

# WHO'S LEADING THE BLIND? AIMSTER, GROKSTER, AND VIACOM'S VISION OF KNOWLEDGE IN THE NEW DIGITAL MILLENNIUM

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*In Viacom v. YouTube, the Second Circuit confirmed that willful blindness may substitute for actual knowledge under the statutory safe harbor from contributory copyright infringement granted to Online Service Providers ("OSPs") under Section 512 of the Digital Millennium Copyright Act (the "DMCA"). An examination of precedent reveals that plaintiffs often attempt to argue that the defendant OSP was willfully blind to generalized infringement on its website. Because liability under the DMCA's safe harbor provision requires knowledge of specific instances of infringement, the Second Circuit's acceptance of the doctrine without further clarification has caused confusion in the intellectual property community. This Note questions whether the willful blindness doctrine fits within the special statutory scheme crafted by the DMCA in an age of ubiquitous user-generated content.*

*In response, this Note argues that willful blindness—to the extent that it is possible to demonstrate under the specificity requirements of the DMCA—has already been accounted for in the statutory language. Further, arguments submitted by plaintiffs with regard to OSPs' general policies of willful blindness must be considered in the light of inducement liability, which may fall outside the*

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*contemplation of the safe harbor. This is so for three reasons. First, legislative history supports an interpretation of red flag knowledge that resolves the problem of willful blindness under the DMCA. Second, the use of willful blindness in copyright law and under the DMCA must avoid imposing an affirmative duty to monitor, and the judiciary's use of common law doctrine risks contravening this provision. Third, the DMCA created a statutory balance of interests that should not be disturbed, particularly when an OSP's actual knowledge of infringement cannot be shown. This Note concludes with the suggestion that general policies tending toward willful blindness may be used as evidence of inducement liability, but that for the purposes of the DMCA safe harbor in litigation, red flag knowledge is equivalent to willful blindness. The judiciary has a burden to clarify the appropriate use of the doctrine.*

I.	Introduction .....	908
II.	The Importance of the DMCA in Principle and Practice.....	910
A.	The Historical Necessity for Online Copyright Liability Limitation Legislation.....	911
B.	DMCA Provisions Relevant to Willful Blindness as Applied by the Courts .....	913
1.	Who Is an OSP? .....	913
2.	Safe Harbors .....	914
3.	Section 512(m)(1): "No Affirmative Duty to Monitor" .....	916
C.	Contrasting Notice, Actual Knowledge, Red Flag Knowledge, and Willful Blindness.....	917
1.	Contrasting Notice and Knowledge .....	917
2.	Actual and Apparent Knowledge in Section 512 .....	919
3.	Willful Blindness .....	920
III.	Consideration and Consequences of <i>Viacom v. Youtube</i> .....	922
A.	The Case in the Southern District of New York and its Progression to the Second Circuit.....	923

1. <i>Viacom</i> in the Southern District of New York .....	924
2. The Decision Is Appealed .....	929
3. Second Circuit Decision.....	931
4. Remand: Judge Stanton Strikes Back .....	933
B. Three Problems Arising from <i>Viacom's</i> Relationship with Section 512(c) Case Law.....	934
1. The Requirement of Specific Knowledge .....	935
2. Avoiding an Interpretation That Violates Section 512(m).....	937
3. Finding a Compromise .....	938
IV. Exploring the Status Quo Under <i>Aimster</i> , Red Flag Knowledge as Willful Blindness, and <i>Grokster's</i> Inducement Standard .....	940
A. The DMCA Reflects Common Law Knowledge Principles .....	941
B. Red Flag Knowledge and Legislative Intent: Bringing an Objective Element to the Test? .....	944
C. Willful Blindness as Intent: Taking "Knowledge" Out of the Knowledge Standard ....	948
V. Seeing the Light: Making Willful Blindness Work in the New Digital Millennium.....	953
VI. Conclusion.....	959

## I. INTRODUCTION

The nature of knowledge has frustrated philosophers and academics for millennia. In April 2012, the Second Circuit inspired further frustration in the legal community by adopting the principle that an actor's knowledge of the high probability of a fact's existence—coupled with steps of deliberate avoidance—will substitute for actual knowledge.<sup>1</sup> The court indicated that the concept, termed "willful blindness," may be used to determine whether Online Service Providers ("OSPs") are shielded from copyright

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<sup>1</sup> See *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 35 (2d Cir. 2012).

infringement liability under the Digital Millennium Copyright Act (the "DMCA").<sup>2</sup> According to the language of the statute's Section 512(c) safe harbor,<sup>3</sup> OSPs may lose immunity if they have either actual knowledge of instances of copyright infringement by their users or awareness of "facts or circumstances from which infringing activity is apparent."<sup>4</sup> This Note asks whether the willful blindness doctrine, shaped as it is by common law criminal and tort principles, fits within the special statutory scheme crafted by the DMCA in a way that is appropriate in the new digital millennium.

Three major considerations guide an examination of case law surrounding willful blindness under the DMCA. First, precedent establishes that any knowledge sufficient to defeat OSP immunity must be specific to the particular infringing content at issue. Second, any definition of knowledge must not be interpreted to impose a duty on OSPs to affirmatively monitor their sites. Finally, the balance of interests struck by the DMCA between content owners and OSPs in limiting liability for copyright infringement must be preserved in any application of willful blindness to the statutory provisions.

To resolve these concerns, this Note argues that willful blindness, to the extent that it is even possible to demonstrate under the specificity requirements of the DMCA, has already been accounted for in the language of the current statutory safe harbors, and that any arguments submitted by plaintiffs with regard to OSPs' general policies of willful blindness must be considered in light of inducement liability, which falls outside the contemplation of Section 512(c). In sum, this Note challenges the current judicial and academic acceptance of the common law concept of willful blindness as a knowledge standard under the DMCA Section 512(c) safe harbor, and offers a means of

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<sup>2</sup> See *Viacom*, 676 F.3d at 35.

<sup>3</sup> Section 512(c) of the DMCA provides immunity from secondary liability in certain circumstances for "user-generated content," e.g., content that is stored on a network at the direction of a user.

<sup>4</sup> 17 U.S.C. § 512(c) (2012).

reconciling the problem of willful blindness with the purposes of the statute.

Part II charts the evolution of the DMCA as a tool for reconciling the interests of early Internet pioneers and content owners and introduces relevant statutory provisions, such as the Section 512(c) knowledge standards, as they are now understood. Part III explores *Viacom v. YouTube* in the Second Circuit<sup>5</sup> and Southern District of New York<sup>6</sup> and identifies three complex considerations underlying any practical application of willful blindness to the safe harbor. Part IV introduces three possible uses of willful blindness under the DMCA, including the approaches taken in *Aimster*<sup>7</sup> and *Grokster*.<sup>8</sup> Finally, Part V proposes a dual role for the willful blindness doctrine—either as evidence attacking the threshold issue of safe harbor protection or as a trend supporting inducement liability on the part of an OSP.

## II. THE IMPORTANCE OF THE DMCA IN PRINCIPLE AND PRACTICE

Any meaningful discussion of the DMCA should begin with an understanding of its purpose and the means by which the statutory language captures that purpose. To that end, Part II.A briefly summarizes the technological and political landscape that necessitated the passage of the statute and, in particular, Title II, the Online Copyright Infringement Liability Limitation Act (“OCILLA”). Part II.B outlines provisions of the legislation that are particularly relevant to the subject of this Note. Part II.C then introduces the several knowledge standards that apply to

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<sup>5</sup> *Viacom*, 676 F.3d at 19.

<sup>6</sup> *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010); *Viacom Int'l, Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110 (S.D.N.Y. 2013).

<sup>7</sup> *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003).

<sup>8</sup> *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

OSPs seeking to take advantage of Section 512 safe harbor protection.

### A. The Historical Necessity for Online Copyright Liability Limitation Legislation

The DMCA<sup>9</sup> was passed as a response to the emerging importance of digital content in commerce. By the time the legislation was signed by President Bill Clinton on October 28, 1998, the Internet was steadily shifting copyrighted content from the exclusive control of rights owners into the hands of consumers.<sup>10</sup> “[E]ven as recently as the 1960s, it was difficult to infringe [copyright]. One needed a printing press, a radio station, or a means of pressing records . . . . Today every man, woman, corporation and child has the technological ability to copy and distribute, and therefore to potentially infringe copyright in ways both harmful and harmless.”<sup>11</sup> The DMCA amended the Copyright Act<sup>12</sup> to reflect consumers’ expanded access to technology and align American copyright law with two World Intellectual Property Organization (“WIPO”) treaties that had been signed in Geneva on December 20, 1996.<sup>13</sup>

The “*terra incognita*” of pre-DMCA case law governing OSPs’ secondary liability was inconsistent and ill-suited to

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<sup>9</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified at various parts of 17 U.S.C.).

<sup>10</sup> See BRUCE A. LEHMAN & RONALD H. BROWN, INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 9 (1995), available at <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>.

<sup>11</sup> Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 618 (2008).

<sup>12</sup> Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at various parts of 17 U.S.C.).

<sup>13</sup> See Amy P. Bunk, *Validity, Construction, and Application of Digital Millennium Copyright Act (Pub. L. No. 105-304, 112 Stat. 2860 (1998))*, 179 A.L.R. Fed. 319, § 2 (2002). See generally Mihaly Ficsor, *The Spring 2007 Horace S. Manges Lecture—Copyright For the Digital Era: The WIPO “Internet” Treaties*, 21 COLUM.-VLA J.L. & ARTS 197 (1997) (discussing the relevant treaties).

the realities of the emerging online copyright realm.<sup>14</sup> The role of OSPs' knowledge of infringement, in particular, was problematic. The first recognized online copyright case dismissed the relevance of knowledge to liability entirely, holding that it impacted only the statutory damages to be assessed to an OSP who unwittingly aided copyright infringement.<sup>15</sup> Other courts subsequently demonstrated confusion over whether OSPs were subject to a direct or vicarious infringement analysis.<sup>16</sup> The *Netcom* case did clarify that contributory copyright infringement online mirrored its offline counterpart in requiring knowledge plus substantial participation,<sup>17</sup> but its holding was not consistently applied until this standard was codified in sections 512(a)–(d) of the DMCA.<sup>18</sup>

OCILLA, codified at 17 U.S.C. § 512, was enacted as Title II to the DMCA and sought to facilitate innovation on the Internet while reflecting rights owners' interest in limiting copyright infringement.<sup>19</sup> Striking a balance between the extent of liability experienced by OSPs and the corresponding monitoring duties of each party was essential to the effective implementation of the statute. Legislators purposely sought to limit OSPs' liability as a means of incentivizing partnership between content owners and emerging entities on the Internet that came into contact with

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<sup>14</sup> See Michelle Ravn, Note, *Navigating Terra Incognita: Why the Digital Millennium Copyright Act Was Needed to Chart the Course of Online Service Provider Liability for Copyright Infringement*, 60 OHIO ST. L.J. 755, 766 (1999).

<sup>15</sup> See *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993).

<sup>16</sup> See, e.g., *Sega Enters. Ltd. v. MAPHIA*, 857 F. Supp. 679 (N.D. Cal. 1994).

<sup>17</sup> See *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995).

<sup>18</sup> See Ravn, *supra* note 14, at 772.

<sup>19</sup> See S. REP. NO. 105-190, at 1–2 (1998) ("The 'Digital Millennium Copyright Act of 1998' is designed to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age.").

that content in the course of business.<sup>20</sup> Interestingly, the issue of OSP liability was so pressing that U.S. compliance with the 1996 WIPO treaties was virtually held hostage until OCILLA could be attached to the bill incorporating the treaties.<sup>21</sup>

## B. DMCA Provisions Relevant to Willful Blindness as Applied by the Courts

### 1. Who Is an OSP?

For the purposes of the DMCA, an OSP is “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,”<sup>22</sup> or “a provider of online services or network access, or the operator of facilities therefor.”<sup>23</sup> Many of the most popular computer and Internet technology

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<sup>20</sup> S. REP. NO. 105-190, at 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. . . . 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 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.”).

<sup>21</sup> See *The Copyright Infringement Liability of Online and Internet Service Providers: Hearing before the Comm. on the Judiciary on S. 1146*, 105th Cong. 13–23, 28–32 (1997) (statements of Cary H. Sherman, Senior Executive Vice President & General Counsel, Recording Industry Association of America; Daniel Burton, Vice President, Novell; and Roy Neel, President & Chief Executive Officer, United States Telephone Association).

<sup>22</sup> 17 U.S.C. § 512(k)(1)(A) (2012).

<sup>23</sup> See *id.* § 512(k)(1)(B).



companies, including Facebook, Inc.,<sup>24</sup> eBay, Inc.,<sup>25</sup> Amazon.com, Inc.,<sup>26</sup> and America Online,<sup>27</sup> are OSPs under the statute. Its broad definition rarely excludes.

## 2. Safe Harbors

The DMCA's safe harbors were included as a compromise between the strong interests of copyright holders in deterring infringement and the legitimate business operations of OSPs. Failure to qualify for the safe harbor does not automatically impose liability on the OSP. Upon loss of the safe harbor's immunity, the plaintiff must still demonstrate liability under common law.<sup>28</sup> The DMCA safe harbors shield four activities from liability: transitory digital network communications,<sup>29</sup> system caching,<sup>30</sup> information location tools,<sup>31</sup> and information residing on systems at the direction of users.<sup>32</sup> This Note is primarily concerned with the last activity, as most websites that operate based on user-generated content fall under this category. The prominence of user-generated content sites characterizes the new digital millennium.<sup>33</sup>

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<sup>24</sup> See *Miller v. Facebook, Inc.*, No. C 10-00264 WHA, 2010 WL 2198204, at \*7 n.5 (N.D. Cal. May 28, 2010).

<sup>25</sup> See *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1088 (C.D. Cal. 2001) ("eBay clearly meets the DMCA's broad definition of online 'service provider.'").

<sup>26</sup> See *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1100 (W.D. Wash. 2004).

<sup>27</sup> See *Ellison v. Robertson*, 357 F.3d 1072 (9th Cir. 2004).

<sup>28</sup> See H.R. REP. NO. 105-796, at 73 (1998) (Conf. Rep.), *reprinted in* 1998 U.S.C.C.A.N. 639, 649.

<sup>29</sup> See 17 U.S.C. § 512(a) (2012).

<sup>30</sup> See *id.* § 512(b).

<sup>31</sup> See *id.* § 512(d).

<sup>32</sup> See *id.* § 512(c).

<sup>33</sup> These websites are otherwise known as members of "Web 2.0" for the access to information and dissemination tools they provide to consumers. See Tim O'Reilly, *What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, O'REILLY (Sept. 30, 2005), <http://oreilly.com/web2/archive/what-is-web-20.html>. Some

The safe harbors are only available to OSPs that have satisfied four conditions. The OSP must have (1) adopted a policy or method by which to terminate the user accounts of repeat infringers and (2) informed its users of such a policy.<sup>34</sup> This policy must (3) be reasonably implemented and (4) accommodate and not interfere with “standard technical measures.”<sup>35</sup> These requirements, combined with the four activities listed above, constitute the threshold requirements for safe harbor eligibility; further application of the safe harbor is evaluated case-by-case, based on the OSP’s specific activity and the nature of the infringement.<sup>36</sup>

The case-by-case analysis under Section 512(c), the safe harbor for user-generated content (hereinafter “the safe harbor”), first requires that the OSP lack both knowledge and awareness of the infringement.<sup>37</sup> If the OSP acquires knowledge of the infringing content, Section 512(c)(1)(iii) mandates that the OSP “act[] expeditiously to remove, or disable access to, the material.”<sup>38</sup> The OSP is free to ignore its knowledge, but doing so removes its activity from safe harbor protection.

Although asserting DMCA safe harbor immunity would represent an affirmative defense to liability at trial,<sup>39</sup> the safe harbors are often addressed as threshold issues at summary judgment, given that their requirements are typically less factually and legally complex than full adjudication of liability.<sup>40</sup>

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examples include eBay, YouTube, Wikipedia, Twitter, craigslist, Wordpress, Tumblr, IMDB (Internet Movie Database), Yelp, and reddit.

<sup>34</sup> See 1 IAN C. BALLON, E-COMMERCE AND INTERNET LAW § 4.12[3][A] (2012-2013 update).

<sup>35</sup> See *id.* (citing 17 U.S.C. § 512(i)(1) (2012)) (footnote omitted).

<sup>36</sup> See Daniel Kohler, Comment, *A Question of Intent: Why Inducement Liability Should Preclude Protection Under the Safe Harbor Provisions of the Digital Millennium Copyright Act*, 41 SW. L. REV. 487, 489 n.15 (2012).

<sup>37</sup> See 17 U.S.C. § 512(c)(1)(A)(i)–(ii) (2012).

<sup>38</sup> See *id.* § 512(c)(1)(A)(iii).

<sup>39</sup> As an affirmative defense, it would be asserted after the plaintiff presented his or her case against the defendant.

<sup>40</sup> See BALLON, *supra* note 34, at § 4.12[1].

### 3. Section 512(m)(1): "No Affirmative Duty to Monitor"

The last relevant provision of OCILLA is the Section 512(m)(1) (hereinafter "Section 512(m)") condition that no interpretation of the statutory safe harbors should be taken to impose an affirmative duty on the OSP to monitor its website or service for copyright infringement.<sup>41</sup> This reflects the commentary in the legislative history.<sup>42</sup> Though the provision has been implicated in a number of recent cases involving the contours of the safe harbor,<sup>43</sup> the courts have as yet failed to produce a significantly detailed and fact-based discussion. This may be because the Section limits judicial interpretation rather than providing any outright imposition of duty or affirmative requirement. Though Section 512(m) best reflects the legislature's intention that liability not be conditioned on whether the OSP has an affirmative monitoring program, this point also holds implications for the interpretation of factors relevant to the safe harbors. In particular, this point may impact whether knowledge for the purposes of Section 512(c) can be demonstrated by behavior that falls within the freedom of choice regarding monitoring inherent in Section 512(m).

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<sup>41</sup> See 17 U.S.C. § 512(m) ("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) . . .").

<sup>42</sup> See generally H.R. REP. NO. 105-551, pt. 2, at 53, 61, 64 (1998), 1998 WL 414916 (describing the provisions of OCILLA that apply to OSPs' knowledge requirements and expressing the Committee's intent not to impose an affirmative monitoring duty though the safe harbor requires an OSP to implement a termination procedure for repeat infringers).

<sup>43</sup> See *In re Aimster Copyright Litig.*, 334 F.3d 643, 649–50 (7th Cir. 2003).

### C. Contrasting Notice, Actual Knowledge, Red Flag Knowledge, and Willful Blindness

Section 512(c)'s safe harbor from liability for information residing on a system or network at the direction of a user is contingent upon the OSP's level of knowledge. To be eligible for the safe harbor, the OSP may not have actual knowledge of the alleged infringement.<sup>44</sup> Nor can the OSP have knowledge of "facts and circumstances from which such infringing activity is apparent,"<sup>45</sup> which is commonly referred to as "red flag" knowledge or awareness. Upon gaining either actual knowledge or red flag knowledge, the OSP must then act expeditiously to remove or disable the infringing content.<sup>46</sup> A similar duty to remove or disable the content is imposed by receipt of a valid notification by a rights owner that the content is infringing.<sup>47</sup> The knowledge criteria imposed by the safe harbor are consistent with the pre-DMCA holding in *Netcom*,<sup>48</sup> which clarified that OSPs should not be directly liable for infringing content posted by users, which typically lies without reference to knowledge or intent.<sup>49</sup>

#### 1. Contrasting Notice and Knowledge

Notice and knowledge were deliberately distinguished by the legislature in crafting the DMCA's safe harbor language.<sup>50</sup> The role of knowledge for determining

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<sup>44</sup> See 17 U.S.C. § 512(c)(1)(A)(i) (2012).

<sup>45</sup> See *id.* § 512(c)(1)(A)(ii).

<sup>46</sup> See *id.* § 512(c)(1)(A)(iii).

<sup>47</sup> See *id.* § 512(c)(1)(C).

<sup>48</sup> Codified in § 512(a) of the DMCA.

<sup>49</sup> See BALLON, *supra* note 34, at § 4.12[6][C].

<sup>50</sup> This may have been an attempt to reconcile the concerns of OSPs, which sought to limit the circumstances under which they would "know" of infringement to purely notice, and those of the media industry, in which many members felt that a notice system alone would be too burdensome. See, e.g., *The Copyright Infringement Liability of Online and Internet Service Providers: Hearing before the Comm. on the Judiciary on S. 1146*, 105th Cong. 22–23 (1997) (statement of Daniel Burton, Vice President,

contributory infringement under the DMCA is different from that of notice; where knowledge provides a standard to impose liability for encouraging or aiding infringement, notice under the DMCA aims to provide a warning giving rise to a duty to investigate the activity complained of.<sup>51</sup> Emily Zarins argues that the specificity of notice and knowledge are correspondingly different. Where, Zarins argues, there is no specificity required of knowledge in the contributory infringement context, “[i]n contrast, the notification requirements impose a high burden on the copyright owner to provide very specific information to the service provider. Because the service provider is not expected to cull through its pages constantly, it needs detailed directions when it is called upon to search its content.”<sup>52</sup> This perspective emerged prior to much of the current case law governing the specificity of knowledge under the DMCA, but it is instructive nonetheless.

Zarins’ argument that the roles of notification and knowledge are separate in assessing OSP liability also suggests that it is possible for a service provider to have *generalized* knowledge of infringement without having *particularized* notice, which would strip away the safe harbor. While she posits that notification under the DMCA should not impose knowledge for the purposes of contributory liability,<sup>53</sup> Zarins’ reasoning also introduces the opposite consideration: should constructive knowledge impose liability or a duty to investigate commensurate with notice under the safe harbor? The legislative history indicates that the purpose of the safe harbor was to construct a shield between knowledge and liability:

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Novell) (explaining why the “notice and takedown” provisions of the bill do not sufficiently incentivize OSPs to cooperate with rights owners).

<sup>51</sup> See Emily Zarins, Comment, *Notice Versus Knowledge Under the Digital Millennium Copyright Act’s Safe Harbors*, 92 CALIF. L. REV. 257, 288 (2004).

<sup>52</sup> *Id.* at 288–89.

<sup>53</sup> See *id.* at 297.

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.<sup>54</sup>

The strict understanding of the safe harbor imposes the same requirements on knowledge as on notice—e.g., imposing a duty on the OSP to disable access or remove infringing material in response to specific knowledge in the same manner in which it would respond to a substantially compliant notification.<sup>55</sup>

## 2. Actual and Apparent Knowledge in Section 512

Actual and apparent knowledge both impose a duty on the OSP to investigate or take down allegedly infringing content under Section 512, and failure to do so will remove safe harbor protection.<sup>56</sup> Actual knowledge in Section 512(c)(1)(A)(i) is a fairly straightforward standard.<sup>57</sup> Apparent knowledge, defined in Section 512(c)(1)(A)(ii) as “facts [and] circumstances from which infringing activity is apparent,”<sup>58</sup> naturally inspires more discussion in the courts by virtue of being more open to interpretation.

These “facts and circumstances” are referred to as “red flag” knowledge (the term used for the duration of this Note). Though the statute does not speak to the specificity of knowledge required to trigger a duty to investigate or take down the content, precedent has established that knowledge must be of specific, particularized instances of

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<sup>54</sup> H.R. REP. NO. 105-796, at 73 (1998) (Conf. Rep.), *reprinted in* 1998 U.S.C.C.A.N. 639, 649.

<sup>55</sup> See BALLON, *supra* note 34, at § 4.12[6][C] (2012).

<sup>56</sup> See *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 643 (S.D.N.Y. 2011) (citing *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 520–21 (S.D.N.Y. 2010)).

<sup>57</sup> 17 U.S.C. § 512(c)(1)(A)(i) (2012).

<sup>58</sup> See *id.* § 512(c)(1)(A)(ii).

infringement.<sup>59</sup> Such knowledge has both a subjective and an objective element.<sup>60</sup> Consequently, Section 512(c)(1)(A)(ii) is understood to impose an apparent knowledge standard, rather than one of constructive knowledge.<sup>61</sup>

### 3. Willful Blindness

Willful blindness is a doctrine that originated in criminal law. In its most basic form, willful blindness is found where the defendant subjectively knew of a high probability of the existence of a fact (in our discussion, copyright infringement) and took deliberate steps to avoid objectively learning of that fact.<sup>62</sup> Knowledge, for the purpose of offenses requiring that mental state, means the actual awareness of the existence of a particular fact.<sup>63</sup>

Courts have emphasized that the doctrine takes into account circumstances of which the defendant was subjectively aware, and not those apparent from the objective viewpoint of a reasonable person in the defendant's condition.<sup>64</sup> Moreover, before a criminal court will give a willful blindness instruction to the jury, it generally requires particularized evidence of deliberate avoidance. The classic example of an oft-cited jury instruction for willful blindness—stemming from a case involving drugs smuggled in the

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<sup>59</sup> See *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 29 (2d Cir. 2012).

<sup>60</sup> See H.R. REP. NO. 105-551, pt. 2, at 53 (1998), 1998 WL 414916.

<sup>61</sup> See *Corbis Corp. v. Amazon.com*, 351 F. Supp. 2d 1090, 1108 (W.D. Wash. 2004).

<sup>62</sup> See MODEL PENAL CODE § 2.02 (1981).

<sup>63</sup> See Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 193 (1990).

<sup>64</sup> See Shawn D. Rodriguez, Comment, *Caging Careless Birds: Examining Dangers Posed by the Willful Blindness Doctrine in the War On Terror*, 30 U. PA. J. INT'L L. 691, 718 (2008) (citing *United States v. Oppong*, 165 F. App'x 155, 163 (3d Cir. 2006); *United States v. Khoroizian*, 333 F.3d 498, 508 (3d Cir. 2003); *United States v. Caminos*, 770 F.2d 361, 365 (3d Cir. 1985)).

trunk of an automobile—confirms that willful blindness has both subjective and objective elements.<sup>65</sup>

Because in order to “know” a fact, one must be aware of its certainty or near certainty, and in order to be reckless, one has at most a substantial awareness of a probability, many conclude that the “awareness” element of willful blindness falls somewhere in between the two.<sup>66</sup> There are several conceptions of willful blindness that fall at various places along the spectrum: one can think of willful blindness as knowledge- or belief-based,<sup>67</sup> one can imagine it as closer to recklessness, or one can view it as a question of intent.<sup>68</sup>

The importation of willful blindness into common law copyright principles began relatively recently. Cases involving the DMCA generally note with acceptance the principle that “[w]illful blindness is knowledge, in copyright

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<sup>65</sup> *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003) (“In considering the issue of knowledge, you should further be aware that under the law this element can be satisfied by inferences drawn from proof that a defendant deliberately closed her eyes to what would otherwise have been obvious to her . . . . If you find from all the evidence beyond a reasonable doubt that the defendant was aware of a high probability that drugs were hidden in her luggage, but deliberately closed her eyes to that probability, you may treat this deliberate avoidance of positive knowledge as the equivalent of knowledge. I emphasize, however, that knowledge cannot be established merely by showing negligence or even foolishness on the part of the defendant. In other words, you may find that the government has satisfied its burden of proving knowledge if you find either; one, that the defendant actually knew the drugs were in the luggage; or, two, that she deliberately closed her eyes to and ignored what she had every reason to believe was the fact. Now, on the other hand, if you find that the defendant actually believed that there were no drugs in the luggage, then this element of the offense would not be satisfied.”).

<sup>66</sup> See Robin Charlow, *Willful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1382 (1992).

<sup>67</sup> This is the strict conception of willful blindness based on the language of the Model Penal Code, which states that “knowledge [of the existence of a fact] is [also] established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.” MODEL PENAL CODE § 2.02(7) (1981).

<sup>68</sup> See generally Charlow, *supra* note 66, at 1366–72 (analyzing various methods for defining what constitutes willful ignorance).



law . . . as it is in the law generally.”<sup>69</sup> The Seventh Circuit has referred to a 1987 case which implied that not only is willful blindness found where the defendant had a subjective belief in the high probability of the infringement, but even perhaps where the defendant *should* have known of such activity.<sup>70</sup> This acknowledgment may indicate a willingness on the part of the courts to expand even the traditional understanding of willful blindness to fit the needs of intellectual property. However, it may require more investigation to determine whether willful blindness appropriately meets the needs of the DMCA.

One of the problematic aspects of wrongs that require knowledge as an element is the perpetrator’s ability to avoid liability simply by avoiding knowledge. The courts have found willful blindness a useful means of imposing liability on “bad faith” actors who intentionally avoid satisfying all of the elements of a knowledge-based crime. However, is it reasonable to infer that avoidance of such knowledge necessarily stems from a motive to avoid liability? Some have suggested adding a motive prong to the willful blindness analysis under the DMCA to sufficiently resolve this question for the interests of OSPs.<sup>71</sup> As of yet, the law has not made such an accommodation, nor have courts explicitly articulated how willful blindness should, as a practical matter, function as a proxy for actual knowledge under the DMCA.

### III. CONSIDERATION AND CONSEQUENCES OF *VIACOM V. YOUTUBE*

In April 2012, the Second Circuit joined the willful blindness discussion, reversing a grant of summary

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<sup>69</sup> *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003).

<sup>70</sup> *See id.* (citing *Casella v. Morris*, 820 F.2d 362, 365 (11th Cir. 1987)).

<sup>71</sup> Recent Case, *Copyright Law—Willful Blindness—Second Circuit Holds That Willful Blindness Is Knowledge in Digital Millennium Copyright Act Safe Harbor Provision.*—*Viacom International, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012), 126 HARV. L. REV. 645, 649 (2012).

judgment in favor of the defendant in *Viacom International, Inc. v. YouTube, Inc.*<sup>72</sup> *Viacom* represents the high-water mark for understanding willful blindness under Section 512 of the DMCA. Part III.A considers the history and holdings of the case in the Southern District of New York and the Second Circuit. Part III.B identifies three problems that arise from *Viacom* and its relationship with past case law interpreting the safe harbor's knowledge requirements.

#### A. The Case in the Southern District of New York and its Progression to the Second Circuit

Viacom International, Inc. ("Viacom") is a multimedia conglomerate based in New York City. Viacom was established as a public company in 1971<sup>73</sup> and Viacom Media Networks now manages "online and mobile platforms in over 160 countries and territories."<sup>74</sup> In 1994, Viacom completed a \$9.9 billion merger with Paramount Communications, Inc., giving the company a massive film empire in the form of Paramount Pictures.<sup>75</sup> As the foregoing information suggests, Viacom owns a huge portfolio of copyrighted content. Consequently, it has a correspondingly large and pressing interest in deterring and pursuing copyright infringement.

YouTube, Inc. ("YouTube") is an Internet company that provides space for users to upload their video content to the website [www.youtube.com](http://www.youtube.com). In the company's own words, "YouTube provides a forum for people to connect, inform, and inspire others across the globe and acts as a distribution platform for original content creators and advertisers large

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<sup>72</sup> See *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 19 (2d Cir. 2012).

<sup>73</sup> History, VIACOM, <http://www.viacom.com/about/Pages/history.aspx> (last visited Dec. 2, 2013).

<sup>74</sup> About Viacom, VIACOM, <http://www.viacom.com/about/pages/default.aspx> (last visited Dec. 2, 2013).

<sup>75</sup> History, VIACOM, *supra* note 73.

and small.”<sup>76</sup> Founded in February 2005, YouTube was an instant sensation. By July 2006, it had 100 million views and 65,000 video uploads per day.<sup>77</sup> Google, Inc. acquired YouTube in October 2006 for \$1.65 billion.<sup>78</sup> As of 2013, the YouTube website is visited by one billion unique users per month, receives 100 hours of video uploaded per minute,<sup>79</sup> and provides a live-streaming feature of special events such as notable interviews and speeches, political debates, sports games, and concerts. In addition to providing a forum for uploading amateur home videos, the site is utilized by politicians, government entities, news agencies, brands, and celebrities to distribute music videos, video advertisements, and broadcast messages to a wide number of people around the globe.<sup>80</sup>

## 1. *Viacom in the Southern District of New York*

On March 13, 2007, Viacom punctuated a long dispute with YouTube over the presence of its content on the latter’s site by filing suit.<sup>81</sup> Viacom asserted that “[s]ome entities,

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<sup>76</sup> *About YouTube*, YOUTUBE, <http://www.youtube.com/yt/about> (last visited Dec. 2, 2013).

<sup>77</sup> *YouTube Serves Up 100 Million Videos a Day Online*, USA TODAY, Jul. 16, 2006, [http://usatoday30.usatoday.com/tech/news/2006-07-16-youtube-views\\_x.htm](http://usatoday30.usatoday.com/tech/news/2006-07-16-youtube-views_x.htm).

<sup>78</sup> *Google to Buy YouTube for \$1.65 Billion in Stock*, N.Y. TIMES DEALBOOK (Oct. 9, 2006, 4:23 PM), <http://dealbook.nytimes.com/2006/10/09/google-to-buy-youtube-for-165-billion-in-stock/>.

<sup>79</sup> *Statistics*, YOUTUBE, <http://www.youtube.com/yt/press/statistics.html> (last visited Dec. 2, 2013).

<sup>80</sup> YOUTUBE, <http://www.youtube.com> (last visited Dec. 2, 2013). For example, a visit to the site shows recommended videos uploaded by the following users: “whitehouse” (the official YouTube channel of the White House), “CBSNewsOnline,” “TheNewYorkTimes,” “officialpsy” (the official YouTube channel of the South Korean music artist PSY, of “Gangnam Style” fame), “RihannaVEVO” (the official YouTube channel for music artist Rihanna), and “collegehumor” (the official YouTube channel for online comedy website [www.collegehumor.com](http://www.collegehumor.com)).

<sup>81</sup> Complaint for Declaratory and Injunctive Relief and Damages, *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (No. 1:07CV02103), 2007 WL 775611.

rather than taking the lawful path of building businesses that respect intellectual property rights on the Internet, have sought their fortunes by brazenly exploiting the infringing potential of digital technology,” and charged that “YouTube is one such entity . . . [and is] harness[ing] technology to willfully infringe copyrights on a huge scale.”<sup>82</sup> The content at issue included segments of popular shows and motion pictures such as “SpongeBob SquarePants,” “The Daily Show with Jon Stewart,” “The Colbert Report,” “South Park,” “An Inconvenient Truth,” and “Mean Girls,” comprising “more than 150,000 unauthorized clips of their copyrighted programming on YouTube that had been viewed an astounding 1.5 billion times.”<sup>83</sup> The complaint alleged direct, contributory, vicarious, and induced copyright infringement.<sup>84</sup> YouTube responded that

Viacom’s complaint in this action challenges the careful balance established by Congress when it enacted the Digital Millennium Copyright Act. The DMCA balances the rights of copyright holders and the need to protect the [I]nternet as an important new form of communication. By seeking to make carriers and hosting providers liable for [I]nternet communications, Viacom’s complaint threatens the way hundreds of millions of people legitimately exchange information, news, entertainment, and political and artistic expression.<sup>85</sup>

Both the plaintiffs and the defendants moved for summary judgment. YouTube claimed the protection of the DMCA safe harbor by virtue of the fact that it did not have “notice” (knowledge) of the alleged infringement.<sup>86</sup> The

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<sup>82</sup> Complaint for Declaratory and Injunctive Relief and Damages at 2, *Viacom*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (No. 1:07CV02103).

<sup>83</sup> *Id.* at 2–3.

<sup>84</sup> *See id.* at 3.

<sup>85</sup> Defendants’ Answer and Demand for Jury Trial at 1, *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (No. 1:07CV02103), 2007 WL 1724620, at \*1.

<sup>86</sup> *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 516 (S.D.N.Y. 2010).

plaintiffs countered in a partial summary judgment motion that, per the statute, YouTube did have knowledge, either actual or through awareness of “facts and circumstances from which infringing activity [was] apparent,” and was otherwise ineligible for the safe harbor.<sup>87</sup>

Viacom’s Memorandum of Law supporting its motion for summary judgment mentioned “willful blindness” no fewer than thirty-one times. However, this reference to willful blindness appeared to apply to the general policies of the YouTube website, rather than evidence of specific infringing videos. For example, Viacom claimed that, post-Google acquisition, “Google reversed its own earlier copyright compliance policies and adopted YouTube’s willful blindness strategy. Instead of screening as was done at Google Video, now every infringing video would remain freely available on YouTube until a copyright owner could detect it and send a takedown notice.”<sup>88</sup> Google asserted that such activity was compliant with the DMCA as understood at the time, and that it did not constitute willful blindness.<sup>89</sup> Viacom urged the court to follow a willful blindness conception of knowledge, adding that “[f]or defendants to prevail, they must have this Court read the concept of willful blindness out of copyright law and the DMCA statute even though it is applied universally, even in the criminal law, as a form of knowledge.”<sup>90</sup> The district court did not specifically respond

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<sup>87</sup> *Viacom*, 718 F. Supp. 2d at 516 (internal quotation marks omitted).

<sup>88</sup> Memorandum of Law in Support of Viacom’s Motion for Partial Summary Judgment on Liability and Inapplicability of the Digital Millennium Copyright Act Safe Harbor Defense at 17, *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (1:07CV02103), 2010 WL 1004561 at \*14.

<sup>89</sup> YouTube agreed with this assessment, asserting that “[p]laintiffs repeatedly invoke the concept of ‘willful blindness.’ But what plaintiffs attack is actually *compliance* with the DMCA.” Defendant’s Opposition to Plaintiffs’ Motions for Partial Summary Judgment at 32, *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (1:07CV02103), 2010 WL 3054854 at \*22 (citation omitted).

<sup>90</sup> Memorandum of Law in Support of Viacom’s Motion for Partial Summary Judgment on Liability and Inapplicability of the Digital Millennium Copyright Act Safe Harbor Defense at 52, *Viacom Int’l, Inc. v.*

to Viacom's invocation of willful blindness in its opinion. However, Judge Louis Stanton did take the opportunity to address willful blindness on remand, as discussed below.

Viacom produced evidence designed to show that YouTube had taken "affirmative steps to deprive itself of item-specific knowledge" in an effort to retain DMCA protection, which amounted to willful blindness.<sup>91</sup> For instance, Viacom alleged that YouTube discontinued a community flagging feature due to the prevalence of copyright infringement reports received.<sup>92</sup> YouTube fired back that the feature had been discontinued due to the reporting of non-infringing content along with unlicensed copyrighted material.<sup>93</sup> Viacom also complained of discrimination in YouTube's fingerprinting technology policies, implying that YouTube deliberately turned a blind eye by refusing to use "existing fingerprinting technology"

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YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (1:07CV02103), 2010 WL 1004561 at \*31.

<sup>91</sup> Amir Hassanabadi, Note, *Viacom v. Youtube—All Eyes Blind: The Limits of the DMCA in a Web 2.0 World*, 26 BERKELEY TECH. L.J. 405, 426 (2011) (internal quotation marks omitted).

<sup>92</sup> See Viacom's Reply to Defendants' Counterstatement to Viacom's Statement of Undisputed Facts in Support of Its Motion for Partial Summary Judgment at 40–41, *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (No. 07-2103) (stating that: "On September 23, 2005, YouTube cofounder Chad Hurley emailed YouTube cofounders Steve Chen and Jawed Karim, stating: '[C]an we remove the flagging link for "copyrighted" today? [W]e are starting to see complaints for this and basically if we don't remove them we could be held liable for being served a notice.'"). Such a community reporting policy is by nature a general activity; in order to show that discontinuing the policy constituted willful blindness, Viacom would have to produce evidence that YouTube had a subjective knowledge of a high probability of the infringing nature of a specific file and that such action was deliberately calculated to avoid confirming that suspicion. One question this does introduce into the analysis is whether such "deliberate steps of avoidance" can apply prospectively—that is, can one be willfully blind if one takes the action of avoidance before having subjective knowledge of a high probability of the fact's existence?

<sup>93</sup> Defendant's Opposition to Plaintiffs' Motions for Partial Summary Judgment at 19, *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (No. 07-2103), 2010 WL 3054854 at \*16.

until 2007, and even then only making it available to content owners who entered into a revenue sharing agreement.<sup>94</sup> Conversely, one could respond that this activity does not constitute turning a “blind eye,” but merely adopting an affirmative monitoring program of the type contemplated by the legislature in enacting the statute and, more importantly, that the failure to offer such technology cannot be a premise upon which to base liability.<sup>95</sup>

Judge Stanton granted summary judgment for the defendants on June 23, 2010.<sup>96</sup> In its opinion, the court clarified that knowledge of infringement must mean knowledge of the infringing nature of a specific piece of content, not simply knowledge that infringement occurs generally on the site or on the part of a user:

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.<sup>97</sup>

Moreover, the court confirmed that such an interpretation was consistent with the purpose of the DMCA—to provide certainty for OSPs while balancing the interests of rights

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<sup>94</sup> See Memorandum of Law in Support of Viacom’s Motion for Partial Summary Judgment on Liability and Inapplicability of the Digital Millennium Copyright Act Safe Harbor Defense at 32–37, *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (No. 07-2103), 2010 WL 1004561 at \*22–25.

<sup>95</sup> “Courts should not conclude that the service provider loses eligibility for limitations on liability under section 512 solely because it engaged in a monitoring program.” H.R. REP. NO. 105-796, at 73 (1998) (Conf. Rep.), *reprinted in* 1998 U.S.C.C.A.N. 639, 649; *see also* Digital Millennium Copyright Act, 17 U.S.C. § 512(m)(1) (2012).

<sup>96</sup> *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 529 (S.D.N.Y. 2010).

<sup>97</sup> *Id.* at 523.

owners. The burden of proving infringement is much lower for rights owners, who are presumably experts on whether the implicated content is genuine:

[T]he 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.<sup>98</sup>

When Viacom did object to over 100,000 suspected videos it had identified over a period of months, in the form of a mass notification on February 2, 2007, YouTube responded quickly and removed the great majority of them by the next business day.<sup>99</sup> The court referenced extensive precedent as support for its ultimate conclusion that "[g]eneral knowledge that infringement is 'ubiquitous' does not impose a duty on the service provider to monitor or search its service for infringements."<sup>100</sup> An essential underlying principle of this conclusion was an emphasis that "if investigation of 'facts and circumstances' is required to identify material as infringing, then those facts and circumstances are not 'red flags.'"<sup>101</sup>

## 2. The Decision Is Appealed

Viacom subsequently appealed to the Second Circuit. In anticipation of the appeal, each side gained a number of amici curiae (fifteen in total), who predictably split according to industry. Amici from the creative industries and traditional academic circles wrote in support of the plaintiffs-appellants, while technology companies such as eBay, Facebook, and the Consumer Electronics Association backed

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<sup>98</sup> *Viacom*, 718 F. Supp. 2d at 524.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 525.

<sup>101</sup> *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1108 (C.D. Cal. 2009) (citation omitted).



YouTube.<sup>102</sup> The fight was particularly contentious because the result could have had profound implications for the business models of the members of each industry. Of these briefs, several addressed Viacom's willful blindness argument in some depth.

Many briefs argued that the district court's decision made way for a "willful blindness" policy that would encourage service providers to dismantle infringement detection facilities as a means of avoiding knowledge.<sup>103</sup> A group of professors focusing on the "economic incentives of legal liability rules" agreed and asserted that the language of the DMCA, through its inclusion of knowledge as an element of copyright infringement, implicitly supported the use of willful blindness as knowledge.<sup>104</sup> Conversely, Facebook,

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<sup>102</sup> Unusually, however, the American Intellectual Property Law Association (AIPLA) agreed with the defendant, though without writing in support of either party. See Brief of Amicus Curiae, American Intellectual Property Law Association, in Support of Neither Party at 2, *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012) (10-3270-cv, 10-3342-cv), 2010 WL 4930316, at \*2 ("The district court correctly held that the DMCA requires either 'actual knowledge' of specific instances of infringement, or awareness of 'facts or circumstances' from which specific instances of infringing activity are apparent. Whether based on actual knowledge or awareness of facts or circumstances, the level of knowledge that is sufficient to strip the ISP of its protection under Section 512 of the Copyright Act, as amended by the DMCA[,] is knowledge of specific instances of infringement. The district court's holding is consistent with the legislative history of the DMCA and relevant case law. AIPLA urges this Court to reject Viacom's broad attempt to deprive Internet service providers of the benefits of the safe harbor provisions of the DMCA based on generalized knowledge that infringing activity is occurring on a site.").

<sup>103</sup> See, e.g., Brief of Amici Curiae Advance Publications, Inc. et al. in Support of Appellants and Reversal at 8, *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012) (10-3270-cv, 10-3342-cv), 2010 WL 5167430, at \*8 (contending that Congress intended to prevent willful blindness).

<sup>104</sup> Brief of Amici Curiae Matthew L. Spitzer et al. in Support of Plaintiffs-Appellants at 1, 6, *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012) (10-3270-cv, 10-3342-cv), 2010 WL 5167437, at \*1, \*6 ("The question . . . is whether the DMCA should be interpreted nonetheless to allow an ISP to escape liability by taking active steps to deliberately avoid actual knowledge of infringement on its system or

Inc., eBay, Inc., IAC/InteractiveCorp., and Yahoo! Inc. proclaimed that “the plaintiffs employ circular reasoning to distort the actual knowledge or awareness requirement by using ‘willful blindness’ to annul the effect of Section 512(m).”<sup>105</sup> Interestingly, the amici demonstrated the reasoning that, in their view, accompanied Viacom’s charge:

- (a) YouTube’s failure to monitor or affirmatively seek facts indicating infringing activity constitutes willful blindness;
- (b) Such willful blindness constitutes YouTube’s actual knowledge of infringements;
- (c) Such knowledge nullifies YouTube’s innocence;
- (d) Section 512(m) applies to only innocent parties;
- (e) Therefore YouTube must monitor or affirmatively seek facts indicating infringing activity.<sup>106</sup>

The brief further argued that the district court correctly rejected Viacom’s willful blindness argument because a converse decision would have applied a monitoring obligation as a condition of preserving the safe harbor.<sup>107</sup>

### 3. Second Circuit Decision

On April 5, 2012, the Second Circuit handed down a complex decision that affirmed in part, reversed in part, vacated in part, and remanded the district court’s decision. On the issue of knowledge, the court confirmed that liability

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network, such that the willfully blind would be entitled to invoke the DMCA’s safe harbor. From a law and economics perspective, the answer is clearly no; any rule that would give ISPs the shelter of the safe harbor as a reward for taking active steps as a ploy to remain willfully blind is simply illogical.”).

<sup>105</sup> Brief for Amici Curiae eBay Inc., Facebook Inc., IAC/InteractiveCorp, and Yahoo! Inc. Supporting Defendants-Appellees and Urging Affirmance at 24, *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012) (10-3270-cv, 10-3342-cv), 2011 WL 1536815, at \*24.

<sup>106</sup> *Id.* at 25, 2011 WL 1536815, at \*25.

<sup>107</sup> See *id.* This Note also argues that any understanding of willful blindness in the safe harbor must be narrowly tailored so as to avoid such an imposition of an affirmative duty—and that such an understanding is found in the statutory language of Section 512(c)(1)(A)(ii) of the DMCA.

under the DMCA and removal of the safe harbor protections requires actual knowledge of or awareness of facts and circumstances indicating infringement relating to specific and identifiable instances of infringement.<sup>108</sup> This view substantially affirmed the district court's holding, using the language of the statute to support the conclusion that expeditious removal of infringing material was only possible upon possessing knowledge specific enough to identify it.<sup>109</sup> The court distinguished actual knowledge and red flag knowledge by clarifying that the difference between them hinges on objective versus subjective belief. Actual knowledge provides a subjective standard, while the "red flag" provision makes a judgment based on the available facts and circumstances—that is, from those facts and circumstances, would the infringement be objectively "obvious" to a reasonable person?<sup>110</sup> Importantly, Judge José Cabranes approvingly cited the Central District of California's holding in *UMG Recordings, Inc. v. Veoh Networks, Inc.*, which declared that "if investigation of 'facts and circumstances' is required to identify material as infringing, then those facts and circumstances are not 'red flags'."<sup>111</sup>

Most significantly, however, Judge Cabranes turned his pen toward Viacom's willful blindness argument. The court began with a general pronouncement that willful blindness has been used as knowledge in the common law doctrines of criminal law, patents, trademark, and copyright.<sup>112</sup> Based on principles of statutory interpretation, the court found that a principle of law will be abrogated "only if the statute 'speak[s] directly to the question addressed by the common law.'"<sup>113</sup> The closest provision the court could find that

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<sup>108</sup> *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 19 (2d Cir. 2012).

<sup>109</sup> *Id.* at 30.

<sup>110</sup> *Id.* at 31.

<sup>111</sup> *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1108 (C.D. Cal. 2009).

<sup>112</sup> *See Viacom*, 676 F.3d at 34 ("The principle that willful blindness is tantamount to knowledge is hardly novel.") (citation omitted).

<sup>113</sup> *Id.* at 35 (quoting *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009)).

“spoke to” willful blindness doctrine was the “no affirmative duty” language in Section 512(m). The court confirmed that the DMCA safe harbor cannot be conditioned on affirmatively seeking out or monitoring for infringing activity, but also wrote that “willful blindness cannot be defined as an affirmative duty to monitor.”<sup>114</sup> Consequently, the court held that because the statute does not abrogate the doctrine, willful blindness “may be applied, in appropriate circumstances, to demonstrate knowledge or awareness of specific instances of infringement,” although it is limited by Section 512(m).<sup>115</sup>

#### 4. Remand: Judge Stanton Strikes Back

Less than two months after YouTube’s final brief was submitted in the remanded case in the Southern District of New York, Judge Stanton defended his previous summary judgment with a strong opinion that again found in favor of YouTube.<sup>116</sup> Judge Stanton began by reiterating that, despite Viacom’s argument to the contrary, YouTube did not have the burden to prove lack of knowledge or notice of infringement for any of the clips in suit to benefit from the affirmative defense provided by the Section 512(c) safe harbor.<sup>117</sup> “[t]he argument is ingenious, but its foundation is an anachronistic, pre-Digital Millennium Copyright Act (DMCA), concept. . . . Congress has determined that the burden of identifying what must be taken down is to be on the copyright owner, a determination which has proven practicable in practice.”<sup>118</sup> Viacom’s admission that “neither side possesses the kind of evidence that would allow a clip-by-clip assessment of actual knowledge” established that it

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<sup>114</sup> *Viacom*, 676 F.3d at 35 (citing *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003)).

<sup>115</sup> *Id.*

<sup>116</sup> See *Viacom Int’l, Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110 (S.D.N.Y. 2013).

<sup>117</sup> *Id.* at 114.

<sup>118</sup> *Id.* at 114–15.

could not fulfill its burden of demonstrating actual knowledge.<sup>119</sup>

Turning to the willful blindness issue presented by the Second Circuit, Judge Stanton found insufficient support for this form of knowledge on YouTube's part. Importantly, the primary barrier to a finding of willful blindness was a convergence of the DMCA's specificity requirement and the "no affirmative duty to monitor" provision in Section 512(m)(1). In Judge Stanton's view, the examples provided by Viacom that allegedly supported a showing of willful blindness "give at most information that infringements were occurring with particular works . . . . The specific locations of infringements are not supplied: at most, an area of search is identified, and YouTube is left to find the infringing clip."<sup>120</sup> Viacom had already admitted that it could not provide evidence of actual knowledge, and the notice provided to YouTube was not sufficient to identify the allegedly infringing clips. After all, even identifying the particular content of a clip at issue is not enough to differentiate it from the potentially legally-uploaded duplicates available on the site. Even this form of notice did not require YouTube to sort through the hundreds of potentially-infringing clips to "affirmatively seek[] facts indicating infringing activity."<sup>121</sup>

Judge Stanton's holding demonstrates the practical difficulty of reconciling the importation of common law copyright standards with the specific scenario that the DMCA was enacted to address. Below, this Note identifies the three major concerns that limit the success of willful blindness theory under the DMCA safe harbor regime.

### B. Three Problems Arising from *Viacom's* Relationship with Section 512(c) Case Law

Consideration of the legislative history of the safe harbors and its case law reveals three distinct issues that must be addressed in any complete understanding of the role of

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<sup>119</sup> *Viacom*, 940 F. Supp. 2d at 114.

<sup>120</sup> *Id.* at 116–17.

<sup>121</sup> *Id.* at 117.

willful blindness under the DMCA. One must first, as Part III.B.1 argues, reconcile willful blindness with the long line of precedent that requires knowledge under the Section 512(c) safe harbor (both actual and apparent) to apply to specific instances of infringement rather than general activity. Second, Part III.B.2 makes clear that any understanding of willful blindness must also, by necessity, avoid factually and legally imposing an affirmative monitoring duty in contravention of Section 512(m); this doctrine draws the limits of willful blindness as understood by the courts, but remains an abstract principle rather than an easily recognizable bright line. Finally, Part III.B.3 asserts that the courts must strive to maintain the essence of the statutory compromise struck in 1998, while adapting flexibly to the realities of the modern Internet as its audience and capacity for infringement expand in pace.

### 1. The Requirement of Specific Knowledge

At the core of the specific knowledge requirement is the dual question of whether it is appropriate for the courts to read specificity into the statutory language, and, consequently, whether it is also or alternatively appropriate for the court to read willful blindness into the knowledge prong. This Note accepts that, based on the legislative history, the language of the statute, and subsequent judicial interpretation, the status quo of requiring knowledge of specific instances of infringement in order to defeat the safe harbor is appropriate and desirable. Copyright law has a longstanding tradition of referring to legislative history.<sup>122</sup> In fact, many courts consult legislative history even in the absence of statutory ambiguity.<sup>123</sup> Beyond the language of the statute, which the *Viacom* court concluded supports a

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<sup>122</sup> See *Wheaton v. Peters*, 33 U.S. 591, 661 (1834); *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).

<sup>123</sup> See 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 2:37 (2013).

requirement of specific knowledge,<sup>124</sup> the legislative history contains several references to a need for specific knowledge.

The safe harbor was implemented to allow OSPs to take steps to combat infringement and limit their own liability in a predictable manner. In the materials that Viacom submitted to the Second Circuit, it claimed that “over 70%” of the material on the YouTube website was subject to copyright.<sup>125</sup> This percentage is, in fact, too low. The nature of copyright is that it is ubiquitous and nondiscriminatory; the video of my hamster’s summer vacation is protected by copyright to the same extent as Viacom’s coveted Daily Show clips.<sup>126</sup> Because almost every piece of content on, for example, YouTube is protected by copyright (with the exception of those works that have fallen into the public domain), loss of the safe harbor due to knowledge that infringement occurs generally on the site would require the OSP to actively police each video and investigate whether it is covered by copyright, whether the video has been uploaded by the rights owner, and whether the content is covered by any exceptions to liability (such as fair use).

Where does willful blindness fit into this conception of knowledge? To the extent that it is even possible to be willfully blind to infringement in the context of a user-

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<sup>124</sup> *Viacom*, 676 F.3d at 30–31 (“Thus, the nature of the removal obligation itself contemplates knowledge or awareness of specific infringing material, because expeditious removal is possible only if the service provider knows with particularity which items to remove. . . . Such a view cannot be reconciled with the language of the statute, which requires ‘expeditious[]’ action to remove or disable ‘the material’ at issue.”) (alteration and emphasis in original).

<sup>125</sup> Opening Brief for Plaintiffs-Appellants at 14, *Viacom Int’l., Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012) (No. 10-3270), 2010 WL 4930315 at \*14.

<sup>126</sup> This example comes courtesy of Professor Jane Ginsburg. Professor Ginsburg also correctly notes that there is a discrepancy in the interest each item may hold for prospective viewers, advertisers, and copyright infringers. See Jane C. Ginsburg, *User-Generated Content Sites and Section 512 of the US Copyright Act* 197–98 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 10-255, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1711924](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1711924).

generated content website without having actual knowledge of that infringement, the purposes of the statute and interested parties are best served by understanding willful blindness under the Section 512(c) safe harbor as equivalent in form and consequence to red flag awareness.

## 2. Avoiding an Interpretation That Violates Section 512(m)

The purpose of the statutory safe harbor in the DMCA, as explored above, was to limit liability for service providers who did not have control over the user-generated content they hosted, yet who made an expeditious and good faith effort to satisfy the demands of rights owners.<sup>127</sup> This balance was preserved not only through the language of the safe harbor itself, but also through the introduction of Section 512(m)(1), which prohibits the imposition of an affirmative duty to monitor. OSPs are free to implement their own monitoring program to enable them to better avoid liability, but the legislature intended that such voluntary action be irrelevant to any duty. The Second Circuit in *Viacom* claimed that Section 512(m)(1) is the provision of the DMCA that most closely “speak[s to]” the willful blindness doctrine.<sup>128</sup> If this is truly as close as the statute comes to willful blindness, is this a whisper or a shout? YouTube argued that willful blindness is precluded from the DMCA knowledge analysis by Section 512(m)<sup>129</sup>—is this necessarily so?

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<sup>127</sup> See H.R. REP. NO. 105-796, at 72 (1998) (Conf. Rep.), *reprinted in* 1998 U.S.C.C.A.N. 639, 649 (“Title II [the Online Copyright Infringement Liability Limitation Act] preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment. At the same time, it provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.”).

<sup>128</sup> See *Viacom*, 676 F.3d at 35.

<sup>129</sup> See Defendant's Opposition to Plaintiffs' Motions for Partial Summary Judgment at 32, *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (1:07CV02103), 2010 WL 3054854 at \*22.



Underlying the concern over the interaction between these two principles—one common law and one statutory—is the fact that willful blindness is composed of two prongs. The first of these prongs would not independently satisfy the statute’s knowledge requirement, but it remains sufficient to trigger what is essentially a duty to investigate. The courts have acknowledged the idea that willful blindness should be shaped by Section 512(m)(1), but ultimately this relationship has remained unexplored. The difficulty stems, again, from the courts’ interpretation of the knowledge component of the safe harbor as requiring *specific* knowledge. Following the Second Circuit’s logic in *Viacom*, willful blindness is not awareness of “facts and circumstances” indicating infringement coupled with a failure to expediently remove the infringing content. Rather, willful blindness is something more, equal to and standing in for actual knowledge. As noted above, there is some controversy over whether red flag knowledge requires an objective element or whether it is willful blindness by another name.

Assume for the moment that red flag knowledge and willful blindness are separate and distinct concepts. This raises the question of whether the first prong of willful blindness should be characterized as something less than knowledge satisfying red flag awareness. Would requiring investigation in those circumstances thus impose an affirmative duty in contravention of Section 512(m)? The solution to this problem lies partly in the discussion above. Having established that the safe harbors are not mere reflections of common law liability, but that they serve to maintain a statutory balance between the risks faced by OSPs and the interests of copyright owners, it may be argued that the closest the DMCA comes to “speaking to” willful blindness is the concept of red flag knowledge.

### 3. Finding a Compromise

Finally, it is necessary to discuss whether the statutory balance imposed by the DMCA remains appropriate for the new digital millennium. Web 2.0, or the emergence of entities which base their business models on user-generated

content, has cultivated a far different landscape than that encountered by the legislature in the years preceding enactment of the DMCA.<sup>130</sup> Many businesses allow user-generated content without control over such content, but also without intending to encourage infringement. In such cases, the note struck by the DMCA still rings years later. Fostering innovation on the Internet requires special considerations that may not otherwise apply to common law copyright. For example, the virtual impossibility of policing a website that receives 100 hours of uploaded content every minute<sup>131</sup> is similarly reflected in the significant amount of discovery that would be required to demonstrate that an OSP was subjectively aware of a probability, but somehow did not have actual awareness of objectively damning facts and circumstances.

Compared to service providers, content owners are best able to evaluate whether user-generated content infringes their copyrights. They have the most intimate knowledge of both industry trends as well as their own content.<sup>132</sup> They have the strongest incentive to police and report infringing uses on the Internet.<sup>133</sup> The extensive discussion of 1997 and 1998 on the need to limit OSP liability and the “critical” role of knowledge for the safe harbor indicates that the DMCA’s statutory balance should not be lightly disrupted. To maintain coherence and predictability in the law of copyright infringement on the Internet, it is imperative that any solution leaves the burden of affirmative monitoring on content owners, while keeping the scope of liability in place.

However, content owners often counter that a limited liability scheme encourages manipulative and exploitative behavior: that is, strict—yet bad faith—compliance with the law. In *Viacom*, Viacom itself seemed to predicate its willful

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<sup>130</sup> See *supra* Part II.A.

<sup>131</sup> *Statistics*, YOUTUBE, <http://www.youtube.com/yt/press/statistics.html> (last visited Dec. 2, 2013).

<sup>132</sup> See Anna Katz, *Copyright in Cyberspace: Why Owners Should Bear the Burden of Identifying Infringing Materials Under the Digital Millennium Copyright Act*, 18 B.U. J. SCI. & TECH. L. 343, 368 (2012).

<sup>133</sup> See *id.*

blindness argument on the fact that YouTube's general business model encourages infringement. While the district court did not accept that such generalized knowledge could defeat the safe harbor, it did remark that willful blindness was the equivalent of knowledge for the purposes of Section 512. Viacom's stance thus raises a different point. Would an argument of willful blindness serve to circumvent safe harbor protection entirely by supporting the assertion that the OSP would be subject to inducement liability? Given the difficulties of demonstrating willful blindness in fact-intensive, specific instances as required by the safe harbor, future courts may choose to borrow from *Grokster*<sup>134</sup>(discussed *infra* in Part IV). They *may* hold that any argument based on a general policy of willful blindness must be sufficient to show that the OSP is not entitled to consideration of the safe harbor as a threshold issue, because such a policy reflects the OSP's primary purpose as a haven for infringement.

#### IV. EXPLORING THE STATUS QUO UNDER *AIMSTER*, RED FLAG KNOWLEDGE AS WILLFUL BLINDNESS, AND *GROKSTER*'S INDUCEMENT STANDARD

With willful blindness entrenched as a knowledge standard at common law, the primary discussion of this Note is whether this standard must (or should) also apply under the DMCA. Part IV of this Note explores three possible roles for willful blindness under the DMCA. First, Part IV.A introduces the status quo as an expanded reading of *Aimster*, an insertion of willful blindness as a supplement to the existing actual and red flag knowledge standards in Section 512. Second, Part IV.B posits that the red flag knowledge provision itself may be Congress's solution to the problem of willful blindness. Finally, Part IV.C questions whether willful blindness may be used as evidence not only of contributory liability, but of inducement sufficient to bypass

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<sup>134</sup> *Metro-Goldwyn-Meyer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

consideration for the safe harbor altogether. These three approaches reflect discrete functions of willful blindness in the DMCA context as a knowledge standard, a strictly statutory construction, or a reflection of intent.

#### A. The DMCA Reflects Common Law Knowledge Principles

Academics often ponder whether, and to what extent, the DMCA reflects common law principles of secondary liability. Many maintain that the safe harbor's knowledge provisions mirror those of common law secondary liability, which makes it appropriate to read common law principles into the statute.<sup>135</sup> However, it may also be said that the very nature of the safe harbor functions as a check on the imposition of secondary liability on service providers.

The seminal case discussing willful blindness as knowledge on the Internet is the Seventh Circuit's opinion in *In re Aimster Copyright Litigation*.<sup>136</sup> In *Aimster*, the Seventh Circuit issued the oft-cited proclamation that "[w]illful blindness is knowledge, in copyright law . . . as it is in the law generally."<sup>137</sup> The court apparently took the view that willful blindness and apparent knowledge were equivalent for the purposes of secondary liability.<sup>138</sup> This is true, in that a willfully blind defendant is deemed to have knowledge of the fact(s) that he or she sought to avoid. However, willful blindness is still conditioned on the circumstances actually in the defendant's knowledge at the time and not on the facts or circumstances that existed generally. The court referenced the famous drug case, *United States v. Diaz*, which found a defendant to be willfully blind by virtue of having absented himself from the

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<sup>135</sup> See R. Anthony Reese, *The Relationship Between the ISP Safe Harbors and the Ordinary Rules of Copyright Liability*, 32 COLUM. J.L. & ARTS 427, 431 (2009).

<sup>136</sup> *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003).

<sup>137</sup> *Id.* at 650.

<sup>138</sup> See *id.*

actual drug dealing transaction or otherwise shielding his eyes during the occurrence of criminal activity.<sup>139</sup>

In the intervening ten years, a small number of courts have used the opinion's most famous line ("[w]illful blindness is knowledge . . .") as the basis for an interpretation of knowledge under the DMCA that reflects common law secondary liability law in copyright. For example, in *Luvdarts, LLC v. AT&T Mobility, LLC*, the Ninth Circuit accepted as undisputed the "fact" that "[w]illful blindness of specific facts would establish knowledge for contributory liability."<sup>140</sup> *Viacom*, however, exhibited the most direct application of willful blindness to the knowledge provisions of Section 512(c).<sup>141</sup> The major question of this Note is whether judicial expansion of the statutory provisions is an appropriate response to the evolving rules of common law secondary copyright liability.

The impact of knowledge on liability appears to differ under the common law understanding and that of the DMCA. For example, the strict liability nature of common law copyright infringement dictates that, for contributory infringement, "the defendant need only have known of the direct infringer's activities, and need not have reached the legal conclusion that these activities infringed a copyrighted work."<sup>142</sup> This results from the fact that contributory liability is described simply as "with knowledge of the infringing activity, induc[ing], caus[ing] or materially contribut[ing] to the infringing conduct of another."<sup>143</sup> However, under the DMCA, simply being aware of the

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<sup>139</sup> See *In re Aimster Copyright Litig.*, 334 F.3d at 650 (citing *United States v. Diaz*, 864 F.2d 544, 550 (7th Cir. 1988)).

<sup>140</sup> *Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068, 1073 (9th Cir. 2013).

<sup>141</sup> See *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 41 (2d Cir. 2012).

<sup>142</sup> 2 PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* § 8.1, at 8:9 n.1 (3d ed. 2008).

<sup>143</sup> *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (quoting *Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

infringing activity does not suffice to defeat safe harbor protection unless the service provider fails to remove the infringing content expeditiously. Moreover, the statutory language, history, and subsequent interpretation support the conclusion that knowledge of the file's infringing nature is necessary, rather than just knowledge that the activity is taking place.<sup>144</sup>

The knowledge requirements under the common law and under the statute thus differ in small but important ways. This conclusion reflects the history of the DMCA as a legislative fix to a confused judicial reaction to the Internet and other rapid technological advances. Next, one must ask: to what extent can the common law shape interpretation of the statute? Or, rather, should the specific language of the statute not be supplemented? "As for secondary liability, the common law claims and the statutory conditions seem unlikely to converge when their differences are rooted in detailed statutory language or the complex interaction of multiple statutory sections."<sup>145</sup> It is conceivable that introducing willful blindness as a proxy for actual knowledge presents one of these very scenarios. The statute presents three categories of knowledge giving rise to a duty to investigate or remove the allegedly infringing content: notice, actual knowledge, and red flag knowledge.<sup>146</sup> The DMCA also provides a check on this duty in the form of Section 512(m). Where the knowledge provisions expressly articulated in the statute are also limited by Section 512(m)'s prohibition on the imposition of an affirmative monitoring duty, this Note suggests that the common law doctrine of willful blindness and knowledge under DMCA may in fact be unlikely to converge.

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<sup>144</sup> See Reese, *supra* note 135, at 433–34; see, e.g., *ALS Scan, Inc. v. RemarQ Cmty., Inc.*, 239 F.3d 619, 623 (4th Cir. 2001).

<sup>145</sup> *Id.* at 443.

<sup>146</sup> See 17 U.S.C. § 512(c) (2012).

## B. Red Flag Knowledge and Legislative Intent: Bringing an Objective Element to the Test?

Red flag knowledge has been much discussed but rarely identified in the post-DMCA case law. The legislative history of the DMCA supports reading the knowledge provisions to include willful blindness. Members of the legislature appeared to accept that the safe harbor provisions of the DMCA did not replace determination of liability at common law, but instead offered a shelter even if “the provider is found to be liable under existing principles of law.”<sup>147</sup>

The urgent nature of the discussion of OSP liability in 1997 and 1998 is compelling. Representative Howard Coble, who introduced the legislation in the House of Representatives and was instrumental in guiding the DMCA through Congress, urged that “[t]he level of knowledge required [was] critical.”<sup>148</sup> He asserted that requiring actual knowledge would be too narrow a standard that would incentivize OSPs to “look the other way and deliberately avoid learning of the infringement.”<sup>149</sup> On the other hand, a general negligence standard would be too broad to achieve the legislation’s purpose of limiting OSP liability on the Internet.<sup>150</sup> Interestingly, Rep. Coble confirmed that the facts and circumstances should “indicate that the material is infringing,” but need not be “sufficient to establish infringement in a court of law.”<sup>151</sup>

In discussing the knowledge standards, the House Judiciary Committee later intimated that “facts and circumstances from which infringing activity is apparent” included “information of any kind that a reasonable person would rely upon[,]” which “may, in appropriate

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<sup>147</sup> H.R. REP. NO. 105-796, at 73 (1998) (Conf. Rep.), *reprinted in* 1998 U.S.C.C.A.N. 639, 649.

<sup>148</sup> 143 CONG. REC. E1452 (daily ed. July 17, 1997) (statement of Rep. Coble), 1997 WL 399815.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

circumstances[,] include the absence of customary indicia of ownership or authorization, such as a standard and accepted digital watermark or other copyright management information.”<sup>152</sup> The Committee asserted, however, that the standard did not obligate a service provider to seek out red flags affirmatively:<sup>153</sup> “this standard differs from existing law, under which a defendant may be liable for contributory infringement if it *knows or should have known* that material was infringing.”<sup>154</sup> Moreover, the Committee clarified that subsection (iii) provided a standard that filled the gap between actual and constructive knowledge furnished by notice.<sup>155</sup> Consistent with the argument above, this view supports an understanding of red flag knowledge as *apparent*, rather than constructive, knowledge.

The Senate Judiciary Committee further clarified, in the context of its discussion on Section 512(d)—but referring also to Section 512(c)—that “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.”<sup>156</sup>

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 . . . 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.<sup>157</sup>

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<sup>152</sup> H.R. REP. NO. 105-551, pt. 1, at 25 (1998), 1998 WL 261605.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* (emphasis added).

<sup>155</sup> H.R. REP. NO. 105-796, at 92 (1998) (Conf. Rep.), reprinted in 1998 U.S.C.C.A.N. 639, 667–68.

<sup>156</sup> S. REP. NO. 105-190, at 48 (1998) (emphasis added).

<sup>157</sup> *Id.*



The most important objective underlying the red flag knowledge standard was to remove from the safe harbor "pirate directories" which referred users to websites where they could access copyrighted content illegally.<sup>158</sup> Because "even a brief and casual viewing" of these websites would alert an OSP to the infringing nature of their content, an OSP who failed to react expeditiously to such a "red flag" would be removed from the safe harbor.<sup>159</sup> The Senate Judiciary Committee asserted that the red flag test "strikes the right balance."<sup>160</sup>

It appears that the legislature's understanding of red flag knowledge is closely related to willful blindness. Both impute knowledge to the actor who willfully ignores circumstantial evidence of infringement (whether subjective or objective). The use of "blind eye"<sup>161</sup> language in the Committee's report further supports the conclusion that willful blindness was contemplated as a form of knowledge for the purposes of the safe harbor. However, the question remains as to whether the "facts and circumstances" sufficient to find willful blindness are equivalent to the "facts and circumstances" raising red flag knowledge in the eyes of the courts. The legislative history supports an interpretation of red flag knowledge that mirrors the objective and subjective elements of willful blindness. Both doctrines consider first the circumstances that the plaintiff subjectively knew, then advance to an objective analysis of whether those circumstances meet the threshold for knowledge.<sup>162</sup>

Legislative history also supports the interpretation of willful blindness as red flag knowledge because it contains language that equates a failure to respond to "red flags" of infringement in terms reminiscent of willful blindness: "[u]nder this standard, a service provider would have no

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<sup>158</sup> See S. REP. NO. 105-190, at 48.

<sup>159</sup> *Id.* at 48-49.

<sup>160</sup> *Id.* at 49.

<sup>161</sup> *Id.* at 48.

<sup>162</sup> See *supra* Part I.C.3.

obligation to seek out copyright infringement, but [the service provider] would not qualify for the safe harbor if it had turned a blind eye to 'red flags' of obvious infringement."<sup>163</sup> David Ludwig agrees with this assessment, if mainly because red flag knowledge appears carefully constructed to strike the balance between imposing too much responsibility (and, consequently, liability) on OSPs while addressing the problem of bad faith actors who may use willful blindness as a means of avoiding liability premised on actual knowledge.<sup>164</sup>

These interpretations of red flag knowledge and willful blindness are consistent with precedent. For instance, courts consistently adhere to the idea that red flag knowledge requires no further investigation than an examination of the allegedly infringing content.<sup>165</sup> Taking the classic example of willful blindness—that of the “drugs in the trunk” scenario—it is clear that actual knowledge of the criminal activity would be acquired by inspecting the trunk itself. Willful blindness is not shown by failing to seek information from sources other than the fact or circumstance at issue. Similarly, red flag knowledge is demonstrated by facts and circumstances indicating infringement that would be *confirmed by a simple inspection of the relevant content*.

Though the case law has not generally considered the issue of whether red flag knowledge represents a statutory incorporation of willful blindness doctrine, one court did acknowledge this possibility. *Columbia Pictures v. Fung* characterized willful blindness as the failure to follow up on

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<sup>163</sup> S. REP. NO. 105-190, at 48 (1998).

<sup>164</sup> See David Ludwig, *Shooting the Messenger: ISP Liability for Contributory Copyright Infringement*, 2006 B.C. INTELL. PROP. & TECH. F. 110701, 110701 (2006) (“The red flag test seems to be the statute’s answer to the problem of willful blindness, operating in the grey area between the no monitoring provision and the formal notice and takedown provisions.”).

<sup>165</sup> See *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1107; *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007).

“a ‘red flag’ from which infringing activity is apparent.”<sup>166</sup> In that case, the district court laid out the two knowledge prongs of 512(c) as “actual knowledge” and “willful ignorance.”<sup>167</sup> Moreover, the court applied evidence of the defendant’s willfully blind business model to defeat his affirmative DMCA safe harbor defense. In light of that evidence, the court proclaimed, the only way that the defendant “could have avoided knowing about [its] users’ infringement is if [it] engaged in an ‘ostrich-like refusal to discover the extent to which [its] system[s] w[ere] being used to infringe copyright.’”<sup>168</sup>

### C. Willful Blindness as Intent: Taking “Knowledge” Out of the Knowledge Standard

Section 512’s safe harbors are only available to select groups of OSPs.<sup>169</sup> The most relevant safe harbor to companies like YouTube, eBay, Facebook, and Twitter is the 512(c) safe harbor for “information residing on systems or networks at [the] direction of users.”<sup>170</sup> This safe harbor will shield from liability those companies that do not have the right or ability to control the user-generated content on their platforms and that do not have actual or red flag awareness of the infringement. By contrast, the safe harbor was designed to exclude certain types of businesses. These generally include peer-to-peer networks established for the sole purpose of facilitating the distribution of copyrighted content (which is often infringing). Through common law precedent, secondary liability principles have evolved into

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<sup>166</sup> *Columbia Pictures Indus., Inc. v. Fung*, No. CV 06-5578 SVW(JCx), 2009 WL 6355911, at \*16 (C.D. Cal. Dec. 21, 2009), *aff’d in part*, 710 F.3d 1020 (9th Cir. 2013) (quoting H.R. REP. NO. 105-551, pt. 2, at 57 (1998), 1998 WL 414916).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at \*18 (quoting *In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003)) (fourth and fifth alterations in original).

<sup>169</sup> See *supra* Part I.B.1.

<sup>170</sup> See 17 U.S.C. § 512(c) (2012).

various distinct forms, such as vicarious and contributory liability, including inducement.

Section 512 specifies two forms of liability that OSPs can incur for copyright violations. The DMCA specifically limited their direct liability for copyright infringement when it codified the *Netcom*<sup>171</sup> holding in Section 512(a), but maintains that an OSP can draw secondary liability to the extent that it is not otherwise shielded by the safe harbor. The Supreme Court has clarified that "[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise the right to stop or limit it."<sup>172</sup> Further, contributory liability is found where a business was established for the practical purpose of aiding infringement.<sup>173</sup> Professor Jane Ginsburg suggests that the Court's interpretation may even extend to businesses that may not have been founded and initially structured for the purposes of infringement, but that over time have seen infringement "play an increasingly profitable part."<sup>174</sup> These businesses may be liable for inducement unless they take good faith steps to combat the infringing activity.<sup>175</sup>

Inducement liability initially evolved outside the DMCA, applying generally to many of those service providers that were explicitly excluded when the safe harbor was drafted.<sup>176</sup> Inducement is a strictly common law concept, and is often

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<sup>171</sup> *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

<sup>172</sup> *Metro-Goldwyn-Meyer Studios, Inc. v. Gorkster, Ltd.*, 545 U.S. 913, 930 (2005) (citation omitted).

<sup>173</sup> See *id.* at 935–36.

<sup>174</sup> Jane C. Ginsburg, *Separating the Sony Sheep From the Gorkster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 ARIZ. L. REV. 577, 579 (2008).

<sup>175</sup> *Id.*

<sup>176</sup> See S. REP. NO. 105-190, at 48 (1998) ("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.").

predicated on intent. The legislature arguably did not have inducement liability in mind when crafting the safe harbors, as demonstrated by the very nature of the activities to which they apply. Trying to import intent-based doctrine into the DMCA risks usurping the safe harbor's traditional role as a threshold issue in determining liability. The distinction between inducement liability and the forms generally discussed in the context of the DMCA raises a number of questions. First, would an argument of a willfully blind business model remove a service provider from consideration for the protections of the safe harbor entirely? Second, is a willfully blind business model evidence of inducement rather than another form of secondary infringement?

Three of the cases previously referenced form the primary basis for this examination. Their significance lies in their examples of *non-content-specific* evidence of willful blindness to support imposing liability for copyright infringement. The defendant businesses in *Aimster*, *Grokster*, and *Fung* were peer-to-peer file-sharing services that allowed users to download files across a network. Many of these downloads constituted copyright infringement. In *Aimster*, discussed above, the court dismissed the idea of safe harbor protection by virtue of the nature of the defendant's business.<sup>177</sup> This is particularly relevant when considering the *Grokster* case, which was decided by the Supreme Court two years later.<sup>178</sup>

*Grokster* is significant for establishing inducement as a basis for liability independent from contributory infringement.<sup>179</sup> The primary question in *Grokster* was "under what circumstances the distributor of a product capable of both lawful and unlawful use is liable for acts of copyright infringement by third parties using the product."<sup>180</sup> The defendants in *Grokster* attempted to avoid liability

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<sup>177</sup> See *In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003).

<sup>178</sup> *Metro-Goldwyn-Meyer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

<sup>179</sup> See *id.* at 936–37.

<sup>180</sup> *Id.* at 918–19.

based on the Supreme Court's *Sony* decision,<sup>181</sup> arguing that their systems had substantial non-infringing uses.<sup>182</sup> Reflecting on *Grokster*'s treatment of intent, it is clear that the law disfavors willful infringement of intellectual property. Similarly, the law does not favor the willful avoidance of knowledge to further such infringement. Any interpretation of the DMCA that adjusts the parameters of safe harbor protection for OSPs must closely consider this.

The legislative history of the DMCA indicates that the legislature specifically intended to exclude from protection businesses that conditioned their operative models on copyright infringement. In the years following the statute's enactment, these businesses would include services such as Napster, Aimster, Grokster, and BitTorrent. In the district court opinion in *Columbia Records v. Fung*, the court characterized the defendant's collection of websites as an "evolutionary modification" of these infringement facilitators, though the sites did not take the form of traditional peer-to-peer services.<sup>183</sup> This indicates a judicial willingness to develop an "inducement" business model that reflects current technological trends.

However, *Fung* is useful for more than its characterization of red flag knowledge.<sup>184</sup> The court in that case also confirmed that "inducement liability and the Digital Millennium Copyright Act safe harbors are inherently contradictory."<sup>185</sup> The court implied that safe harbor protection was to be conditioned on a good faith standard, and that the bad faith inherent in inducement liability was a primary driver behind the exclusion of inducement-driven business models from consideration for Section 512(c) protection.<sup>186</sup> Such an approach to

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<sup>181</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>182</sup> *See Grokster*, 545 U.S. at 933.

<sup>183</sup> *Columbia Pictures Indus., Inc. v. Fung*, No. CV 06-5578 SVW(JCx), 2009 WL 6355911, at \*1 (C.D. Cal. Dec. 21, 2009).

<sup>184</sup> *See supra* Part IV.B.

<sup>185</sup> *Fung*, 2009 WL 6355911, at \*18.

<sup>186</sup> *See id.*

inducement liability is consistent with *Grokster* and the willful blindness discussion in *Aimster*.<sup>187</sup>

The *Fung* district court's contribution to willful blindness has been largely ignored in subsequent case law. The only negative treatment of the case was the district court's opinion in *Viacom*, which was then addressed in the Second Circuit.<sup>188</sup>

Precedent governing inducement on the Internet—particularly in light of *Grokster*—supports the use of willful blindness to demonstrate inducement liability. For a plaintiff to show that a business was established for the purpose of copyright infringement or, as Professor Ginsburg suggests, has developed such a purpose, it is logical that generalized evidence of willful blindness to infringement would sufficiently support this allegation.<sup>189</sup>

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<sup>187</sup> On appeal, however, the Ninth Circuit in the *Fung* litigation clarified that “[i]t is . . . conceivable that a service provider liable for inducement could be entitled to protection under the safe harbors.” *Columbia Pictures Indus., Inc., v. Fung*, 710 F.3d 1020, 1040 (9th Cir. 2013) (emphasis in original). The court suggested a two-pronged analysis of inducement liability that included consideration for the safe harbor. *See id.* at 1044. However, the court appeared to use its previous determination that *Fung* behaved in an inducing manner to impute at least some form of red flag knowledge to the defendant: “[W]hile *Fung*’s inducing actions do not necessarily render him per se ineligible for protection under § 512(c), they are relevant to our determination that *Fung* had ‘red flag’ knowledge of infringement.” *Id.* at 1043 (citation omitted). This analysis, while reasonable at first glance, is somewhat at odds with the court’s previous openness to a safe harbor defense to inducement liability. The specific nature of knowledge under the DMCA’s safe harbors may shield an OSP from liability with regard to one particular clip or another, but when liability is conditioned on a business model, how will the specificity requirement be applied?

<sup>188</sup> *Viacom Int’l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010); *see supra* Part III.A.

<sup>189</sup> *See* Ginsburg, *supra* note 174, at 577.

## V. SEEING THE LIGHT: MAKING WILLFUL BLINDNESS WORK IN THE NEW DIGITAL MILLENNIUM

The holding in *Viacom* has inspired significant commentary both on the district court level and in the Second Circuit.<sup>190</sup> On the one hand, rights owners viewed the district court's holding (and the Second Circuit's affirmation) that knowledge must relate to specific instances of infringement as an unfairly broad application of safe harbor immunity from secondary liability for OSPs.<sup>191</sup> On the other, the Internet community grumbled that *Viacom* commensurately expanded the grounds on which the safe harbor may be pushed aside by confirming willful blindness as knowledge under the DMCA.<sup>192</sup> Professor Eric Goldman argues that the decision's ramifications may affect the cost of entering the industry, as it may provide unsophisticated start-up companies less room for error, possibly resulting in less competition in the long run.<sup>193</sup> Further, the ruling may

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<sup>190</sup> See John M. Gatti, Daniel A. Rozansky & Crystal Jonelis, *Southern District of New York Rules in Viacom v. YouTube*, STROOCK & LAVAN LLP (June 28, 2010), <http://www.stroock.com/SiteFiles/Pub952.pdf>; Richard Busch, *How the Second Circuit's Decision in Viacom May Change the Web*, FORBES (May 30, 2012, 12:15 PM), <http://www.forbes.com/sites/richardbusch/2012/05/30/how-the-second-circuits-decision-in-viacom-may-change-the-web/>.

<sup>191</sup> See Glenn G. Pudelka & Kelly Donahue, *Court Continues to Find Broad Safe Harbor Protection for Service Providers*, LEXOLOGY (June 26, 2013), <http://www.lexology.com/library/detail.aspx?g=f7d36667-4b4e-4fb3-88c8-90bbb5ec2457>.

<sup>192</sup> Eric Goldman, *Second Circuit Ruling in Viacom v. YouTube Is a Bummer for Google and the UGC Community*, TECH. & MKTG. L. BLOG (Apr. 5, 2012, 1:33pm), [http://blog.ericgoldman.org/archives/2012/04/second\\_circuit\\_3.htm](http://blog.ericgoldman.org/archives/2012/04/second_circuit_3.htm) ("In the end, this opinion narrows the grounds of 512 fights, and that's a good thing; but because it opens up new grounds for plaintiffs to exploit, this opinion pushes back—by many years—the day when the safe harbor preempts copyright owners from bringing meritless yet ruinous anti-UGC lawsuits. To me, that's a clear loss for the Internet, no matter how many points of contention YouTube actually won today.").

<sup>193</sup> See *id.*



inspire more litigation and longer discovery, as plaintiffs attempt to show that an ISP's subjective hunch and failure to act should collectively nullify the safe harbor.<sup>194</sup>

How can *Viacom v. YouTube* clear a path for future courts facing the willful blindness issue? One suggestion is that that the Second Circuit should have added a motive analysis to its pronouncement that willful blindness constitutes knowledge under the DMCA.<sup>195</sup> Doing so would have maintained the reasonable and long-established principle that willful blindness is knowledge in the common law while distinguishing between OSPs who do not investigate suspected infringement for good faith reasons and those who fail to investigate due to a desire to avoid liability.<sup>196</sup> Adding a motive requirement, however, would not address concerns over the level of knowledge required to trigger the first prong of willful blindness (namely, that the accused infringer have a subjective belief of a high probability of the existence of the fact). While motive would likely speak to whether the actions taken by the accused infringer were deliberate (and thus could help courts in that respect), the ambiguity surrounding whether a "subjective[] belie[f] that there is a high probability that a fact exists"<sup>197</sup> should trigger a duty to investigate under the DMCA leaves questions about the role of Section 512(m) in the doctrine.

The courts now have the opportunity to demonstrate through a factual analysis just what willful blindness should mean under the DMCA. Based on legislative history, it appears that lawmakers contemplated willful blindness under the umbrella of facts and circumstances indicating

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<sup>194</sup> See Goldman, *supra* note 192.

<sup>195</sup> See Recent Case, *Copyright Law—Willful Blindness—Second Circuit Holds That Willful Blindness Is Knowledge in Digital Millennium Copyright Act Safe Harbor Provision.—Viacom International, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012), 126 HARV. L. REV. 645, 649 (2012).

<sup>196</sup> See *id.*

<sup>197</sup> See *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 (2011).

infringement.<sup>198</sup> The difficulty of reconciling willful blindness with the existing knowledge standards involves a number of factors: the principle that knowledge must be specific enough to identify the infringing content, and not just of infringement on the site generally; the Section 512(m) qualification that the conditions of maintaining safe harbor protection cannot impose an affirmative monitoring duty on service providers; and case precedent dictating that a “red flag” requiring investigation is not a red flag at all for the purposes of the statute.<sup>199</sup>

Why reject the status quo? In truth, the three considerations listed above are problems created by strict judicial adherence to the common law conception of willful blindness. If the issue of knowledge was already “critical” in 1998, what has it become in the new digital millennium? Former President Bill Clinton, who signed the DMCA into law, famously said, “When I took office, only high energy physicists had ever heard of what is called the World Wide Web . . . . Now even my cat has its own Web page.”<sup>200</sup> With the population of the Internet exploding and technology advancing faster than ever, it has become critical to maintain legal standards that are consistent, comprehensible, and, most importantly, technologically appropriate.

The judiciary has also begun to voice some dissatisfaction with the incomplete legal advice dispensed from the Second Circuit. For instance, Judge William Pauley of the Southern District of New York recently noted that “*Viacom* offers little guidance on how to reconcile the tension between the doctrine of willful blindness and the DMCA’s explicit repudiation of any affirmative duty on the part of service providers to monitor user content.”<sup>201</sup> Judge Ronnie Abrams

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<sup>198</sup> See *supra* Part IV.B.

<sup>199</sup> See *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007).

<sup>200</sup> President Bill Clinton, Excerpts from Transcribed Remarks by the President and the Vice President to the People of Knoxville on Internet for Schools (Oct. 10, 1996).

<sup>201</sup> *Capitol Records, Inc. v. MP3tunes, LLC*, No. 07 Civ. 9931(WHP) 2013 WL 1987225, at \*2 (S.D.N.Y. May 14, 2013).

cited her colleague's criticism of *Viacom* in her own attempt to reconcile *Viacom*'s broad pronouncement regarding willful blindness with the DMCA's restrictions based on specificity and Section 512(m):<sup>202</sup> "[t]o hold . . . that instances of willful blindness as to infringing content collateral to the litigation are sufficient to divest a defendant of safe harbor protection . . . would . . . complicate rather than resolve the tension described [by Judge Pauley]."<sup>203</sup> As in the majority of cases interpreting *Viacom*, Judge Abrams was unable to find sufficient evidence of willful blindness.<sup>204</sup>

Further, permitting plaintiffs to argue willful blindness as a means of defeating safe harbor protection may lead to significant waste of judicial resources. *Viacom*'s language regarding the necessity of "explicit fact-finding" on willful blindness has led to denial of summary judgment in favor of fact-finding in willful blindness in a number of instances.<sup>205</sup> One may ask: In a case in which willful blindness may be the only issue of knowledge standing between the defendant and safe harbor protection, is it truly desirable to mandate "explicit fact-finding" and trial rather than resolving the case at the summary judgment stage?

Permitting courts to supplement the statutory scheme may also be a slippery slope. The reading of willful blindness into the DMCA arguably represents a judicial eagerness to retake the reins on the problem of copyright infringement on the Internet. Judicial incorporation of common law concepts into a statutory regime implicates the balance between Congress and the courts, in addition to the balance between rights owners and OSPs.

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<sup>202</sup> See *Capitol Records, LLC v. Vimeo, LLC*, Nos. 09 Civ. 10101(RA), 09 Civ. 10105(RA), 2013 WL 5272932, at \*21 (S.D.N.Y. Sept. 18, 2013).

<sup>203</sup> *Id.* (citing *MP3tunes*, 2013 WL 1987225, at \*2).

<sup>204</sup> See *id.* at \*22.

<sup>205</sup> See *MP3tunes*, 2013 WL 1987225, at \*3 ("Because *Viacom* emphasizes the importance of explicit fact-finding in establishing willful blindness, this Court vacates that portion of the October 2011 Order granting summary judgment to Defendants on the issue of contributory infringement liability . . . and finds that factual issues preclude summary judgment.").

The *Viacom* court correctly noted that a statute does not abrogate doctrine unless the statute “speak[s] directly to” it.<sup>206</sup> However, the court missed the mark in finding that Section 512(m) was the closest whisper the DMCA offered to the willful blindness problem. An examination of the statute’s legislative history shows that extensive discussion was given to the issue and, moreover, indicates that the idea of red flag knowledge was a legislative compromise reached to address this very problem.<sup>207</sup> As such, the relationship between willful blindness and Section 512(m) has in fact already been reconciled by the statute. The court in *Viacom* referred to the principle of strictly construing legislation that would otherwise be in derogation of the common law.<sup>208</sup> However, the DMCA safe harbors do not derogate anything because they are not themselves arbiters of liability, but rather artificially constructed threshold shields; therefore, they need not conform directly to common law liability rules. Under the Second Circuit’s logic, because the requirement of specific knowledge is not directly stated in the statute—but must be inferred—almost no service provider would ever benefit from safe harbor protection. The statute’s failure to derogate the common law principle that generalized knowledge can support liability would apply to essentially every OSP operating in Web 2.0. Such a result would be absurd and contrary to the purpose of the safe harbor.

To answer the three major problems raised by the inclusion of willful blindness in the definition of knowledge under the safe harbors of the DMCA, this Note proposes a dual role for the doctrine. These problems include the fact that the DMCA’s reflection of common law copyright liability is limited, due to its special role in reconciling copyright law with the realities of the Internet. Willful blindness, without further guidance from the courts with regard to its

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<sup>206</sup> *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 35 (2d Cir. 2012) (alteration in original).

<sup>207</sup> See *supra* Part IV.B.

<sup>208</sup> See *Viacom*, 676 F.3d at 35.

application in different factual scenarios, may potentially contravene the “no affirmative duty” provision of the DMCA.

One consideration when assessing the use of willful blindness in criminal law and common law copyright is the fact that the doctrine fills an important role for offenses that require knowledge for liability, as it addresses the fact that deliberate avoidance of knowledge indicates some *mens rea* but avoids the actual knowledge. Because willful blindness falls somewhere between knowledge (or willfulness) and recklessness, it serves a useful purpose in the common law.<sup>209</sup> In the presence of a statutory doctrine that also serves this purpose, there is no need to read-in willful blindness for actual knowledge. OSPs also lose the safe harbor in the event of knowledge that falls short of actual awareness. Substituting willful blindness for actual knowledge for the purposes of the safe harbor is repetitive and undesirable, because it frustrates the intent of the DMCA. Moreover, the statute does speak to the willful blindness doctrine, albeit not explicitly. Red flag knowledge satisfies the judicial purpose of avoiding willful blindness, and thus supplementing the statutory knowledge standards with common law doctrine was inappropriate.

Nearly every discussion of willful blindness in the DMCA context approaches the issue from a generalized standpoint. In terms of specific instances of infringement, it is difficult to conceive of a situation in which the court would find that the defendant had neither objective nor subjective knowledge, but instead was willfully blind to a specific instance of infringement. Moreover, even if the court were to identify willful blindness appropriately, how would an OSP take deliberate steps of avoidance? Is failing to investigate actionable without contravening Section 512(m)? If a duty to

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<sup>209</sup> See Rodriguez, *supra* note 64, at 720 (“[M]erely showing that a defendant should have known a fact or circumstance at issue is insufficient to sustain a conviction for an offense requiring a *mens rea* of knowledge or willfulness, and thus the same showing is insufficient to permit convicting a defendant based on willful blindness. The same logic applies to the second element of willful blindness, requiring that the defendant act deliberately to avoid culpable knowledge.”).

investigate or remove is triggered by knowledge, and willful blindness stands in place of actual knowledge, this could generate a situation in which a *duty* to act is imposed by virtue of a *failure* to act, in response to knowledge that doesn't satisfy actual awareness of the fact at issue or even reasonable awareness of that fact.

This Note argues that the most sensible application of the willful blindness doctrine under the DMCA was demonstrated in the district court's opinion in *Fung*.<sup>210</sup> If the courts are unwilling to apply a workable standard for red flag knowledge, and would rather welcome common law doctrine into the DMCA's statutory scheme, they risk blurring the lines between the limited liability of OCILLA and the confusion of pre-DMCA case law. Courts should work with what they are given, rather than strain to see the grass that appears greener in the common law.

## VI. CONCLUSION

The court in *Viacom* would have provided better guidance by acknowledging willful blindness as a form of knowledge under Section 512(c)(1), but only within the scheme of red flag awareness. Maintaining at least some objective standard for knowledge preserves the economic incentives inherent in the statute as well as relieves the evidentiary burden on the plaintiff. Because removal of the safe harbor is conditioned on a "reasonableness" standard, this discourages extensive discovery searching for evidence of both a subjective "hunch" and deliberate avoidance, which is often a counterfactual and difficult to prove. The abrogation issue was wrongly decided; Section 512(m) is not the closest friend that willful blindness has in the statute. A longstanding principle of textual statutory interpretation advocates that the statutory language speaks for itself unless it is vague or introduces problematic consequences.<sup>211</sup>

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<sup>210</sup> Columbia Pictures Indus., Inc. v. Fung, No. CV 06-5578 SVW(JCx), 2009 WL 6355911 (C.D. Cal. Dec. 21, 2009).

<sup>211</sup> See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415–20 (1989) (explaining and questioning a

If Congress had wished to supplement actual knowledge with a willful blindness standard other than red flag knowledge, it would have done so.

Plaintiffs also have the option to argue willful blindness generally (as did Viacom). In such a case, the evidence must be sufficient to show that the business model generally falls outside Section 512(c) and that the *Grokster* inducement principle applies. This is a high burden, but one that would preserve the statutory balance, reflect legislative intent and language, and resolve the factual problems associated with application of willful blindness as a doctrine in the new digital millennium. Such an approach would remain consistent with case law on inducement while providing an interpretation of willful blindness that is appropriate in light of legislative intent.

The Supreme Court has spoken on inducement liability for businesses that are ineligible for safe harbor consideration in *Grokster*. Perhaps now, on the issue of willful blindness in the new digital millennium, it is time for the Supreme Court to shed some light once again.

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number of interpretive principles); *Public Citizen v. U.S. Dep't. of Justice*, 491 U.S. 440, 466 (1989) ("It has long been an axiom of statutory interpretation that where an otherwise acceptable construction of a statute would raise serious . . . problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.") (internal quotation marks omitted).