen: “We’re going to have a tough time defending the fact that we’re not liable for the copyrighted material on the site.” *Id.*

Document 8: Defendants do not contest that in June 2005, Chen emailed the other founders that “we got a complaint from [YouTube’s own service provider] that we were violating their user agreement. i *think* it may be because we’re hosting copyrighted content. instead of taking it down – i’m not about to take down content because our ISP is giving us shit – we should just investigate moving www.youtube.com.” RSUF ¶ 33. Defendants say that it turned out Chen was wrong and the ISP was concerned about something other than copyright. But that just underlines Chen’s state of mind and intent that the site maintain infringing content – knowing what was on the site, he immediately assumed infringement had to be the problem, and then vowed not to do anything about it. *Id.*

⁵ Defendants claim they took proactive measures after this, including on advice of counsel, and scanned for and removed South Park clips. Def. Opp. Mem. 18-19. The references to advice of counsel should be disregarded because Defendants expressly waived an advice of counsel defense in open court (and subsequent written confirmation) – thereby blocking discovery into such legal advice. Viacom Opp. Mem. 12. And even if their claim that they took specific steps to scan and remove South Park programs were credited, it only hurts Defendants, because (1) it demonstrates their ability to take steps to control the site when they chose to do so, and (2) highlights their failure to do so for Viacom’s intellectual property generally.

Document 9: With respect to Google’s own intent, Defendants cannot genuinely dispute the repeated, consistent warnings by Google Video’s senior executive team in a memorandum prepared for the May GPS meeting that “YouTube’s business model is completely sustained by pirated content” and that it was a “‘rogue enabler’ of content theft,” “80% illegal pirated content,” “‘a video Grokster,’” and the like. RSUF ¶¶ 151-159. The directness and power of these party admissions by Google executives is overwhelming, so Defendants try to exclude them based on hearsay and foundation objections, which are entirely frivolous.⁶

Document 10: It is undisputed that: Credit Suisse performed a valuation of YouTube and provided a fairness opinion as part of Google’s due diligence for the acquisition; this information was provided in a formal board book to Google’s Board to support the acquisition and purchase price; the board book included a statistical sample and analysis of YouTube views provided by Google to Credit Suisse for this purpose; and it showed that fully 60% of YouTube views were of “premium” copyrighted content, only 10% of which was licensed. RSUF ¶¶ 173, 176. Recognizing how damaging the Credit Suisse analysis is, Defendants again respond with a mass of baseless objections to a plainly admissible document prepared by Google’s financial advisor and agent and concededly presented to its most senior executives and board members. Most importantly, nothing argued by Defendants responds to the facts set forth in Credit Suisse’s

⁶ See Fed. R. Evid. 801(d)(2) (admissions of party opponent); *Grokster*, 454 F. Supp. 2d at 972 (documents are authenticated by act of production by opposing party); *John Paul Mitchell Sys. v. Quality King Distribs., Inc.*, 106 F. Supp. 2d 462, 472 (S.D.N.Y. 2000) (same). Defendants assert that sometimes the Google Video executives were quoting views of content owners. That does not change the power of the warnings. And other admissions in that same document are the Google Video executives’ own words. Defendants further argue there is no proof that this memorandum ever was shown to Eric Schmidt or Sergey Brin, who attended the GPS. Although all Google executives during their depositions uniformly asserted a lack of memory about the meeting, use at the GPS was the very purpose for which Google Video executives prepared the document. RSUF ¶ 147. Its warnings are compelling party admissions by senior Google executives, irrespective of whether the document was read by Schmidt or Brin.

analysis. It is undisputed. And Defendants cannot be serious in disparaging their financial advisor’s analysis as “back of the envelope” when it was the heart of the valuation and fairness opinion presented to the board of a public company in support of its \$1.8 billion acquisition.

These documents are but a representative sample of the written evidence of Defendants’ expression and other affirmative conduct showing their intent, all prepared contemporaneously and not for purposes of litigation. Based on these documents alone (or any combination of them), Defendants’ “unlawful objective is unmistakable.” *Grokster*, 545 U.S. at 940.⁷

2. Defendants’ Intent Is Also Shown by Their Conduct in Selectively Deploying Audible Magic Only in Connection with Content Deals.

The foregoing undisputed facts include “affirmative steps taken to foster infringement” – such as keeping “obviously copyright infringing stuff” on YouTube, aborting a planned keyword filter, disabling community flagging for copyright, and highlighting “favorite” videos they knew were overwhelmingly infringing – which establish both that Defendants had *Grokster* intent and that they acted on that intent to make YouTube a haven for infringement. Similarly, Defendants’ selective deployment of Audible Magic fingerprinting is further and particularly egregious affirmative conduct evidencing and effectuating their unlawful intent (as well as their right and ability to control infringement). Our earlier briefs have shown: (1) that filtering technology including Audible Magic was available and widely deployed well before YouTube’s launch in 2005; (2) that YouTube actually had in hand an Audible Magic license since the fall of 2006; (3)

⁷ As ineffectual as the declarations of co-founders Hurley and Chen are, the Court should also disregard them outright. Hurley was deposed and claimed lack of memory 206 times over the course of 140 pages, covering the very documents cited above. *See* Hohengarten Ex. 312. His declaration is entitled to no weight. *Perma Res. & Dev. Co. v. Singer Co.*, 410 F.2d 572 (2d Cir. 1969). [REDACTED]

[REDACTED] *see* Wilkens Reply Ex. 14, so the statements in his declaration could never be admitted at a trial and are thus not admissible for summary judgment either. Such manipulations of the legal process by the founders should not be allowed, however fruitless they are.

that the cost of using Audible Magic was \$200-\$300 thousand a year, a pittance for Defendants; (4) yet Defendants deliberately wielded Audible Magic fingerprinting as a carrot and a stick in 2006-2007, offering it as an inducement (or cudgel) to copyright owners to enter into license deals, and withholding it from companies like Viacom and other MPAA studios who declined to license their content. Viacom Opening Mem. 18-20, 34-37.

Recognizing that this conduct cannot be squared with their claims of innocent intent, Defendants now assert they actually offered to use Audible Magic to protect content owners without a license deal all along.⁸ This effort to avoid summary judgment is absurd on its face. Were it true that Defendants were prepared to use Audible Magic filtering technology to block infringement in 2006 and 2007, then not only Viacom, but also the MPAA and the world's other most sophisticated content owners such as NBC Universal, Fox, Disney, Warner, Sony and Columbia Pictures would have taken them up on the "offer." *See also infra* note 11.

In reality, numerous written offers and terms sheets in the record document the fact that Defendants offered to use Audible Magic for Viacom and many other major content companies in connection with content license deals in late 2006 and early 2007 – which Defendants do not dispute. RSUF ¶¶ 298-310.⁹ Conversely, Defendants cannot point to a single written offer to Viacom or any other company to use Audible Magic without a content deal in that time frame.

⁸ Defendants also try to shift attention away from their aggressive misuse of Audible Magic by describing their creation of a homegrown filtering technology that they deployed for Viacom in 2008. As Viacom has acknowledged from the outset, that was a positive development – but it cannot undo the effects of years of intentional facilitation of infringement before 2008.

⁹ Defendants' prior offer to use Audible Magic for Viacom as part of a content deal refutes their suggestion that they could not use Audible Magic for Viacom because Viacom had not yet loaded its fingerprints into Audible Magic. As the earlier offer in connection with the content deal shows, Defendants understood that Viacom would rapidly prepare the needed fingerprints as soon as YouTube (or any other video website) agreed to use them to protect Viacom's content. Likewise, Defendants' offer in connection with a content deal also refutes their suggestion now that Audible Magic was not suitable for audio-visual content like Viacom's.

Attempting to create a dispute of fact, Defendants point to their discussions in 2006 and January 2007 with the MPAA about possible joint testing of Audible Magic technology; submit a declaration from their employee Chris Maxcy saying that he never told Viacom’s representative Adam Cahan that Defendants were withdrawing their offer to use Audible Magic on February 5, 2007, but instead merely “postponed” (and never rescheduled) the phone call in which they were supposed to discuss that subject;¹⁰ and submit another declaration from their employee David King, which asserts in conclusory terms that “YouTube’s policy was to make CYC (including Audible Magic) open to all rights-holders” even without revenue monetization – but without providing any specifics as to timeframe and no documentation or information about how the alleged “policy” was implemented or communicated.¹¹

None of this succeeds in creating a genuine and material factual dispute. First, as to the MPAA negotiations, Viacom does not dispute that Defendants led the MPAA to believe they were considering joint Audible Magic testing during 2006 and January 2007 – as evidenced by a January 31, 2007, email from Dean Garfield of the MPAA to Viacom that Defendants tout. But Defendants simply ignore the key point: Mr. Garfield testified under oath that Defendants later told the MPAA explicitly that they would not filter, absent revenue sharing agreements. RSUF

¹⁰ Cahan’s contemporaneous record of the conversation stated that Maxcy cancelled the call because “they are claiming use of the tool requires a deal.” Hohengarten Ex. 383.

¹¹ King’s declaration actually backfires on Defendants, for it shows that Viacom and other major content owners were not granted access to Audible Magic in 2005-2008. King identifies four companies that purportedly “used Audible Magic solely to block videos.” King Decl. ¶ 10. But he is conspicuously vague as to the dates those four companies were given access to the blocking technology, “between February 2007 and December 2009,” *id.* ¶ 8, and does not set forth the financial arrangements with the four companies in exchange for access, *see* Viacom CSUF ¶ 95. Conspicuously absent from the list of companies in paragraph 10 are

[REDACTED]

In short, the most important and sophisticated content owners are missing – virtually all of whom in 2006-2007 were insisting on Audible Magic or filtering technology before licensing their content to YouTube.

¶ 226. Defendants have not offered any evidence to rebut that testimony.¹² The proposed Audible Magic agreements with the MPAA went unsigned by Google, the proposed tests never occurred, and an Audible Magic agreement was never reached with any of the major studios. RSUF ¶¶ 227-229. Thus, it is undisputed that though Defendants negotiated with the MPAA about Audible Magic through January 2007, they later broke those negotiations off.

As to the Maxcy and King declarations, they create no genuine dispute about the real issue. Maxcy's declaration seeks to create a question about what transpired during a specific phone call on February 5. *See* Maxcy Opp. Dec. ¶¶ 10-12. But such a narrow and contrived factual dispute is not material, because the undisputed evidence shows that after February 5, Defendants told Viacom through communication in writing at the highest levels that Audible Magic was available only with a content license. And that communication is confirmed by numerous contemporaneous internal statements of Defendants' policy – including one by Mr. King that directly contradicts his declaration. In the face of this documentation, Mr. Maxcy's hairsplitting about what was said on February 5, and Mr. King's conclusory, nonspecific, and undocumented assertions about YouTube's "policy," do not create genuine factual disputes.

Specifically, on February 2, 2007, Viacom General Counsel Mike Fricklas wrote to Google General Counsel Kent Walker and point-blank requested deployment of Audible Magic to protect Viacom content. Hohengarten Ex. 244. NBC's General Counsel wrote the same request. Kohlmann Ex. 29. On February 17, Google's Walker responded to both by email. Hohengarten Ex. 382. His response did not say that Audible Magic was available to Viacom and NBC even absent a license, as both general counsel had specifically requested. Just the opposite. Walker asserted that Defendants had no obligation

¹² Because they cannot rebut Mr. Garfield's sworn testimony, Defendants moved to strike his entire deposition on frivolous grounds. *See* RSUF ¶ 223.

to invest substantial resources to develop, deploy and distribute to every copyright owner in the world complex audio fingerprinting services. Nor has YouTube promised to do so. YouTube announced its commitment to work collaboratively with a handful of partners to develop, test, and launch audio fingerprinting optimized for the context of those specific business partnerships.

Id. at 08050274 (emphasis added). He then attacked Audible Magic technology as prone to false positives and false negatives, never explaining why YouTube had offered the same technology to both Viacom and NBC if they would sign revenue deals. Walker even testified that he could not recall offering to use Audible Magic with Viacom. Wilkens Reply Ex. 12, at. 65:18-72:16.¹³

This repudiation by Google’s General Counsel is confirmed by all of Defendants’ contemporaneous internal documentation, which uniformly sets forth their policy of offering the “Claim Your Content” or “CYC” tool that included Audible Magic only as part of content deals:

- On February 15, 2007, Google’s executive in charge of content partnerships, David Eun, wrote that YouTube’s “CYC tools,” including the “Audio fingerprinting system whereby the content partner can send ‘reference fingerprints’ to Audible Magic’s database,” “are only offered to partners who enter into a revenue deal with us.” Hohengarten Ex. 144 (emphasis added).

- On March 6, 2007, David King wrote an email that directly contradicts the declaration he submitted to the Court. Responding to an email among several employees stating that the CYC tool that included Audible Magic was available only if “a partner signs a commercial contract,” King stated his agreement: “bottom line is CYC only for non-music partners, and CVP [which

¹³ In an attempt to counter these unambiguous statements, Defendants point to the final paragraph of Walker’s February 17 email and suggest it constitutes an offer of the Audible Magic technology, in direct contradiction to the unambiguous refusal earlier in the same communication. In fact, the last paragraph of the email, which refers to possible future tests of unspecified “tools,” merely provides vague blandishments that Google was “open to discussing your possible participation in these tests.” That is plainly not an open offer to use the future “tools” – much less Audible Magic, which was already actually deployed for content partners – for Viacom. Indeed, as we show, Defendants’ firm policy was to make Audible Magic available only with a content and revenue deal – exactly as stated by Walker earlier in the same email.

did not include Audible Magic or other fingerprinting or automated technology] for everyone else.” Wilkens Reply Ex. 4, at 06519634 (emphasis added).

- On March 7, 2007, Google Sales Engineer Sathya Smith relayed that policy in an email to other Google employees with the Subject line “Please Read: guidelines for deploying YT tools” describing “the final verdict” about the “distribution of these tools.” Concerning the CYC tool that included Audible Magic, Smith wrote: “CYC: should only be given to signed, non-music partners. This is what legal has authorized.” Wilkens Reply Ex. 1 (emphasis added).

- On March 30, 2007, Matthew Liu, YouTube’s Product Manager for CYC, wrote re “fingerprinting that can do automatic takedowns”: “Right now we have not been giving the tool to partners without a revenue share contract in place.” Kohlmann Ex. 21 (emphasis added).¹⁴

Statements by Defendants’ then-lead counsel at the first status conference in this case in July 2007 also show that Audible Magic filtering was not being made available to Viacom. Defendants’ counsel did not tell the Court this entire lawsuit was a gigantic mistake because Defendants had always been amenable to using existing filtering technology for Viacom. To the contrary, he stated that Google was “working hard on” its own proprietary fingerprinting system it hoped to have in place “in the fall,” and emphasized that this future system would stem infringement of Viacom’s works. Hohengarten Ex. 362, at 15:15-17:15. That lawyer soon was gone from the case – and the promised filtering did not arrive for Viacom until 2008.

No reasonable factfinder could conclude that Defendants offered to use Audible Magic for Viacom without a content deal from 2005 until 2008, even when YouTube was using the technology for business partners in 2007. Such protection was always conditioned on an extortionate revenue deal, which both shows Defendants’ *Grokster* intent and their refusal to

¹⁴ The *New York Times* even reported Hurley as saying YouTube would discuss using filtering technology for “Viacom as part of a broader deal.” Wilkens Reply Ex. 15.

exercise their control over the site until it served their business interests to do so in 2008. The problem was not that Defendants could do nothing to curtail infringement. It was that they did not want to. They intentionally operated YouTube to foster infringement in order to attract users, and they succeeded. They are liable under *Grokster*.

II. DEFENDANTS ARE VICARIOUSLY LIABLE.

Defendants are also vicariously liable for the infringement on YouTube unless the site is entitled to an exemption from the settled legal principles rooted in the Second Circuit's seminal decision in *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963).¹⁵

A. Defendants Received a Direct Financial Benefit.

It cannot seriously be disputed that Defendants received a direct financial benefit from infringement under the well-established “draw” standard. Viacom Opening Mem. 29-31, 37-39. Although Defendants question whether the “draw” standard applies in this Circuit, it is derived from *Shapiro*, 316 F.2d at 307, and multiple judges in this District have applied this standard as the test of a direct financial benefit. *Lime Group*, 2010 WL 1914816, at *24-*25; *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 156-57 (S.D.N.Y. 2009); *Arista Records, Inc. v. Mp3Board, Inc.*, No. 00 CIV. 4660 (SHS), 2002 WL 1997918, at *11 (S.D.N.Y. Aug. 29, 2002). Defendants cannot point to a single decision to the contrary.

The courts have also flatly rejected Defendants' claim that the “draw” standard applies only to “a service devoted nearly entirely to infringement,” Defs. Opp. Mem. 81. As Judge Baer explained, “the law is clear that to constitute a direct financial benefit, the ‘draw’ of infringement need not be the primary, or even a significant, draw – rather, it need only be ‘a’ draw.” *Usenet*, 633 F. Supp. 2d at 157; *accord, e.g., Lime Group*, 2010 WL 1914816, at *24 (Judge Wood).

¹⁵ *Shapiro* expressly rejects Defendants' suggestion (Def. Opp. Mem. 62) that vicarious liability requires an agency relationship. *Shapiro*, 316 F.2d at 307.

Defendants’ suggestion that there is no evidence that the infringement on YouTube was a draw for users is conclusively answered by Defendants’ own contemporaneous statements that infringement accounted for 54% to 80% of the views or traffic on the site. Viacom Opening Mem. 8, 10, 15-16. Defendants’ own data also show that the specific infringing clips in suit here accounted for hundreds of millions of views, and thus were plainly a “draw” for users. RSUF ¶ 8. Defendants themselves repeatedly recognized that Viacom content is particularly attractive to users. RSUF ¶¶ 31-32. And Defendants’ response to an interrogatory admits that they derived income from ads shown on the watch pages of Viacom’s clips in suit. Hohengarten Ex. 361. A more direct financial benefit from infringement is impossible to imagine, as Defendants recognized when they stopped placing ads on watch pages of infringing clips in early 2007 “for legal reasons,” RSUF ¶ 250, leaving them exposed legally for 2005-2006. And even after removing ads from specific infringing watch pages, Defendants retained ads elsewhere throughout the YouTube site, such as on home, search, and browse pages, and derived revenue from users who were drawn by infringing clips and found those clips via those pages, as well as from additional monetizable search traffic on Google’s own site. Viacom Opening Mem. 30-31.

Even leaving aside current ad revenue, Defendants derived a direct financial benefit from infringement because it attracted the enormous YouTube user base for future monetization. As the Google board book showed, it was that user base – largely attracted by infringing material – that made YouTube worth at least \$1.8 billion to Google. RSUF ¶ 180. That constitutes a direct financial benefit. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001).

B. Defendants Had the Right and Ability to Control.

Defendants also had the right and ability to control infringement. Defendants indisputably reserved and exercised the right to remove videos and block users from YouTube for any reason at their sole discretion. RSUF ¶ 267. That constitutes the right and ability to

control under the test repeatedly followed in this District. *Usenet*, 633 F. Supp. 2d at 157; *Mp3Board*, 2002 WL 1997918, at *11; *accord Napster*, 239 F.3d 1023. Defendants can cite no contrary case from this Circuit. Under that standard, summary judgment is appropriate.

Defendants assert the Ninth Circuit applied a different standard in *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1173 (9th Cir. 2007), requiring a “practical ability” to “stop or limit the directly infringing conduct.” But no court in this Circuit has followed suit, and even the Ninth Circuit would apply the standard from its decision in *Napster*, not *Perfect 10*, here. *Perfect 10* concerned Google’s right and ability “to stop or limit the direct infringement of third-party websites” – not to police its own website. 508 F.3d at 1173 (emphasis added). Unlike *Perfect 10*, and like *Shapiro, Napster*, and the dancehall cases, this case is about Defendants’ right and ability to exclude infringing activity from their own site, not third-party sites.

In any event, applying the *Perfect 10* test would not help Defendants. They have always had the practical ability to “stop or limit the directly infringing conduct” on YouTube, through such means as manual review, community flagging, keyword filters, Audible Magic fingerprinting, and the like. Adhering to the strategy of “plausible deniability,” Defendants say that each of these techniques had limitations, particularly as YouTube got larger and more saturated with infringement.¹⁶ But these tools, individually and collectively, have been successfully used by both Google Video and YouTube when they wanted to in order to “limit” (even if not entirely eliminate) illegal uploads, as called for in *Perfect 10*, 508 F.3d at 1173; *see also Grokster*, 545 U.S. at 939 (looking to “mechanism to diminish the infringing activity”) (emphasis added). A defendant cannot financially benefit from piracy and then selectively refuse

¹⁶ “Plausible deniability” is the legal strategy counseled by Defendants’ amicus Electronic Frontier Foundation (which was also *Grokster*’s counsel). *See Kohlmann Decl.* ¶ 101 & Ex. 92 (“buil[d] a level of ‘plausible deniability’ into your product architecture and business model” in order to be able to “convince a judge that . . . monitoring and control is impossible”).

to deploy anti-piracy tools in its arsenal just because they are not perfect. To avoid vicarious liability, the site operator must deploy its “reserved right to police . . . to its fullest extent.” *Napster*, 239 F.3d at 1023. Thus, Google’s General Counsel effectively conceded Defendants’ vicarious liability when he stated Defendants’ position in writing that they would not “invest substantial resources” to deploy existing Audible Magic technology to protect copyright owners (yet another straw man since the cost, particularly to Google, was trivial). *Hohengarten Ex. 382*.

III. DEFENDANTS ARE DIRECTLY LIABLE.

Defendants are also direct infringers. Defendants do not dispute that all the infringing conduct at issue takes place on their own systems (unlike, say, the peer-to-peer infringement at issue in *Grokster*). See *Viacom Opening Mem.* 44. Therefore, as Defendants seem to concede, their direct liability turns on whether they had the minimal level of “volition” required for direct infringement. See *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 130-31 (2d Cir. 2008). Defendants are forced to the extreme position that under *Cartoon Network*, direct liability can never arise when a defendant causes infringement by programming a computer to make copies through “automated processes,” regardless of the defendant’s volition in setting up the infringement system in the first place. *Defs. Opp. Mem.* 56.

Defendants simply ignore Viacom’s showing in its opening brief (at 44-46) that *Cartoon Network* held no such thing. That case did not erect a sweeping robot exception to direct liability as Defendants claim. It held that volitional conduct was absent “only . . . on the facts of this case,” 536 F.3d at 133, where the defendant’s system was like a remote VCR or DVR that let a home viewer make a single copy of a television show which only that user could watch, *id.* at 130-31. The Second Circuit expressly relied on the analogy to home VCR or DVR copying in determining that the home viewer made the copies, not the system operator. *Id.* at 131. But Defendants here operate the Internet equivalent of broadcast TV, and like any broadcaster,

Defendants, not their viewers, performed, indexed, promoted, sold advertising against, and profited from videos which the Defendants made available to the world at large.

Before and after *Cartoon Network*, courts have found “volitional conduct” outside the context of a remote-DVR where automated processes are involved, if the defendants’ conduct in setting up a system transformed them ““from passive providers of a space in which infringing activities happened to occur to active participants in the process of copyright infringement.”” *Usenet*, 633 F. Supp. 2d at 148; *see* Viacom Opening Mem. 45 (citing cases). Defendants’ infringement was anything but passive or incidental; it was intended. They are directly liable.¹⁷

IV. DEFENDANTS ARE NOT PROTECTED BY THE DMCA.

Because Defendants are liable for infringement three ways, they put most of their effort into arguing that § 512(c) of the DMCA immunizes their conduct. But as shown in our earlier briefs and the amicus brief of other content owners, there is no merit to the contention that the DMCA overrides *Grokster* or decades-old principles of vicarious liability. *E.g.*, Viacom Opening Mem. 47, 50, 55. The DMCA was enacted to provide balanced protection for intellectual property over the Internet, not to create loopholes for intentional, profit-driven facilitation of infringement. To qualify for the DMCA, Defendants must prove they meet all its requirements. *See id.* at 48. They indisputably fail at least three.

A. Defendants Had Knowledge and Awareness of Infringement Within the Meaning of the DMCA.

The Court has before it two diametrically contrasting legal positions as to the meaning of § 512(c)(1)(A) concerning knowledge or awareness and the obligations flowing from it.

¹⁷ Conduct that is not itself directly infringing remains relevant to Defendants liability for direct infringement (*contra* Defs. Opp. Mem. 60-62) because it shows Defendants’ conduct was volitional, not passive. *See Usenet*, 633 F. Supp. 2d at 148-49.

As we have shown, the record includes a startling series of admissions by Defendants’ founders and most senior executives not only acknowledging pervasive piracy on YouTube, but expressing and acting on the intent to foster and profit from that infringement. Yet, Defendants still claim they lacked knowledge or even awareness of facts and circumstances from which “infringing activity” was apparent under the DMCA. They reach that result by replacing the words “infringing activity” in § 512(c)(1)(A) with the words “specific clips,” and by interpreting the DMCA in conflict with *Grokster*’s and *Aimster*’s clear rejections of a specific-knowledge requirement. *Grokster*, 545 U.S. at 934; *Aimster*, 334 F.3d at 650. Indeed, Defendants’ “specific knowledge” interpretation is so extreme they say it provides immunity even for intentional facilitation of infringement under *Grokster*.

By contrast, Viacom’s interpretation of the DMCA knowledge provision tracks precisely the language used by Congress in § 512(c)(1)(A) and fundamental legal norms reflected in subsequent decisions like *Grokster* and *Aimster*. Contrary to Defendants’ extreme position, courts have uniformly held that liability under *Grokster* negates the DMCA defense. Viacom Opening Mem. 50. Even the other Internet services who submitted an amicus brief to this Court supporting Defendants do not argue that the DMCA immunizes *Grokster* facilitation – because legitimate businesses have no need of a safe harbor for intentional wrongdoing.

Even aside from *Grokster* liability, the DMCA knowledge prong covers the kind of knowledge of pervasive infringement and willful blindness shown by the record here – with or without awareness of specific infringing clips. Defendants argue that a willful blindness standard is “rhetoric” and the concomitant duty to act “amorphous.” Defs. Opp. Mem. 26, 38. But that is an attack on the concept of willful blindness itself, which is ubiquitous in the law, and

which is no more rhetorical here than in every area where it is routinely recognized as the equivalent of knowledge. *See* Viacom Opening Mem. 50-51; Viacom Opp. Mem. 28-29.

Under the DMCA, actual knowledge of infringing “material” or awareness of facts and circumstances from which “infringing activity” is apparent triggers the service provider’s duty to “act expeditiously to remove, or disable access to, [infringing] material.” § 512(c)(1)(A)(iii). To be sure, knowledge of specific clips would qualify as knowledge of “infringing activity” or “material”; but the latter phrases are in no way arbitrarily limited to specific clips. Defendants’ repeated admissions more than suffice to evidence actual knowledge and (even more assuredly) awareness of apparent widespread “infringing activity” on YouTube. Under the DMCA, a service provider with such knowledge or awareness cannot keep benefiting from infringement by burying its head and awaiting formal takedown notification of specific infringing clips (particularly where it is shown that the provider intended to promote infringement within the meaning of *Grokster*). Instead, knowledge triggers a proactive duty to “act expeditiously to remove” infringing material. Defendants’ no-obligation-to-act theory is an effort to find refuge in “willful blindness,” which, no matter how hard they claim otherwise, is a form of knowledge. *Aimster*, 334 F.3d at 650; *Tiffany (N.J.) Inc. v. eBay Inc.*, 600 F.3d 93, 109-10 (2d Cir. 2010).

Contrary to Defendants’ complaints, there is nothing “amorphous” about the duty under the DMCA’s plain statutory language to “act expeditiously to remove, or disable access to, the [infringing] material,” which is the counterpoint to willful blindness under the statute. § 512(c)(1)(A)(iii). Within the bounds of reasonable efforts, YouTube could have done many things to identify and remove specific infringing clips. Viacom Opening Mem. 32-35. What Defendants could not do, if they wanted to qualify for the DMCA defense, was close their eyes, dismantle the tools, and place all responsibility upon content owners while collecting revenues

and awaiting takedown notices – what Defendants euphemistically refer to as their “DMCA compliant” policy – as opposed to taking steps to comply with § 512(c)(1)(A)(iii).

Defendants argue that three courts in California have insisted on knowledge of specific infringing clips. Defs. Opp. Mem. 37. They ignore the limited records and issues before those Courts – unlike here. In all three cases, the plaintiffs did not develop a record showing by the defendants’ own admissions that they actually knew and were aware of (indeed, intended) pervasive piracy on the sites. For example, the plaintiff in *Io Group Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1136-37 (N.D. Cal. 2008), proceeded on the theory that defendants were on notice merely because ten of its works were infringed. The plaintiff in *Hendricksen v. eBay Inc.*, 165 F. Supp. 2d 1082, 1084 (C.D. Cal. 2001), similarly proceeded on the basis that one work (a film) was infringed. And the plaintiff in *Corbis Corp. v. Amazon.com Inc.*, 351 F. Supp. 2d 1090 (W.D. Wash. 2004), presented no evidence of pervasive illegal activity on the Amazon website, contending instead that 232 of its celebrity photographs were illegally sold on Amazon and pinning its knowledge argument on the theory that celebrity pictures generally “were vulnerable to copyright infringement.” *Id.* at 1107-09. This is the type of showing – little more than an argument that a website must have known that the illegal activity could be found on the site – that courts and commentators have treated as too diffuse to trigger a finding of actual or apparent knowledge. 2 *Goldstein on Copyright*, § 8.3.2 at 8:41 & n.79.1 (3d ed. 2009).

Nor can Defendants claim refuge in § 512(m). They say the red-flag provision in § 512(c)(1)(A)(ii) and the proactive obligation in subsection (iii) are in reality unenforceable surplusage because § 512(m) separately provides that a service provider is not required to monitor or to “seek facts indicating infringing activity.” They thus argue that § 512(m) permits willful blindness and refusal to act to remove infringing material even in the presence of red

flags of rampant infringement (or, indeed, intentional facilitation of infringement). But no court has ever read § 512(m) the way Defendants urge this Court to read it.¹⁸ Contrary to Defendants' extreme position, § 512(m) does not nullify red-flag notice under § 512(c)(1)(A), or make the DMCA the only area of law to legitimize intentional ignorance. The two subsections are readily reconciled, as required by the first rule of statutory construction. Viacom Opening Mem. 58-59.

That is true for two reasons. First, § 512(c)(1)(A) and § 512(m) actually complement each other because they pertain to obligations under different circumstances and different times. Section 512(m) says that a service provider has no general obligation to “monitor[] its service or affirmatively seek[] facts indicating infringing activity.” But § 512(c)(1)(A)(iii) unambiguously requires that “upon obtaining such knowledge or awareness,” the service provider then must “act[] expeditiously to remove . . . the material” (emphasis added). Thus, a service provider without knowledge does not need affirmatively to seek it out, but once § 512(c)(1)(A) is triggered, it may not close its eyes to piracy and must remove the infringing material (even more so where piracy is both pervasive and intended). Every authority recognizes that the two subsections work together in this way, and do not permit willful blindness as Defendants claim. The legislative history explains: “a service provider need not monitor its service or affirmatively seek facts indicating infringing activity [But] 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.” S. Rep. No 105-190, at 44 (1998). Scholars and treatises are in accord. *E.g.*,

¹⁸ In fact, not even the *Veoh* decision relied on by Defendants suggests that § 512(m) allows inaction in the face of red flags under the DMCA’s knowledge prong. Indeed, *Veoh* highlighted the legislative history that makes clear that even where there is no duty to monitor in the first instance, “‘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.’” *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1108 (C.D. Cal. 2009) (quoting H.R. Rep. No. 105-551(II), at 53 (1998)).

Ginsburg, 50 Ariz. L. Rev. at 598 (once on notice under § 512(c)(1)(A)(ii), § 512(m) does not “entitle the service provider to remain militantly ignorant”); 2 *Goldstein*, 8:41-8:44 (“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”).

Second, § 512(m) is concerned with “privacy,” not publicly posted materials, and thus has no applicability to the upload of infringing videos to YouTube for all the world to see. Viacom Opening Mem. 59; 3 *Nimmer on Copyright*, 12B-09[B], at 12B-98.3-99 (2009).

Only in a world where reality does not matter can the most senior executives of a website admit that their site is “out of control” with piracy and that copyrighted materials generate 70%-80% of their views, and yet claim they may remain legitimately blind to “infringing activity” and free to profit from it. Section 512(c)(1)(A), not § 512(m), is the controlling statutory provision, and Defendants had to deploy reasonable steps to “act expeditiously to remove or disable access” to infringing clips. Intentional ignorance was not an option.

B. Defendants Derived a Direct Financial Benefit from and Had the Right and Ability to Control Infringement Within the Meaning of the DMCA.

Defendants are also outside the DMCA because they derived a direct financial benefit from infringement and had the right and ability to control it under § 512(c)(1)(B). This issue primarily turns on whether the DMCA tracks the common law of financial interest and control, or overrides it. We showed in Point II that Defendants are liable under the common law.

Numerous cases have held that the terms “direct financial benefit” and “right and ability to control” in the DMCA follow and codify the legal standards for these elements under the common law of vicarious copyright liability. Viacom Opening Mem. 55 (citing cases); *Neder v. United States*, 527 U.S. 1, 21 (1999) (presumption that statutory terms incorporate settled common law meaning); Alfred C. Yen, *Internet Service Provider Liability for Subscriber*

Copyright Infringement, 88 Geo. L.J. 1833, 1882 (2000) (“Subsection (B) [of § 512(c)(1)], therefore, does no more than condition nonliability on the nonexistence of vicarious liability”).

With respect to the financial benefit element, there is no real legal debate: every court to address the issue has ruled that the DMCA tracks the vicarious liability “draw” standard. *See* Viacom Opp. Mem. 34. The Court should reject Defendants’ plea for an entirely novel DMCA standard, never accepted anywhere, under which revenues directly attributable to infringement, no matter how vast, would not count as a “financial benefit directly attributable to the infringing activity,” as long as the defendant also derived at least some income of the same kind from noninfringing activity. *See id.* at 36-37.

Turning to control, substantial precedent recognizes this DMCA element also tracks the common law. Viacom Opening. Mem. 56-57. Indeed, the DMCA’s legislative history expressly states that the statute’s “‘right and ability to control’ language . . . codifies the second element of vicarious liability.” H.R. Rep. No. 105-551(I), at 26 (1998); *see* Viacom Opening Mem. 58.¹⁹

Those courts that have instead interpreted the DMCA as creating a new and different standard of control have never offered any rationale that “dictates” departure from the common law, as required by *Neder*, 527 U.S. at 21-22. There is no merit to the claim that the common law standard under *Napster*, where control exists when the defendant has the “ability to block infringers’ access to a particular environment for any reason whatsoever,” *Napster*, 239 F.3d at 1023, would be redundant under the DMCA. There is a wide gap between the broad editorial control exercised by an operator (like a dancehall operator) who may remove material for any reason at all, and the more limited right (which every landlord has, and the DMCA itself grants)

¹⁹ Defendants and their amici play with words when they suggest a different standard is implied because the DMCA refers to the right and ability to control “infringing activity.” The common law uses essentially the same language. *E.g.*, *Usenet*, 633 F. Supp. 2d at 156 (“vicarious liability is premised wholly on direct financial benefit and the right and ability to control infringement”).

to take action against illegal activity. The common law vicarious liability control standard reflects the former, broader kind of control, not the latter, more limited control. *Shapiro*, 316 F.2d at 307. There is nothing redundant about these standards.

Nor does § 512(m) “dictate” a departure from the common law. Even with a provision absolutely identical to what ultimately became § 512(m), Congress expressly stated that the DMCA’s “‘right and ability to control’ language . . . codifies the second element of vicarious liability.” H.R. Rep. 105-551(I), at 26; *see* Viacom Opening Mem. 58.²⁰ Section 512(m) concerns “monitoring” private materials, not control of public postings resulting in direct financial benefit. Viacom Opening Mem. 59; *see Io*, 586 F. Supp. 2d at 1153 (under DMCA service provider must “police its system to the fullest extent permitted by its architecture”).²¹

Defendants’ contrary reading is self-evidently incorrect because it would leave the “right and ability to control” under the DMCA empty and this precondition of DMCA eligibility meaningless. Viacom made this point in its first brief. Yet Defendants still have not identified a single situation in which a right and ability to control would exist under their extreme reading. *See* Defs. Opp. Mem. 50-51. Defendants understand they lose if the right and ability to control means anything, so they are forced to argue that it covers nothing. But this prong of the DMCA must have a meaning. And under *Neder*, that meaning is supplied by the common law.²²

²⁰ Indeed, Defendants’ own description of the legislative history makes clear that Congress did not see § 512(m) as altering the control standard. *See* Defs. Opp. Mem. 51 n.35.

²¹ Nor are Defendants helped by their misleading quotation (Defs. Opp. Mem. 34-35) of part of a CLE presentation by one of Viacom’s present in-house counsel. Defendants’ brief omits that the lawyer made the presentation when he did not work for Viacom (so that, contrary to Defendants’ mischaracterization, it is not the viewpoint of or an admission by Viacom), and that he testified that his CLE presentations were intended to give the audience an understanding of the spectrum of arguments on an issue, not to represent his own view. *Schapiro Opp. Ex. 102*, at 135, 140.

²² There is also no merit to Defendants’ argument that the DMCA rejects the common law standards of financial benefit and control because the legislative history states that “Section 512(c) limits the liability of qualifying service providers for claims of direct, vicarious and

Indeed, if any website ever had the right and ability to control infringement, surely it is YouTube. Defendants not only could police their site to remove or limit infringing material, they actually did so – for favored business partners, albeit not for Viacom. That must constitute the right and ability to control infringing activity under any legal standard.

C. Defendants’ Direct and Secondary Liability Is Not by Reason of Storage at the Direction of Users Within the Meaning of the DMCA.

The DMCA also does not apply because Defendants’ infringement liability is not by reason of storage at the direction of users.²³ The essential underlying facts relevant to this aspect of the DMCA are not disputed, but the governing legal standard is. The determinative legal issue is whether the “by reason of” language of § 512(c) calls for but-for or proximate causation.

Consistent with the Supreme Court’s uniform interpretation of “by reason of” language in varied statutory contexts, § 512(c) applies only when the passive provision of storage services is the proximate cause of potential infringement liability. Viacom Opening Mem. 62. Defendants rush past these cases and contend § 512(c) covers any form of infringement that has some but-for causal link to storage, no matter how remote, so that if infringing videos are initially submitted by users, then § 512(c) immunizes anything and everything Defendants do with those videos on their own initiative thereafter. That view does not accord with the language, structure or purpose of the DMCA, and would extend the safe harbor far beyond the passive webhosts that Congress had in mind when it enacted § 512(c). Defendants’ contrary arguments have been answered in

contributory infringement,” H.R. Rep. No. 105-551(II), at 53 (1998). This does not dictate departure from the common law financial benefit and control standards. Vicarious liability can arise under circumstances other than due to a direct financial benefit and right and ability to control infringement under *Shapiro*, and in those other circumstances, the safe harbor protects providers. *See Yen, supra*, 88 Geo. L.J. at 1886 (explaining that DMCA protects service providers in event “courts would expand vicarious liability doctrine no longer to require the defendant’s direct financial benefit or right and ability to control infringement”).

²³ Defendants have not contested Viacom’s showing that they do not qualify for the safe harbors for other Internet functions under § 512(a), (b) or (d). *See Viacom Opening Mem.* 60 n.24.

Viacom’s prior briefing. *See* Viacom Opening Mem. 60-64; Viacom Opp. Mem. 42-44. YouTube fundamentally is an entertainment site, not a storage provider, with all financial gains flowing only to Defendants “by reason of distribution at the direction of YouTube.” Defendants are not protected by the DMCA for their multifold activities beyond those necessary for “storage” directed by users.²⁴

V. VIACOM’S OWNERSHIP OF THE WORKS IN SUIT AND THEIR INFRINGEMENT ON YOUTUBE REMAINS UNDISPUTED.

Although there is no dispute that Viacom’s works were infringed en masse on YouTube, Defendants mount a meritless attack on Viacom’s submission of Rule 1006 summaries to establish ownership and infringement. This is the paradigm case for Rule 1006 evidence.

Viacom has identified some 3000 works in suit, and some 63,000 accused clips in suit that infringe those works. Hence, documentation establishing ownership and infringement is certainly “voluminous.” Rule 1006 thus specifically authorizes submission of “a chart, summary, or calculation” in lieu of the underlying documents. Fed. R. Evid. 1006. Indeed, if the Court or a jury had to review and compare each and every one of 3000 copyrighted works in suit and 63,000 infringing clips, plus all the documents establishing ownership, then proof of infringement in cases like this, where the scope of infringement is enormous, would be unnecessarily unmanageable. That in fact appears to be Defendants’ objective in launching their evidentiary challenge. Rule 1006 provides a practical alternative.

²⁴ Notably, none of the cases cited by Defendants (Defs. Opp. Mem. 27 n.10), other than the *Veoh* decisions, even addressed the “by reason of storage” requirement of § 512(c). Moreover, businesses like Amazon and eBay have no need for the DMCA’s protection. Unlike YouTube, the Amazon and eBay stores do not reproduce or distribute infringing materials themselves, *see, e.g., Tiffany*, 600 F.3d at 96-97 (describing eBay), so they would at most be liable as secondary infringers. They therefore already benefit from the heightened liability standards for secondary liability, which the DMCA tracks. *See* Viacom Opening Mem. 47-48.

To prove ownership, Viacom submitted Rule 1006 charts listing the Bates numbers of the copyright registrations for each work in suit and, where the registration is in the name of another entity, the assignment documents establishing the chain of title from the registration entity to the Viacom plaintiff. *See* Solow Decl. ¶¶ 2-15 & Exs. A-E.²⁵ A copyright registration is prima facie evidence of ownership, and thus the registrations plus chain of title documents establish Viacom’s ownership of the works in suit unless Defendants submit rebutting evidence. 17 U.S.C. § 410(c); *Fonar Corp. v. Domenick*, 105 F.3d 99, 104 (2d Cir. 1997) (copyright registration “shifts to [defendant] the burden of proving the invalidity of the copyright”).

Similarly, to prove infringement, Viacom submitted a chart matching up the unique YouTube identifiers for each accused clip, the title of the work in suit from which the pirated clip was copied, the copyright registration for the work, and the Viacom entity that owns it. Solow Decl. ¶¶ 16-25 & Ex. F. That establishes infringement, unless rebutted by Defendants. *See* 17 U.S.C. § 106 (exclusive rights of copyright); *id.* § 501(a) (defining infringement).²⁶

Defendants’ contention that the Rule 1006 summaries are not sufficient because Viacom has not introduced the underlying ownership documents and actual copies of the works in suit and infringing clips defies the Rule. “[T]he evidence underlying Rule 1006 summaries need not be admitted into evidence Indeed, such an interpretation of the rule would negate its explicit grant of discretion to the trial judge to order the underlying documents produced in court.” *Air*

²⁵ Mr. Solow laid a proper foundation for the charts, which were prepared by personnel working at his direction. *See* 6 *Weinstein’s Federal Evidence* § 1006.05[3] (2d ed. 2010).

²⁶ Defendants’ further contention that Viacom had to negate the existence of a license is frivolous. It is well-established that the existence of a license is an affirmative defense that must be proved by Defendants – not Viacom. Defendants’ own statement of the rule in the Second Circuit makes that clear: the burden shifts to Viacom to prove that copying is outside the scope of a license only “where there is no dispute about the existence of a license.” Defs. Opp. Mem. 24 (citing *Bourne v. Walt Disney Co.*, 68 F.3d 621, 631 (2d Cir. 1995)). Here, Defendants have made no colorable showing that they have any license, express or implied, for clips pirated from Viacom works and uploaded to YouTube by third parties. *See* Viacom Opp. Mem. 57-62.

Safety, Inc. v. Roman Catholic Archbishop of Boston, 94 F.3d 1, 7 n.14 (1st Cir. 1996); *accord Granite Partners, L.P. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 96 Civ. 7874, 2002 WL 826956, at *7 (S.D.N.Y. Sept. 20, 2002). The rule requires the party proffering the summaries to make the underlying evidence available to the other party, which is then in a position to call inaccuracies (if any) to the attention of the Court, which retains the discretion to order the originals produced if need be. Fed. R. Evid. 1006; *United States v. Bakker*, 925 F.2d 728, 736-37 (4th Cir. 1991). Viacom fully complied with the rule.²⁷

Defendants cannot defeat summary judgment by saying they will offer rebuttal evidence in the future, or vaguely suggesting the possibility of fair use. Defendants have presented no evidence to contest proof of ownership and verbatim copying, other than for 3 out of 3000 works and 8 out of 63,000 clips. RSUF ¶ 6; Defs. Opp. Mem. 25 n.9. Except for these trivialities, there are no disputed facts about ownership and copying of the works in suit.

Thus, there is no merit to Defendants’ plea that the Court should avoid ruling on the real issues: *Grokster* intent; vicarious and direct liability; and ineligibility for the DMCA defense. The Supreme Court made this clear in *Grokster*: “Although an exact calculation of infringing use, as a basis for a claim of damages, is subject to dispute, there is no question that the summary judgment evidence is at least adequate to entitle MGM to go forward with claims for damages

²⁷ The cases cited by Defendants (Defs. Opp. Mem. 23) requiring the original works to be admitted into evidence are fundamentally distinguishable. Those cases were about whether one copyrighted work had been plagiarized in creating a new (but allegedly “substantially similar”) work. Comparison by the factfinder of the copyrighted work and alleged infringement was needed because their similarity was the disputed issue. Here, the issue is verbatim copying on a massive scale, not “substantial similarity.” If there were a basis for Defendants to contest the similarity of a particular clip to the original work, they should have done so in their opposition papers, instead of objecting wholesale to Viacom’s proper use of Rule 1006 summaries.

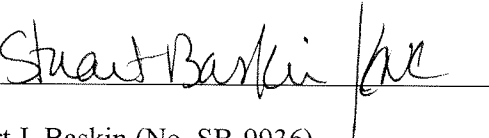
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and equitable relief.” *Grokster*, 545 U.S. at 940-41. Viacom is entitled to summary judgment on liability issues, reserving the quantification issue for a trial on damages and injunctive relief.²⁸


CONCLUSION

Viacom’s motion for partial summary judgment on liability and the DMCA defense should be granted, and the case set for a trial on damages and other relief.

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June 4, 2010

²⁸ As in their earlier briefing, Defendants devote many pages to completely irrelevant sideshows, such as their discussion (and more than 100 “additional material facts” in their CVSUF) about Viacom’s anti-infringement practices after acquiring the “Addicting Clips” website. Unlike YouTube, Addicting Clips had received at most five notices of infringement at the time Viacom acquired the company, refuting any attempt to characterize it as knowingly facilitating infringement. RSUF ¶¶ 349-430. In any event, Viacom’s conduct unrelated to YouTube or the works in suit has no bearing on Defendants’ liability for their intentional wrongdoing. *E.g.*, *Liz Claiborne, Inc. v. Mademoiselle Knitwear, Inc.*, 13 F. Supp. 2d 430, 445 (S.D.N.Y. 1998).

AFFIRMATION OF SERVICE

I, Na'eem A. Conway, hereby certify that on June 4, 2010, I caused the following materials to be served upon all counsel in this case.

Via electronic mail, as agreed by all counsel.

- Viacom's Reply Memorandum of Law in Support of Viacom's Motion for Partial Summary Judgment;
- Declaration of Scott B. Wilkens in Support of Viacom's Reply in Support of its Motion for Partial Summary Judgment;
- Viacom's Reply to Defendants' Counterstatement to Viacom's Statement of Undisputed Facts in Support of its Motion for Partial Summary Judgment; and
- Viacom's Evidentiary Objections to Portions of Declarations Submitted in Support of Defendants' Opposition to Viacom's Motion for Partial Summary Judgment.

Via overnight mail, as agreed by all counsel.

- Exhibits to the Declaration of Scott B. Wilkens in Support of Viacom's Reply in Support of its Motion for Partial Summary Judgment.

Respectfully submitted,

*Plaintiffs Viacom International Inc.,
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Inc., Paramount Pictures Corporation, and
Black Entertainment Television LLC*


Na'eem A. Conway