

10-3270-cv

10-3342-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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

v.

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

(Additional Caption On the Reverse)

*On Appeal from the United States District Court
for the Southern District of New York (New York City)*

BRIEF FOR DEFENDANTS-APPELLEES [REDACTED PUBLIC VERSION]

David H. Kramer
Michael H. Rubin
Bart E. Volkmer
WILSON, SONSINI GOODRICH & ROSATI
650 Page Mill Road
Palo Alto, California 94304
(650) 493-9300

Andrew H. Schapiro
A. John P. Mancini
Brian M. Willen
MAYER BROWN LLP
1675 Broadway
New York, New York 10019
(212) 506-2500

Counsel for Defendants-Appellees

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

Plaintiffs-Appellants,

and

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

Plaintiffs,

v.

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

Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellees state that YouTube, Inc. and YouTube LLC are wholly owed subsidiaries of Google Inc. Appellees further state that Google Inc. does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

The text of the Digital Millennium Copyright Act (“DMCA”), the cases interpreting it, and sound public policy all support the district court’s decision granting summary judgment to YouTube.

In enacting the DMCA, Congress understood that some of the material posted by the millions of people who use online services would infringe copyrights. But Congress recognized that requiring service providers to engage in an arduous screening process for every user-posted text, picture, and video would inhibit free expression and stifle the growth of the Internet. The DMCA thus gives legitimate services “safe harbor” against potentially crushing infringement claims while providing copyright holders an expedient way to stop any misuse of their content. The statute makes copyright owners, not service providers, responsible for policing their copyrights by identifying, and, if they choose, requesting the removal of infringing material. That was the only sensible approach: copyright holders are the ones in a position to know what material they own, what they have licensed, and where they want their works to appear online.

This case demonstrates the wisdom of Congress’ judgment. When plaintiffs notified YouTube about videos that they did not want on the site, YouTube removed them expeditiously. Plaintiffs cannot point to a single clip that YouTube knew was infringing but did not take down. Nor can plaintiffs make any serious

claim that YouTube should have known simply by looking at a given video whether it infringed their copyrights. That is due in part to the ways that plaintiffs themselves used YouTube to advance their own businesses—a topic about which their briefs are virtually silent.

Plaintiffs posted what they termed a “boatload” of videos to YouTube, often doing so covertly, and they authorized many others to do the same. They also deliberately chose to keep a wide range of user-uploaded clips on YouTube. Plaintiffs’ marketing practices made it difficult even for them to tell whether YouTube clips containing their material were authorized. Plaintiffs repeatedly sent YouTube takedown notices for videos that they had actually posted. In this litigation, Viacom mistakenly sued over many videos that it was responsible for uploading. Even Viacom’s lawyers were tripped up by Viacom’s stealth marketing: in the district court, they submitted two documents under penalty of perjury that incorrectly swore that Viacom had not posted any of the clips at issue.

Unable to make the showing that the DMCA demands, plaintiffs try to rewrite the statute. They ask this Court to hold that generalized awareness of unspecified infringement voids safe-harbor protection, unless the service provider takes a series of indeterminate steps to monitor its service, apparently including the use of plaintiffs’ preferred filtering technology. But Congress decided otherwise. The DMCA makes clear that more than general knowledge is required, and it

expressly provides that the safe harbor does not depend on service providers investigating whether users' posts are infringing.

The careful balance struck by the DMCA created the legal infrastructure for a free and open Internet. The safe harbors have allowed YouTube and services like it to flourish as platforms for creative, political, and social expression. YouTube has allowed performers and artists to rocket from oblivion to fame; has given politicians, pundits, protesters, and the Pope a powerful new way to communicate with the public; has facilitated citizen-journalism and social change in repressive regimes; and has inspired laughter at the antics of dancing babies and skateboarding dogs. YouTube gives creators of every kind the ability to promote their work to a global audience—all free of charge and editorial control. The decision below faithfully applied the statute and allowed those considerable public benefits to continue. That decision should be affirmed.

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether the district court properly concluded that the safe harbor of the DMCA protects YouTube against plaintiffs' infringement claims. In particular:
 - a. whether the district court correctly held that disqualifying knowledge under the DMCA requires knowledge of particular infringing items or activity, and not merely generalized awareness that unidentified infringing material may be somewhere on the service provider's system.

b. whether the DMCA's control-plus-financial-benefit provision protects a service that, like YouTube, had no direct influence over the alleged infringements at issue and has a legitimate business model that generates revenue from its vast array of non-infringing uses.

c. whether the district court correctly held that the DMCA's protections against infringement claims that arise "by reason of the storage at the direction of a user" are not forfeited when a service facilitates access to user-submitted materials.

2. Whether YouTube is entitled to summary judgment on plaintiffs' claims of inducement where plaintiffs failed to show that YouTube communicated an inducing message or took active steps to encourage users to infringe.

COUNTERSTATEMENT OF FACTS

Plaintiffs' briefs distort the record: they mischaracterize documents, take quotations out of context, and ignore the overwhelming and undisputed evidence of YouTube's legitimate purpose and operation. While the decision below can be affirmed on the law alone, the actual facts belie plaintiffs' story.

A. YouTube

1. YouTube's legitimate founding purpose and operations

Chad Hurley, Steve Chen, and Jawed Karim founded YouTube in early 2005 and created the "beta" version of the YouTube website in April 2005. JA-IV:107-

108(¶¶2-4). YouTube's service officially launched in December 2005; in November 2006, YouTube was acquired by Google. JA-IV:114(¶23).

YouTube announced itself to the world as “the first online community site that allows members to post and share personal videos.” JA-V:363. The service aimed to provide users with an easy way to share personal video clips and to build new communities around such clips. JA-IV:107(¶¶2, 22); JA-IV:117; JA-IV:148. YouTube's basic functionality is simple: users upload short video clips that YouTube's computer systems automatically process and store so they can be seen by other users worldwide. JA-IV:107(¶2); JA-V:161-164(¶¶2-10).

A wealth of contemporaneous documents, which plaintiffs ignore, confirm YouTube's legitimate purpose and operation. In hundreds of internal emails, as well as communications with investors and the public, YouTube's founders shared their vision: to “focus on real personal clips that are taken by everyday people” (JA-IV:122) in order to “become the primary outlet of user-generated content on the Internet” (JA-IV:136). *E.g.*, JA-IV:119 (Chen describing YouTube as “a site that features creative videos from personal users”); JA-IV:117 (Karim: YouTube is “a repository for all kinds of personal videos on the internet”); JA-IV:133 (Chen: “we do have a community and it's ALL user generated content”); JA-IV:141 (Hurley: “I think the key to our success is personal videos”); JA-V:181 (Karim describing YouTube's goal to “further grow our audience and reach to secure our

position as the #1 place for personal videos on the internet”); JA-IV:107(¶¶2-13, 19, 22), 128-131, 148; JA-IV:65(¶¶3-6, 15-16).

YouTube’s founders took copyright issues seriously, and recognized that doing so was important to building their business. JA-IV:67(¶6); JA-IV:112(¶16). They never solicited infringing material or encouraged users to post unauthorized videos. JA-IV:107(¶¶8, 11), 147 (Hurley: “we should never promote piracy or tell them how to do it”); JA-IV:131. To the contrary, YouTube’s earliest advertisements emphasized its aim to “become a community of digital video authors and their videos.” JA-V:60, *see also* JA-V:62; JA-IV:129. The very name of the service and its slogan (“Broadcast Yourself”) reinforced YouTube’s focus on personal videos. JA-IV:109(¶7), 118, 123-124 (“Broadcast yourself ... is what the site is all about.”); JA-V:57 (“The videos you upload should be about you (hence, YouTube!”)).

During YouTube’s first few months, its small scale made it possible for the founders to review user-uploaded videos individually. They occasionally came across what looked like professional media content that they were concerned may have been posted without authorization. YouTube’s founders consistently *rejected* such videos, which they viewed as inconsistent with their vision for the site. In July 2005, for example, Chad Hurley wrote to tell a user that his video had been “rejected because it was copyrighted material,” explaining that “[w]e are trying to

build a community of real user-generated content.” JA-IV:145. Similar examples abound. *See, e.g.*, JA-IV:107(¶¶11, 15-17), 127, 132, 141-144, 149-150; JA-V:207-208(¶6), 210-213.

2. YouTube’s efforts to help copyright owners

Plaintiffs also ignore the many steps YouTube has taken to deter users from uploading unauthorized material and to assist content owners in protecting their copyrights. Copyright holders and anti-piracy groups like the Motion Picture Association of America (“MPAA”) repeatedly have praised YouTube for its efforts to combat copyright abuse. JA-IV:176-77(¶¶32-33).

YouTube requires users to agree to Terms of Use that prohibit them from submitting unauthorized material and repeatedly reminds users that they are prohibited from uploading unauthorized copyrighted content. YouTube provides a “Copyright Tips” page to help users understand copyright law and avoid inadvertently posting infringing material. In addition, YouTube has imposed a time-limit for most videos to prevent the posting of full-length television shows and movies; registered an agent to receive notices of alleged infringement from copyright holders; expeditiously removed allegedly infringing materials upon receiving such notices; terminated the accounts of users suspected to be repeat infringers; and maintained a team of employees around the clock to assist

copyright owners in removing unauthorized material. JA-IV:165(¶¶5-10, 12, 14, 17-19); JA-IV:113-14(¶¶20-21).

YouTube has also long used technological measures to help content owners. In early 2006, YouTube introduced a tool that allows copyright holders to mark allegedly infringing videos and effect their removal with the click of a button. JA-IV:170(¶18). YouTube also deployed “hashing” technology that blocks all users from uploading identical copies of videos removed in response to takedown notices. JA-IV:173(¶25). In February 2007, YouTube started using audio-based “fingerprinting” technology licensed from a company called Audible Magic. JA-IV:152-155(¶¶4-10). Plaintiffs’ suggestion that YouTube could have eradicated unauthorized videos by using Audible Magic earlier or in a different way ignores the facts (and is contrary to the DMCA). As discussed below (*infra* 70-73), Audible Magic was no magic bullet; it was an unreliable way of screening video content that none of the plaintiffs were using to protect their copyrights before they filed this lawsuit, and most never used at all.

Recognizing the limits of existing technologies, YouTube rapidly supplemented its use of Audible Magic by building its own fingerprinting system. JA-IV:155-159(¶¶11-16). YouTube’s pioneering technology, called Content ID, uses audio- and video-fingerprinting technology developed in-house specifically to identify videos on YouTube. JA-IV:152(¶¶2-3). Content ID scans every single

video uploaded to YouTube and compares it with reference files provided by participating copyright holders. If a match is identified, the system applies the content owner's instructions about what to do with the video. JA-IV:161-163(¶¶23-28). YouTube was the first user-submitted content website to develop its own video-fingerprinting system. JA-IV:159-160(¶19).

Since it launched in October 2007, Content ID has been used by thousands of copyright holders to make their own choices about how, where, when, or whether they want their material to appear on YouTube. JA-IV:160-161(¶¶21-22). YouTube worked closely with major content owners—including Viacom and the MPAA—to develop and test Content ID. JA-V:221-222(¶¶4-6); SJA-VIII:1897; JA-VI:760-767. YouTube offered Content ID to Viacom as soon as it launched, and Viacom signed an agreement to start using the technology in February 2008. JA-IV:163-164(¶¶29-31); JA-V:222-224(¶¶7, 9-10).

3. Quantity and diversity of videos on YouTube

YouTube hosts an extraordinary range of video content. In YouTube's first five years, more than 500 million videos were posted to the service from over 250 million separate accounts. JA-IV:165(¶¶26, 31). At the time of summary judgment, more than 24 hours of video was being uploaded every minute. SPA:9; JA-IV:115-116(¶26). Those videos are endlessly varied: amateur comedy routines, raw video footage taken in war zones or during protests in foreign capitals, clips of

cats playing the piano, videos teaching people how to fix a faucet or bake a cake, and video messages sent by U.S. soldiers overseas to their families back home, to give just a few examples. JA-V:165-179(¶¶2-22).

YouTube is an important platform for aspiring artists and musicians, who post their own short films and music videos. JA-V:173-174(¶16). YouTube is also an essential source of political information, and has become an important way for citizens to communicate with candidates and elected officials. JA-V:166-167(¶6); JA-IV:174-175(¶29). Governments and international institutions have YouTube channels. JA-V:168-169(¶¶7-8). Leading colleges and universities upload video lectures on every subject imaginable. Students seeking admission to those colleges, and colleges seeking to recruit students, turn to YouTube. JA-V:171-172(¶¶12-13). Nonprofit organizations and celebrities use it to publicize their causes. JA-V:170-171, 175-176(¶¶10-11, 18). Law enforcement officials post videos seeking the public's help in identifying criminals. JA-V:176(¶19). The list goes on and on.

YouTube has also entered into partnerships with hundreds of television and movie studios, sports teams and leagues, record labels, and music publishers. JA-IV:180(¶9); JA-V:174-175(¶17). Under these arrangements, content creators make their material available on YouTube either by uploading it directly or by “claiming” videos posted by other users. JA-IV:180-181(¶10). Even without

express partnerships, many professional content owners—including plaintiffs—routinely post their material on YouTube and authorize marketers and licensees to do the same. *Infra* 44-50.

4. Plaintiffs' story is not supported by the record

Disregarding this evidence of YouTube's legitimate origins, socially beneficial uses, and efforts to prevent infringement, plaintiffs strive to portray YouTube as a "pirate" site, and gravely predict the demise of copyright if their view of the DMCA is not adopted. But plaintiffs' breathless story of a nefarious plot to steal their content is a fiction not supported even by the handful of out-of-context quotations that they string together from a few early documents.

- Viacom claims that "YouTube's founders applied a no-holds barred approach, with one exhorting his colleagues to 'concentrate all of our efforts in building up our numbers as aggressively as we can through whatever tactics, however evil.'" Viacom Br. 9. What the document in question actually says is: "***If I were running the show*** I'd say, we concentrate all of our efforts in building up our numbers as aggressively as we can through whatever tactics, however evil ***i.e scraping myspace.***" JA-I:832 (emphases added). As the portions omitted by Viacom make clear, Steve Chen (who was YouTube's CTO) was not "running the show" and his idea (to use a computer "scraping" program to gather information

about the social-networking service MySpace) had nothing at all to do with copyright infringement. JA-V:201.

- Plaintiffs attribute to Chen the statement that removing “obviously copyright infringing stuff” would reduce YouTube’s traffic by 80 percent. Viacom Br. 10. That is not what Chen said. His off-the-cuff guess related to the effect of removing so-called “stupid videos”—amateur videos, often of stunts or pranks, that made the rounds on the Internet, usually with the blessings of their creators. JA-II:159-161; JA-V:199-200. “Stupid videos” were not clips from network-television shows or feature films, and the recurring debates among YouTube’s founders about such videos were not about whether to allow infringing videos. JA-V:206(¶3); JA-IV:110-111(¶12); JA-V:483-484; JA-V:492. In the same document, in fact, Chen and Karim agreed that YouTube should *continue* taking down clips from TV shows and movies—because they didn’t want YouTube to “look like a dumping ground for copyrighted stuff.” JA-II:159. “If we keep that policy,” Karim wrote, “I don’t think our views will decrease at all.” *Id.*; *e.g.*, JA-IV:141.

- Plaintiffs quote another email in which Chen wrote that the “only reason why our traffic surged was due to a video of this type.” JA-II:171. Plaintiffs claim, without citation, that Chen was referring to a “copyrighted and unauthorized” video. Viacom Br. 10. But this exchange actually related to

another “stupid video,” this one “of a person playing the drinking game ‘quarters.’” JA-V:200.¹

- Viacom similarly distorts an email in which Chen supposedly chastised Karim for “blatantly stealing content from another site.” Viacom Br. 11. It is undisputed that the clips at issue were “user-generated videos created by airplane enthusiasts” (JA-V:442)). Chen unambiguously told Karim to “stop” posting such videos (JA-II:164), emphasizing that “we aren’t a stupid video site” and “we want to promote personal videos” (JA-V:504). This exchange does nothing to support plaintiffs’ claims, and only confirms YouTube’s good faith.

- Plaintiffs claim that an email in which YouTube’s founders debated whether to preemptively remove a clip of the Space Shuttle demonstrates “a policy of maintaining access to infringing videos unless and until it received a ‘cease and desist’ demand from the copyright owner.” Viacom Br. 11. The document shows nothing like that. It reflects a decision to continue removing “stuff like movies/tv shows” while suggesting a different approach for “short

¹ Plaintiffs refer to a document in which Chen wrote that he was “not about to take down content because our ISP is giving us shit.” Viacom Br. 10 (citing JA-II:152). As Chen explained, his concern was not that he wanted YouTube to host unauthorized material; instead, he was legitimately concerned that YouTube’s Internet Service Provider wanted YouTube to remove material based on a complaint YouTube hadn’t seen and couldn’t evaluate. JA-V:198-199. The problem was resolved without incident, and turned out to be unrelated to copyright. *Id.*; JA-V:430.

news clips,” based in part on an untutored belief that such clips were fair use. JA-II:173.² Internal debates such as these reflect good-faith efforts by young non-lawyers in a start-up, not a purpose to encourage piracy.

- Plaintiffs refer to an informal memo that Karim wrote in March of 2006—five months after he had left the company (JA-V:439-440). Viacom Br. 14. Although he understood that YouTube had no legal obligation to monitor, Karim suggested that it might benefit from “preemptively” removing “content that is blatantly illegal,” noting that “much of this content does not even seem to attract many views.” JA-II:183. Given his earlier departure, Karim did not know that YouTube already was conducting “spot reviews” to try to identify and remove clips from shows like *Family Guy* and *South Park*. JA-IV:195(¶¶11); JA-V:382-84, 406-10, 414-417.³ In any event, YouTube did not ignore the issues Karim raised. The same month, YouTube hired a copyright expert as general counsel

² That belief was hardly unreasonable; a Viacom executive expressed the same view in her deposition: “I don’t know if it was authorized, but it looks like a news clip, which my understanding of news clips is that there was fair use of news clips.” JA-V:472-473.

³ Karim was not attuned to the practical challenges of spot checking, which did not scale and was ineffective. JA-IV:195-96(¶¶12-13); JA-V:387-388, 392-393, 396-399; JA-V:548-556, 561-578. It grew even more complicated as media companies began flooding YouTube with content for promotional purposes. JA-IV:178-180(¶¶2-7). At the time of Karim’s memo, *South Park’s* creators were expressly encouraging users to “download” the show wherever it could be found on the Internet (JA-V:420), and Viacom itself was covertly posting clips of its material—including many of the shows that Karim mentioned—to YouTube (JA-IV:248; SJA-VIII:2055-70; SJA-V:1017-18(¶110)).

and rolled out a slew of new features aimed at helping content owners detect and remove unauthorized materials. JA-IV:165(¶¶2-4, 12, 18, 25).

- Finally, Plaintiffs assail YouTube for rolling out, and two weeks later removing, a feature that allowed users to flag videos as potentially infringing. But, as explained below (*infra* 40-42), that feature was ineffective, because random users have no reliable way to distinguish authorized videos from unauthorized ones. Instead of a flawed user-flagging feature that the DMCA does not require, YouTube embraced the mechanism that the statute actually contemplates: removing videos based on sworn notices from copyright owners.

B. Viacom And The Putative Class Plaintiffs

Plaintiffs also ignore important undisputed facts about their relationships with YouTube. Viacom makes one offhand reference to the fact that it authorized content to appear on YouTube (Viacom Br. 25 n.2), but that radically understates the ways that Viacom has used YouTube to advance its business.

Recognizing that “YouTube is a powerful marketing platform that most networks are using for promotion” (JA-VI:682), Viacom employees and various third-party marketing agencies working on its behalf posted a wide array of clips from Viacom television programs and movies to YouTube. JA-IV:210(¶¶2, 18), 223-232, 249-251, 254-257, 260-261, 285-315, 317, 390, 531-534; JA-V:289-301, 311-315, 319, 323-359; JA-VI:782-784. Viacom did some of its uploading openly,

but much of it was covert, using dozens of obscure YouTube accounts that bore no obvious link to Viacom. JA-IV:212(¶5), 388, 391-407; SJA-VI:1311-28; JA-V:286-287; JA-VI:640-643(¶¶2-6),660-668. Viacom also issued confidential (and ever changing) instructions to its copyright-monitoring agents to leave up on YouTube a wide array of user-posted videos containing Viacom content—clips that Viacom was aware of and could easily have taken down had it wanted to. JA-IV:394, 434-435, 442, 536, 578-583, 586-602, 613, 615, 651-658; JA-VI:719-744.

In 2006, Viacom tried to purchase YouTube, after Viacom’s “best minds” concluded that it would be a “transformative acquisition.” JA-IV:431; JA-V:138-159. Top Viacom executives were passionate about acquiring YouTube (JA-VI:434-438), having concluded that “[c]onsumption of ‘branded’ content on YT is low” (SJA-VIII:2038) and that “user generated content appears to be what’s driving it right now” (JA-VI:424). JA-VI:430 (Viacom executive contrasting YouTube with Napster: “Napster had effectively no non-infringing uses, YT has many, etc.”).

The same year, Viacom proposed a content-partnership agreement with YouTube. JA-IV:180(¶8); SJA-VI:1330. Before a deal could be struck, however, Google announced that it was buying YouTube. Viacom then opted for what it dubbed a “strong arm approach” under which it would “push for significantly better terms.” SJA-VI:1332-1336. When negotiations stalled, in February 2007,

Viacom sent YouTube takedown notices for approximately 100,000 clips, a tactic that it hoped would pressure YouTube to accept Viacom's terms. SJA-VI:1338. In its zeal to inflate the number of takedown requests (SJA-IX:2090-91, 2102), Viacom erroneously targeted many clips that Viacom itself had authorized to appear on YouTube, as well as thousands of other videos in which Viacom had no copyright interest at all. JA-IV:196-198(¶¶15-18); SJA-V:1067-68(¶210). Even so, by the next business day, YouTube had taken down the videos that Viacom had identified. JA-IV:196(¶14).

Having failed to obtain the deal that it wanted, Viacom sued YouTube in March 2007. A group of putative class plaintiffs, who include music publishers and two foreign sports federations, filed suit a few months after Viacom did. Like Viacom, these plaintiffs have frequently authorized their content—including works-in-suit—to appear on YouTube. They have generally done so by licensing third parties to use their works in various media, including Internet sites like YouTube. *Infra* 48-49.

C. The Clips-In-Suit

While the fact is missing from plaintiffs' briefs, this case is about the alleged infringement of a *particular* set of video clips (the "clips-in-suit") that appeared on YouTube at various times between 2005 and 2008. All the clips-in-suit have been removed from YouTube, most in response to DMCA takedown notices. SPA:10.

Viacom originally claimed that hundreds of thousands of YouTube videos infringed its copyrights (JA-I:209-210(¶3)), but ultimately identified a list of 63,497 clips-in-suit. JA-IV:216(¶¶6-7).⁴ It turned out, however, that many of those allegedly infringing clips had actually been uploaded to YouTube by Viacom's own employees and agents, and thus were licensed to be on YouTube. JA-IV:216-218(¶¶6-13); JA-IV:42-44. Even when, after years of litigation, Viacom realized that it was responsible for posting a number of the clips-in-suit, and tried to drop them from the case, its lawyers *still* were unable to find and exclude all of the allegedly infringing clips that Viacom had uploaded or otherwise authorized. JA-IV:218-219(¶14); JA-VI:645-647(¶11). Many remaining clips-in-suit, moreover, are identical to or indistinguishable from promotional clips that Viacom acknowledges posting to YouTube. JA-IV:220-221(¶17); JA-VI:643-645(¶¶9-10).

Most of Viacom's clips-in-suit are under four minutes long; many are under one minute long. JA-IV:219(¶15). These short clips, like many of Viacom's other clips-in-suit—including those posted by members of Congress, a presidential candidate, and news reporters—raise obvious fair-use questions. *E.g.*, SJA-

⁴ Viacom jettisoned about 15,000 of those clips-in-suit by abandoning claims concerning videos posted after May 2008 (when Viacom chose to start using YouTube's Content ID system). Mem. of Law ISO Viacom's Mot. For Partial Summary Judgment 2 n.1 (Mar. 5, 2010) ("Viacom MSJ"); JA-VI:793.

IX:2227 (Schapiro Reply Ex. 173A/173B (uploaded by Barack Obama’s campaign), *id.* at 174A/174B (uploaded by Talking Points Memo), *id.* at 175A/175B (interview uploaded by the AP)). *Cf.* Br. for Defendants-Appellees at 22, *Kane v. Comedy Partners*, No. 03-9136 (2d Cir. Feb. 4, 2004) (Viacom arguing to this Court that “4% to 8% of the copyrighted work ... constitutes use of a small or insignificant portion that requires a fair use finding as a matter of law.”).

The putative class plaintiffs identified some 13,500 clips-in-suit from nearly 900 works (mostly musical compositions and sports broadcasts). Those clips vary considerably: grainy footage shot by spectators at sporting events and concerts; short sports highlights; home-videos of people lip-synching, singing karaoke, or giving guitar lessons. *E.g.*, JA-V:810 (Schapiro Exs. 190A/190B, 192A/192B, 193A/193B, 194A/194B, 195A/195B, 210A/210B). Many are examples of fair or *de minimis* use, including parodies, transformative uses of songs, and dozens of clips under five seconds long (JA-IV:219-220(¶16)). Like Viacom, class plaintiffs have claimed infringement of works that they have licensed to be on YouTube, as well as works that their co-owners and/or co-licensees have a right to post or license. *Infra* 48-49.

D. The DMCA Safe Harbors

Congress enacted the DMCA to address the fact that in “the ordinary course of their operations service providers must engage in all kinds of acts that expose

them to potential copyright infringement liability.” S. Rep. 105-190, at 8 (May 11, 1998). The statute aims to “facilitate the robust development and world-wide expansion of electronic commerce” (*id.* at 1), by limiting online service providers’ “legal exposure for infringements that may occur in the course of their activities.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007). The DMCA balances the interests of copyright owners with those of service providers facing infringement claims that might deter technological innovation and stifle free expression.

The safe harbor at issue here covers infringement claims that arise “by reason of the storage at the direction of a user of material that resides on” the service provider’s system. 17 U.S.C. § 512(c)(1). This provision has been consistently applied to services that make user-submitted content accessible, including to a video-hosting service very much like YouTube. *Wolk v. Kodak Imaging Network*, 2011 WL 940056, at *3 (S.D.N.Y. Mar. 17, 2011); *Io Grp., Inc. v. Veoh Network, Inc.*, 586 F. Supp. 2d 1132 (N.D. Cal. 2008).

To qualify for protection, a service provider must meet certain threshold “conditions for eligibility” (§512(i)) and designate an agent to receive “notifications of claimed infringement” (§512(c)(2)). Those notifications allow copyright holders to prevent unauthorized use of their works without an elaborate judicial process. Once a copyright owner, under penalty of perjury, informs the

service provider of the existence and location of infringing material ((§512(c)(3)), the provider must expeditiously remove that material (§512(c)(1)(C)).

The DMCA regime reflects Congress' decision to "place the burden of policing copyright infringement ... squarely on the owners of the copyright." *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007). The statute makes clear that service providers need not monitor for, or affirmatively seek out, infringing activity. §512(m); *UMG Recordings, Inc v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1113 & n.17 (C.D. Cal. 2009) ("*UMG II*").

The safe harbor protects service providers from damages liability for copyright infringement, allowing plaintiffs to seek only a "limited" form of injunctive relief (§512(j)). These protections apply no matter the type of infringement alleged. Congress explained that the DMCA shields "qualifying service providers from liability for all monetary relief for direct, vicarious and contributory infringement." H.R. Rep. No, 105-551 (Part II), at 50 (July 22, 1998).

E. Summary Judgment Proceedings

In March 2010, the parties cross-moved for summary judgment on the applicability of the DMCA safe harbor. Viacom also moved for summary judgment on certain of its underlying infringement claims, and YouTube moved on plaintiffs' inducement claims. The district court granted YouTube's motion and denied plaintiffs' motions. SPA:33.

The court held that the DMCA requires “actual or constructive knowledge of specific and identifiable infringements of individual items”—not just “a general awareness that there are infringements.” SPA:7. Surveying the text, legislative history, and case law, Judge Stanton identified the “clear and practical” rule at the heart of the DMCA (SPA:23):

if a service provider knows (from notice from the owner, or a ‘red flag’) of specific instances of infringement, the provider must promptly remove the infringing material. If not, the burden is on the owner to identify the infringement. General knowledge that infringement is ‘ubiquitous’ does not impose a duty on the service provider to monitor or search its service for infringements.

Turning to the relationship between the DMCA and inducement liability, the court found that the principles developed in *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), “have little application” to a service like YouTube that provides a platform for users to post and access “all sorts of materials,” registered a DMCA agent, and removes infringing materials when learning about them. SPA:24-25. Judge Stanton noted that Viacom’s own General Counsel wrote in a 2006 email that “the difference between YouTube’s behavior and Grokster’s is staggering.” SPA:25 (quoting JA-VI:423-424).⁵

⁵ The district court (without citing any evidence) wrote that “a jury could find that the defendants not only were generally aware of, but welcomed, copyright-infringing material being placed on their website.” SPA:9. Viacom seizes on that sentence, invoking the word “welcomed” five times just in the first five pages of its

The court next ruled that plaintiffs' claims arise "by reason of the storage at the direction of a user of material" on YouTube's system. Consistent with rulings in two similar cases, Judge Stanton held that plaintiffs' position "confines the word 'storage' too narrowly to meet the statute's purpose." SPA:26. Finally, the court held that YouTube (1) lacked "the right and ability to control" the infringing activity; (2) had implemented an appropriate repeat-infringer policy; and (3) responded properly to DMCA takedown requests by removing "the specific clips identified" in such notices. SPA:28-32.

After plaintiffs confirmed that they were not seeking injunctive relief under §512(j), the district court denied the putative class' motion for class certification as moot and entered final judgment in YouTube's favor on all claims. SPA:34-37.

SUMMARY OF ARGUMENT

I. Section 512(c) protects YouTube against all of plaintiffs' infringement claims.

A. The district court correctly held that generalized knowledge of infringing activity on a service does not disqualify a service provider from safe-

brief. While YouTube disagrees that plaintiffs' evidence, even favorably construed, would be sufficient to show that it "welcomed" infringing material, the district court's statement changes nothing. As Judge Stanton found, it is legally irrelevant whether someone subjectively "welcomed" or otherwise felt pleased about the presence of potentially infringing videos. Inducement liability demands proof of encouragement or other affirmative steps to foster infringement, and no jury could conclude that YouTube encouraged or took active steps to foster infringement. *See infra* 83-92.

harbor protection. Instead, the knowledge contemplated by the DMCA is that of specific, identifiable infringements—knowledge that the service provider can respond to “expeditiously” by removing the particular infringing material at issue. That result follows from the statute’s text, legislative history, and purpose, and is supported by all the case law. Plaintiffs’ approach, which would require service providers to take an indeterminate series of “commercially reasonable” steps in response to general awareness of unidentified infringement of something, somewhere, is at odds with all of those authorities.

This case shows why Congress required particularized knowledge and put primary responsibility on copyright owners, not service providers, to seek out infringing activity. Not only is YouTube filled with non-infringing material of endless variety, but plaintiffs themselves complicated any infringement inquiry exponentially in the way they used YouTube to advance their business interests. Plaintiffs extensively and aggressively posted clips of their copyrighted material on YouTube, and they authorized their agents and licensees to do likewise. Plaintiffs also left up countless other videos containing their works that they found on YouTube but purposefully chose not to take down.

Especially in light of their own actions, plaintiffs cannot make the showing of particularized knowledge that the DMCA requires. They offered no evidence that YouTube actually knew that any of the clips-in-suit were infringing or that

YouTube was aware of “red flags” from which the infringing nature of those clips was “apparent.” Lacking particularized knowledge of the alleged infringements, YouTube was obligated to remove plaintiffs’ clips-in-suit only in response to DMCA notices, and it is undisputed that YouTube did so.

B. YouTube did not receive “a financial benefit directly attributable to the infringing activity” while maintaining “the right and ability to control such activity.” As for “control,” YouTube has no duty under the DMCA to review hundreds of millions of clips to identify those that might be unauthorized or infringing. Both as a legal and a practical matter, the methods plaintiffs say were available to YouTube to forestall the alleged infringing activity (keyword searching, community flagging, Audible Magic fingerprinting) cannot give a service provider “control” within the meaning of the statute. That is underscored by plaintiffs’ recurring difficulties, even in this litigation, in distinguishing authorized from unauthorized postings of their own material on YouTube.

But even if YouTube had “control,” it still would be protected by the DMCA because YouTube receives no financial benefit directly attributable to the infringing activity alleged. YouTube’s industry-standard revenue model does not depend on or favor infringing activity, but instead generates advertising revenue from YouTube’s myriad non-infringing uses. Earning revenue in the same neutral

way as virtually every online service provider does not constitute receipt of a disqualifying financial benefit under the DMCA.

C. Plaintiffs' claims arise "by reason of" the storage of videos on YouTube at users' direction. An unbroken line of cases confirms that 512(c) applies to service providers like YouTube that facilitate third-party access to user-stored material. Plaintiffs' argument that the DMCA covers only "passive providers of storage" is not supported by the statute, would undermine its basic purposes, and has been uniformly rejected in other cases, as it should be here.

II. While the DMCA protects YouTube against all of plaintiffs' claims, plaintiffs' inducement claims fail without regard to the statute. Plaintiffs seek to dilute the Supreme Court's strict standard for inducement liability and ignore the undisputed evidence that YouTube is not the kind of pirate service—one that takes active steps with the purpose of encouraging infringement—described in *Grokster*. YouTube was founded with a legitimate purpose and has never invited its users to infringe. It houses a massive array of non-infringing videos and has taken industry-leading steps to deter copyright violations. YouTube is worlds away from any service that has been found liable for inducement, and plaintiffs' evidence neither satisfies *Grokster* nor takes YouTube outside the DMCA.

ARGUMENT

I. **YouTube Is Entitled To DMCA Protection.**

The district court correctly found no genuine issue as to any material fact bearing on YouTube's entitlement to the safe harbor.

A. **YouTube Meets The Threshold DMCA Qualifications.**

YouTube readily meets Section 512(c)'s threshold requirements: it is undisputed that YouTube is a "service provider" (§512(k)(1)(B)) that has a registered DMCA agent (§512(c)(2)) and accommodates "standard technical measures" (§512(i)(1)(B)).

YouTube has also "adopted and reasonably implemented ... a policy" for terminating the accounts of users "who are repeat infringers" (§512(i)(1)(A)). YouTube terminates the accounts of users who receive three "strikes" for violating its rules relating to copyright. JA-IV:173-176(¶¶27-31). YouTube's adoption and implementation of its repeat-infringer policy satisfy the DMCA. *See UMG II*, 665 F. Supp. 2d at 1116-18; *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1101-02 (W.D. Wash. 2004).⁶

⁶ The putative class incorrectly claims that YouTube did not have a repeat-infringer policy until March 2006. Class Br. 56. The evidence is undisputed that YouTube adopted and displayed a repeat-infringer policy, which informed users that their accounts could be terminated for infringement, at least as of September 2005. JA-IV:114(¶21); SJA-IX:2151, 2153-54, 2156-58. In December 2005, YouTube adopted a more formal "three-strikes" approach, but that merely refined

Plaintiffs' only challenge to YouTube's repeat-infringer policy is the putative class' suggestion that YouTube somehow "prevents copyright holders from providing DMCA-compliant notifications." Class Br. 55-56. This cryptic and unsupported assertion (which not even Viacom joins) ignores the record. YouTube has removed over 4.7 million videos (of its more than 500 million total videos) in response to DMCA notices or their equivalent. JA-IV:173(¶26). That number reflects YouTube's efforts to make its notice-and-takedown system easy and efficient for copyright holders. JA-IV:176-177(¶¶32-33).⁷ As early as 2006, YouTube created an automated tool that lets copyright holders send takedown notices with the click of a button. JA-IV:-170-174(¶¶16-28). Plaintiffs themselves have for years used YouTube's automated takedown tool to secure the removal of videos containing their content. JA-IV:769-773; JA-IV:776-777; SJA-VII:1710-11. YouTube has received frequent praise from copyright owners—including plaintiffs and their agents—for its efficient and easy-to-use notice-and-takedown system. JA-IV:172(¶22); JA-IV:669; JA-IV:727; JA-IV:778-790; SJA-VI:1305; SJA-VI:1343; SJA-VII:1722-23.

the existing policy, which already satisfied the DMCA. *Perfect 10, Inc. v. CCBill, LLC*, 340 F. Supp. 2d 1077, 1089 (C.D. Cal. 2004).

⁷ YouTube has terminated more than 400,000 user accounts—a significant number, but a tiny fraction of the more-than 250 million registered YouTube accounts. JA-IV:176(¶31).

B. YouTube Did Not Have Disqualifying Knowledge.

Plaintiffs have not identified a single clip-in-suit that YouTube knew was infringing but failed to promptly take down. Instead, plaintiffs offer various theories about why generalized awareness that unidentified infringing material may be somewhere on YouTube should be disqualifying. Those theories, as the district court held, are contrary to the DMCA.

1. The DMCA Requires Knowledge Or Awareness Of Specific Infringing Activity.

The district court correctly held that the DMCA's knowledge provisions (§512(c)(1)(A)) "describe knowledge of specific and identifiable infringements of particular individual items" and thus that "[m]ere knowledge of [the] prevalence of such activity in general is not enough." SPA:18.

a. The DMCA's text and case law make clear that specific knowledge is required.

Courts applying the DMCA have uniformly found that the plaintiff must show that the service provider knew of, but failed to expeditiously remove, the *particular* infringing material at issue. *Wolk*, 2011 WL 940056, at *6 (plaintiff failed to "establish that [provider] knew or should have known of the specific infringing activity"); *UMG II*, 665 F. Supp. at 1111 (rejecting claim that a "provider's general awareness of infringement, without more, is enough to

preclude application of section 512(c)"); *Io*, 586 F. Supp. 2d at 1148-49; *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1093 (C.D. Cal. 2001).

These rulings are correct. It is “common knowledge that most websites that allow users to contribute material contain infringing items.” *UMG II*, 665 F. Supp. 2d at 1111. Congress was well aware of that when it passed the DMCA, and it was in part for that reason that the safe harbors were enacted. S. Rep. 105-190, at 8. If 512(c) does not apply to providers that are generally aware that they may be hosting infringing material, it applies to no one, and the DMCA could not fulfill its goal of ensuring “that the variety and quality of services on the Internet will continue to expand.” *Id.*

Plaintiffs’ position is also inconsistent with the basic operation of Section 512(c). Under that provision, knowledge alone is not disqualifying; instead, a service provider that gains knowledge of infringement remains protected if it “acts expeditiously to remove, or disable access to, the material.” §512(c)(1)(A)(iii). That removal obligation necessarily contemplates knowledge of specific infringing material. A service provider can remove material expeditiously only if it knows with particularity which items to remove.

Plaintiffs seek to replace the DMCA’s clear mandate that service providers expeditiously take down known infringing items with an ill-defined obligation to “take commercially reasonable steps” in response to generalized awareness that

infringement may be occurring. Viacom Br. 33. Viacom has conjured this “commercially reasonable steps” standard out of thin air. It is not in the statute, its legislative history, or any of the cases. It was not even in Viacom’s district court briefs, which argued that general knowledge gave rise to equally amorphous duties to “look into the matter further” or “clean up the site.” Viacom MSJ 52, 54.

However phrased, plaintiffs’ extra-statutory formulations should be rejected. The DMCA does not compel YouTube to implement filtering technology or community flagging—or whatever other steps copyright owners might deem “commercially reasonable”—in response to generalized awareness of unspecific infringing activity. To the contrary, the statute expressly *disclaims* any requirement that a service provider “monitor[] its service or affirmatively seek[] facts indicating infringing activity.” §512(m); *see UMG II*, 665 F. Supp. 2d at 1113 & n.18 (§512(m) “makes clear that the safe harbors’ limits on liability do not turn on whether a service provider monitors its service”).

b. Plaintiffs misconstrue the red-flag knowledge provision.

Plaintiffs argue that the DMCA’s so-called “red-flag” knowledge provision—which creates a takedown obligation based on awareness of “facts or circumstances from which infringing activity is apparent” (§512(c)(1)(A)(ii))—cannot be limited to specific infringing material because then it would (supposedly) be satisfied only when a service provider already has actual

knowledge. Viacom Br. 27; Class Br. 31-32. Plaintiffs misunderstand red-flag knowledge and its relationship to actual knowledge.

The difference between the two provisions is *not* between specific and generalized knowledge, but instead between a subjective and an objective standard. The two provisions offer alternative means for a plaintiff to show the same thing: that a service provider had enough notice about a particular infringing item to be required to expeditiously remove that item without receiving a takedown notice. Whereas the actual-knowledge provision relies on a determination of what service provider actually or subjectively knew, the facts-or-circumstances provision allows consideration of objective factors to determine whether the provider was aware of facts that would have made the infringement at issue obvious *to a reasonable person*. S. Rep. 105-190, at 44. A plaintiff can establish objective awareness (“red-flag” knowledge) without proving that the service provider *subjectively* believed that the material was infringing. While that distinction between actual, subjective knowledge and red-flag awareness is important, both standards apply only as to specific instances of infringement—“the material” that the service provider must expeditiously remove (§512(c)(1)(A)(iii)).⁸

⁸ Plaintiffs get no help from the phrase “infringing activity” in §512(c)(1)(A)(ii). Viacom Br. 26-28. Congress explained why it used the term “activity”—to make clear that the statute covered infringing “activity using *the material* on the system or network,” regardless of whether “copyright infringement is technically deemed to occur at that site or at the location where the material is

That is confirmed by the strict nature of the red-flag test. To be charged with knowledge under that provision, the service provider first must have actually been aware of the circumstances from which the infringing activity at issue was supposedly apparent. H.R. Rep. 105-551(II), at 53. And a red flag must be “blatant,” something from which the only reasonable conclusion is that the material or activity is infringing. *Corbis*, 351 F. Supp. 2d at 1108 (infringing nature of the material must be “apparent from even a brief and casual viewing”); S. Rep. 105-190, at 48 (red flag makes infringement “obvious”); 3 NIMMER 12B.04[A][1] (“the flag must be brightly red indeed—and be waving blatantly in the provider’s face”). That test protects service providers against having “to make discriminating judgments about potential copyright infringement.” H.R. Rep. 105-551(II), at 58.

Congress crafted such a “high bar for finding ‘red flag’ knowledge” because it recognized that it is challenging for service providers to distinguish infringing from non-infringing material. *UMG II*, 665 F. Supp. 2d at 1111. No red flag exists, therefore, where circumstances leave uncertain whether the material is protected by copyright at all, or whether a particular use is licensed or, if

received.” S. Rep. 105-190, at 44 (emphasis added). The term was not included to distinguish between specific and general knowledge, but to make clear that the statute applies to knowledge of specific instances of infringement regardless of where the infringement technically occurs.

unlicensed, a fair use. H.R. Rep. 105-551(II), at 57-58. A service provider has no “investigative duties” to make such determinations. *CCBill*, 488 F.3d at 1114. Indeed, “if investigation of ‘facts and circumstances’ is required to identify material as infringing, then those facts and circumstances are not ‘red flags.’” *UMG II*, 665 F. Supp. 2d at 1108.

There is no room here for an approach that would convert generalized information that unspecified infringement is occurring somewhere into red-flag knowledge. Red flags, instead, are necessarily specific: they indicate unmistakably that a given piece of material or a given activity using that material is infringing. And they create an obligation for the service provider to expeditiously remove *that particular material*. That does not render red-flag knowledge duplicative of actual knowledge. The red-flag provision does independent work, establishing that a service provider can lose DMCA protection by failing to remove a given item, even if the plaintiff cannot prove that the provider subjectively thought the item was infringing.

- c. Plaintiffs’ inability to show knowledge here does not render the DMCA’s knowledge provisions meaningless.

Plaintiffs erect another straw man when they argue that a specific-knowledge requirement collapses Section 512(c) “into a single minimal requirement that a service provider respond to takedown notices.” Class Br. 2, 32-33; Viacom Br. 27-28.

That the DMCA requires particularized knowledge does not mean that a service provider's only duty is to comply with takedown requests. Providers must act on knowledge or awareness of infringement where it exists.⁹ The district court here found that because plaintiffs did not establish that YouTube had knowledge or awareness that any of the clips-in-suit were infringing, its duty to remove those clips was triggered only when it received proper takedown notices. SPA:10. That is exactly what the DMCA contemplates. Plaintiffs' inability to present evidence of actual or red-flag knowledge in this case does not make those provisions superfluous.

- d. Grokster did not alter the DMCA's knowledge requirements.

Plaintiffs are also wrong to suggest that the Supreme Court's decision in *MGM Studios v. Grokster* means that the DMCA requires only generalized knowledge. Viacom Br. 29-30; Class Br. 37-39.

⁹ Such knowledge or awareness must come from a source *other than* the copyright holder. §512(c)(3)(B)(i) (providing that information from a copyright owner that does not comply with statutory requirements "shall not be considered" in determining actual or red-flag knowledge). The notice-and-takedown provision, in contrast, directs service providers to remove infringing items based on information provided by copyright owners in the prescribed form. §512(c)(1)(C), (c)(3). Both provisions require service providers to expeditiously remove specific infringing material, therefore, but they get to that removal obligation in different ways.

Grokster involved contributory-liability claims against peer-to-peer file-sharing networks that were not covered by the DMCA and made no claim to safe-harbor protection. The Supreme Court did not even mention the DMCA, much less address how its knowledge provisions should be applied. To the extent that *Grokster* discusses knowledge of infringement, moreover, it supports YouTube's position. The Court made clear that "mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability." *Id.* at 937. The Court thus rejected the expansive view of secondary liability based on generalized knowledge that plaintiffs want to force onto the DMCA.¹⁰

While *Grokster* indicates that an "actual *purpose* to cause infringing use" may give rise to inducement liability even without "knowledge of specific unlawful uses" (*id.* at 934 (emphasis added)), that provides no support for plaintiffs' very different claim that general knowledge of infringement disqualifies a service provider from the protections of the DMCA. Plaintiffs assert that nothing

¹⁰ Even without regard to the DMCA, courts have held that a computer-system operator can be held contributorily liable only "if it 'has *actual* knowledge that *specific* infringing material is available using its system.'" *Perfect 10 v. Amazon.com*, 508 F.3d at 1172 (9th Cir. 2007) (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001) (emphases in original). Against that backdrop, it would make no sense if the DMCA, which was intended to give service providers *additional* protection against secondary-liability claims (S. Rep. 105-190, at 19-20), required only *generalized* knowledge.

in the DMCA suggests that Congress intended to alter the “principle of liability” recognized in *Grokster* (Viacom Br. 30), but that makes no sense. The statute was enacted seven years before the Supreme Court first incorporated the concept of inducement into copyright law (*Grokster*, 545 U.S. at 936-37), so there was nothing for Congress to alter.

As explained below, moreover, YouTube is not liable for inducement under *Grokster* as a matter of law, and plaintiffs’ rhetoric about the consequences that supposedly would ensue from applying the DMCA to services that intentionally induce infringement (Viacom Br. 28, 30-31) has nothing to do with the facts of this case. *Infra* 85-92.

2. Plaintiffs’ Invocation Of “Willful Blindness” Distorts The DMCA And The Record.

Plaintiffs’ argument that YouTube should be charged with knowledge of the infringements alleged here because it supposedly was “willfully blind” (Viacom Br. 34-39; Class Br. 34-36) distorts the DMCA, the record, and the concept of willful blindness itself.

a. Plaintiffs impermissibly seek to shift to YouTube the responsibility to seek out and identify infringements.

Plaintiffs claim that YouTube was “willfully blind” because, while it responded to takedown notices, it did not proactively filter or review every video posted to the service in an effort to determine its copyright status. What plaintiffs

label willful blindness is actually allegiance to the DMCA, which expressly relieves online services of any obligation to affirmatively monitor their sites for infringement. Embracing the statute's directives cannot be a basis for depriving YouTube of safe-harbor protection.

With the red-flag knowledge provision, Congress created a statutory alternative to actual knowledge that serves a similar purpose to—but is distinct from—common-law willful blindness. As discussed above, that provision prevents service providers from ignoring particular instances of “readily apparent infringement.” *UMG II*, 665 F. Supp. 2d at 1108. But it requires expeditious removal of particular infringing material, not open-ended investigation into potential infringement across an entire service. The provision thus addresses the concern that service providers might willfully disregard obvious infringing activity, while ensuring that “the burden of policing copyright infringement” remains “squarely on the owners of the copyright.” *CCBill*, 488 F.3d at 1113; *see also UMG II*, 665 F. Supp. 2d at 1111.

The DMCA also includes §512(m), which expressly rules out any construction of the statute that conditions safe-harbor protection on a service provider “affirmatively seeking facts indicating infringing activity.” As the legislative history explains, it would “undermine” both §512(m) and “the knowledge standard of subsection (c)” to suggest that “a provider must investigate

possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing.” S. Rep. 105-190, at 52; H.R. Rep. 105-551(II), at 61. Insofar as an extra-statutory willful-blindness rule might impose some affirmative monitoring obligation on services that have only generalized knowledge that infringement may be afoot, the DMCA unambiguously does not. Section 512(m) confirms that the statute relieves service providers of any broad common-law duty to monitor or otherwise seek out infringing activity.

As the district court explained, Congress’ decision “makes sense” given the realities faced by services like YouTube:

the infringing works in suit may be a small fraction of millions of works posted by others on the service’s platform, whose provider cannot by inspection determine whether the use has been licensed by the owner, or whether its posting is a ‘fair use’ of the material, or even whether its copyright owner or licensee objects to its posting.

SPA:19. Content owners are best equipped to determine these things, and forcing service providers to guess about them, and risk liability if they get it wrong, would undermine the protections for free expression and innovation that Congress intended the DMCA to provide.

These concerns are particularly significant here, not only given the volume of indisputably non-infringing material on YouTube, but also because of the countless examples of YouTube videos containing *plaintiffs’ own content* that were

authorized, intentionally left up, or that are fair or *de minimis* uses. *Infra* 44-53, 56 n.21; JA-VI:748 (Viacom General Counsel explaining Viacom’s choice not to remove “many, many clips that use material from our shows and movies” from YouTube “because it is possible that there could be a fair use claim”). Plaintiffs’ broad assertions of willful blindness ignore this reality.¹¹

b. Plaintiffs “evidence” does not show willful blindness.

Plaintiffs point to two instances of YouTube’s supposed willful blindness (Viacom Br. 36-37), but neither provides a basis for depriving YouTube of the safe harbor.

First, Viacom cites YouTube’s decision to stop community flagging for possible copyright violations. Plaintiffs’ story makes no sense even on its own terms: a service would not launch such a feature in the first place if it really wanted to blind itself to infringement. Regardless, YouTube did not end its brief experiment with user flagging to avoid learning about infringing videos, as plaintiffs suggest. YouTube terminated community flagging for legal reasons and

¹¹ Plaintiffs’ claims are also inconsistent with their own actions. In running its own user-submitted-content websites, which claimed the protections of 512(c), Viacom embraced the DMCA’s no-monitoring ethos with enthusiasm. One of its website’s policy manuals told employees “something that can’t bear enough repeating”: “User generated content should never be monitored.” JA-V:619; *see also* JA-V:645 (“Actively monitoring the site or exercising editorial control over the content that gets uploaded violates the DMCA and has tremendously bad implications for the company”).

because it was ineffective, as users had little ability to distinguish authorized from unauthorized videos. JA-IV:113-114(¶20); JA-V:180. In the two weeks that the community flagging was operative, users flagged 53 videos (JA-V:516-518), and those videos confirm the problems with relying on users to make guesses about potential copyright infringement.¹²

In moving away from community flagging, YouTube instead embraced the more reliable and effective procedure that the DMCA actually contemplates: removing material identified in sworn notices from actual copyright holders, rather than unverified complaints from random users. JA-IV:113-114(¶¶20-21); JA-V:180; JA-V:542-545; JA-V:232(¶10) (explaining that YouTube created a flag allowing copyright owners to send automated DMCA notices). Viacom itself took the same approach to user-flagging in running its own user-submitted content services. When Viacom [x-----REDACTED-----

¹² See SJA-V:810. The flagged videos included: a video of a parakeet, *id.* (Schapiro Opp. Ex. 387A/387B); a video of cat chasing a ball, *id.* (Ex. 389A/389B); a video of two hamsters, *id.* (Ex. 390A/390B); a movie-maker's demo reel, *id.* (Ex. 391A/391B); and a Pepsi commercial, *id.* (Ex. 393A/393B). It makes sense, moreover, that even after YouTube stopped community flagging for copyright, it continued to allow flagging for pornography. In contrast to copyright infringement, pornographic material can be identified by looking at the video alone. JA-V:850-855 (Viacom executive acknowledging differences between identifying pornography and infringement).

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As a matter of law, moreover, the decision to cease community flagging cannot disqualify a service provider from the DMCA. User flagging is a (particularly ineffective) way of seeking facts indicating infringing activity, and under §512(m) cannot be a requirement of safe-harbor eligibility. Plaintiffs' effort to equate foregoing user-flagging with willful blindness has been rejected by the only other court to have considered it and should be rejected here. *Id.*, 586 F. Supp. 2d at 1150.

Second, plaintiffs argue that YouTube's willful blindness is shown in the way it deployed fingerprinting technology. The undisputed evidence again belies plaintiffs' claim. In 2006, YouTube started using digital "hashing" to block identical copies of videos taken down for copyright reasons. JA-IV:173(¶25); JA-IV:152-153(¶4). Later that year, YouTube became the first video-hosting service to license Audible Magic's audio-fingerprinting system. JA-V:234-236(¶¶2-7); *infra* 70-73.

Shortly after that, YouTube started building Content ID, its own video-fingerprinting tool, which it believed would offer a better solution for helping copyright owners. JA-IV:151(¶¶2, 11-16); JA-V:221(¶2). Content ID involved an enormous expenditure of time and money, and was something no comparable

online service had done. JA-IV:159-160(¶¶17, 19). Since Content ID’s launch in October 2007, thousands of rights holders, including Viacom, have used it successfully. JA-IV:151(¶¶21-22, 29); JA-V:222-224(¶¶5-11). These facts are the antithesis of willful blindness.

But YouTube would not have lost safe-harbor protection even if had not implemented filtering technology. The DMCA imposes no “obligation on a service provider to implement filtering technology at all, let alone technology from the copyright holder’s preferred vendor or on the copyright holder’s desired timeline.” *UMG II*, 665 F. Supp. 2d at 1111; *id.* at 1113. The only “technical measures” that service providers must “accommodate” are those described in the DMCA. §512(i).

Finally, while there is no basis for applying the extra-statutory doctrine of willful blindness in this case, plaintiffs have not presented evidence that meets that standard. This Court’s recent ruling in *Tiffany v. eBay* illustrates the high bar for showing that an online service provider was willfully blind, even where the DMCA does not apply. In *Tiffany*, a trademark case, this Court held that eBay was not willfully blind even though it was “generally aware” that counterfeit Tiffany goods were being sold through its website, but did not investigate “the extent” of that infringement or analyze its data “to prevent further infringement.” *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 514-15 (S.D.N.Y. 2008), *aff’d* 600 F.3d 93,

110 (2d Cir. 2010). Allowing Tiffany to prevail on a willful-blindness theory would impermissibly impose “an affirmative duty to take precautions against potential counterfeiters, even when eBay had no specific knowledge of individual counterfeiters.” *Id.* Even at common law, therefore, willful blindness requires proof that a service provider “purposefully contrived” to ignore a very significant risk that *specific* material was infringing. *Id.* at 515. Plaintiffs could not make that showing here, even if it were relevant to the DMCA inquiry.

3. Plaintiffs’ Posting, Leaving, And Licensing Content On YouTube Undermine Any Claim Of Knowledge.

It is undisputed that plaintiffs authorized great quantities of their copyrighted material to appear on YouTube in a number of different forms. This evidence underscores why Congress put primary responsibility on content owners to make infringement determinations and directly undermines plaintiffs’ claims that YouTube had disqualifying knowledge of infringement.

a. Plaintiffs posted and licensed their material on YouTube in many different forms.

Like many other media companies, Viacom directly and through its marketing agents posted to YouTube countless videos containing its copyrighted material. Several aspects of Viacom’s embrace of YouTube are particularly significant.

First, Viacom’s posting of content to YouTube was extensive. Viacom’s own documents reveal that it uploaded a “boatload of clips onto YouTube for distribution” (JA-IV:260) and was “VERY aggressively providing clips on an ongoing basis” (JA-V:291).¹³ Viacom’s uploading activity started early in YouTube’s existence (JA-IV:233, 248), and even Viacom’s decision to sue could not curb its desire to “continue to ‘place’ authorized clips on YouTube.” JA-VI:687. Indeed, Viacom kept uploading material to YouTube throughout this litigation. JA-II:753(¶1.54); *e.g.*, JA-V:306 (Paramount in March 2007: “We are still uploading content to YouTube”); JA-V:308 (MTV lawyer in August 2007: “Actually we’re OK with uploading our own material on youtube for promotional purposes.”); SJA-VIII:2075 (August 2008 email from marketer to YouTube: “We work with MTV (Viacom) on several of their shows and upload a lot of their content.”); JA-IV:285 (MTV authorizing postings to YouTube in February 2008).¹⁴

¹³ See also JA-VI:682 (Viacom lawyer reporting that “there are A LOT of clips they [VH1] have seeded to you tube”); JA-IV:317 (“We actually provide clips to YouTube quite aggressively.”); JA-VI:782 (“it would be a significant task to keep you updated on each and every clip we post ongoing”); JA-IV:211(¶2), 221(¶18), 223-232; JA-VI:640-641(¶¶2-3).

¹⁴ Viacom has admitted that its employees uploaded “approximately” 600 clips through May 2008 (JA-II:716(¶123); SJA-IV:919-20(¶19(a)), but that number (while significant) is wildly inaccurate. It omits Viacom’s extensive use of third-party marketing agents who uploaded thousands of additional clips at Viacom’s direction. JA-IV:101-102(¶¶2-4); JA-IV:184(¶¶5-6); JA-IV:218(¶13), 288-315; JA-VI:640-643(¶¶2-7), 660-662, 666-668. It also ignores Viacom’s acknowledged

Second, Viacom and its agents posted a wide variety of videos on YouTube, including long excerpts (or even full episodes) of television shows and clips taken from its films with nothing indicating their origins. JA-VI:640(¶2), JA-VI:657-659; JA-VI:694; SJA-VII:1752-54 (Paramount explaining that “MI:3 scenes found on YouTube.com” were “brought online this week as pa[r]t of normal online publicity before the release of the film”).¹⁵ These videos were not obvious advertisements, and indeed many clips were calculated to look unauthorized. Viacom uploaded what its documents describe as footage from the “cutting room floor” and clips “rough[ed] up” to “add to the ‘hijacked’ effect” (JA-IV:234; JA-IV:238; JA-IV:254; JA-VI:640(¶2))—which Viacom now calls a “common” practice (JA-II:755(¶1.61)). *See also* JA-IV:257-258; SJA-VI:1296-97, 1405.

Third, while YouTube knew that Viacom was posting some clips, YouTube did not know, and could not have known, the full extent of Viacom’s marketing activities. Viacom uploaded certain clips using its “official” YouTube accounts,

inability to provide a full accounting of its postings on YouTube. JA-VI:639(¶¶23, 30).

¹⁵ The nature of what Viacom posted is illustrated by the clips-in-suit that Viacom withdrew after realizing that they were actually approved marketing materials. Many of those withdrawn clips are unadorned excerpts from Viacom’s works that are identical to—or effectively indistinguishable from—clips that Viacom is still suing over. *See* JA-V:810 (*compare* Rubin Reply Ex. 291A/B (authorized clip from *Iron Man*) *with id.* Ex. 272A/B (identical clip-in-suit); *compare id.* 279A/B (authorized clip from *Drillbit Taylor*) *with id.* 274A/B (identical clip-in-suit)); *see also* JA-VI:644-645(¶10); JA-II:756(¶1.63).

but it did more of its posting using obscure accounts and agents. JA-VI:641-643(¶¶3-5); JA-IV:102(¶4); JA-IV:184(¶¶5-6); SJA-VI:1301-03; SJA-IX:2163-66; SJA-VI:1234-38. The extent of Viacom’s stealth-marketing emerged only in discovery, when YouTube uncovered no fewer than 50 Viacom-related accounts that collectively uploaded many thousands of clips to YouTube. JA-IV:212-216(¶5(a)-(f)); JA-VI:641-642(¶4); JA-VI:660-668; JA-IV:864-872; JA-V:286; SJA-IX:2179-2196). There is no way to tell from the names of these accounts—including “demansr,” “gooddrugy,” “thatsfunny,” “ultrasloppyjoe,” and “waytoblue”—that they were linked to Viacom or to distinguish them from other run-of-the-mill YouTube accounts.

Blurring its connection to the videos it authorized was an important part of Viacom’s strategy. JA-IV:238. Examples abound:

- MTV employee in 2006: “Spoke with Jeff [another MTV employee] and we are both going to submit clips to YouTube.com—him through his personal account so it seems like a user[] of the site and me through ‘mtv2’” (JA-VI:697);
- Paramount executive asking that clip be posted on YouTube “NOT WITH A PARAMOUNT LOGO OR ASSOCIATION” (JA-IV:262);
- Paramount executive instructing marketer that clips were “to be uploaded from his personal acct and not associated with the film” (JA-IV:265);
- Paramount executive advising that clips posted to YouTube “should definitely not be associated with the studio – should appear as if a fan created and posted it” (JA-IV:271-272);
- MTV approving marketer’s request to post clips on YouTube, “if u can do it the in cognito [sic] way” (JA-IV:285);

- Paramount employee discussing uploading YouTube clip from Kinko's in order to mask its origin (SJA-VI:1402-03).

Such practices not only left YouTube users (and YouTube itself) at a loss to know who was posting the videos, they often made it difficult for Viacom itself to distinguish between authorized and unauthorized clips.¹⁶

The actions of the putative class plaintiffs similarly underline YouTube's inability to know what is unauthorized. Many works owned by those plaintiffs, including works-in-suit, have been licensed to appear on YouTube. Some works were licensed to third-parties by class plaintiffs themselves; some by their co-owners or sub-publishers. As a result, even plaintiffs themselves have trouble knowing exactly what uses of what material are permitted at any given time.

For example, plaintiff Rodgers & Hammerstein ("R&H") has issued numerous licenses that allow its compositions to be posted on the Internet, including on YouTube. JA-IV:663-666; SJA-VI:1372-75. R&H routinely allows

¹⁶ Contrary to Viacom's claim, which is unsupported by the one document it cites, Viacom did not offer "to work with YouTube to ensure that it knew precisely which clips were authorized." Viacom Br. 45 n.5. Even during discovery in this case, Viacom refused to provide information to YouTube about its marketing activities, asserting specious privilege claims and other objections to frustrate YouTube's ability to determine which clips and accounts Viacom had authorized. JA-VI:650-656(¶¶20-30); JA-VI:670; SJA-VI:1281-86. Moreover, as confirmed by Viacom's frequent internal confusion about what clips it "seeded" to YouTube, its many erroneous takedown requests, and the fact that it mistakenly sued over many clips that it was actually responsible for posting, Viacom itself did not know "precisely which clips were authorized." *Infra* 66-69.

theater companies to post clips of their productions on YouTube (SJA-VI:1420-23); many of those licensed clips are indistinguishable from R&H's clips-in-suit. R&H has also authorized clips to appear specifically on YouTube. SJA-VI:1427-28, 1434-39; JA-IV:672-675. The same is true of the other publisher-plaintiffs, which regularly issue general Internet licenses, and have expressly licensed their compositions to appear on YouTube for promotional purposes. SJA-VI:1443-44, 1446-50, 1463-64; SJA-VII:1509-14, 1526-27, 1559-62, 1613-16, 1631-32; JA-IV:687-688, 691-692. Plaintiff Cherry Lane even sponsored a contest that invited participants to "record their own versions of [a song] and post the video to www.youtube.com." SJA-VII:1545-46, 1762.¹⁷ In addition, many of plaintiffs' works are co-owned by other parties, each of whom has the right to independently license the work. SJA-VI:1503; SJA-VII:1667, 1701-02; JA-IV:752-753. Plaintiffs did not inform YouTube of the details of their licensing and co-ownership arrangements. JA-IV:694; JA-IV:745-746; SJA-VI:1440; SJA-VII:1635.¹⁸

¹⁷ Several of the soccer clubs that make up the Premier League created official YouTube "channels" to which they have uploaded a variety of videos, including match footage. JA-IV:711-712, 714-15.

¹⁸ Plaintiffs certainly were not the only professional content owners posting videos on YouTube without a formal content-licensing deal. Many other media companies—including a number of plaintiffs' *amici*—uploaded or otherwise authorized their content to appear on YouTube, often covertly. *E.g.*, JA-IV:69(¶11) (describing clip uploaded by Nike); JA-IV:102-105 (clips uploaded on

This extensive evidence bears directly on the knowledge inquiry. It underscores why the DMCA requires particularized knowledge and confirms that plaintiffs cannot show that YouTube had such knowledge. Given plaintiffs' own conduct, the presence of their material on YouTube would have said nothing about whether such material was unauthorized—much less created a circumstance from which infringement was obvious.

- b. Viacom's decision to purposefully leave many clips on YouTube further refutes any allegation of knowledge.

The approved appearance of plaintiffs' content on YouTube does not end with the videos they themselves posted or expressly licensed. It is undisputed that Viacom deliberately left up on YouTube a great many clips containing its material that were uploaded by others. Viacom's "leave-up" decisions eviscerate any claim that YouTube had disqualifying knowledge.

Viacom hired a company called BayTSP to monitor YouTube and send takedown notices as Viacom directed. With the click of a mouse, BayTSP could secure the removal of any unauthorized videos that it found. JA-IV:170(¶18). But

behalf of *amici* Miramax and The Weinstein Company); JA-IV:179-80(¶¶3-10) (clips uploaded on behalf of *amici* HBO, The Weinstein Company, Sony Pictures, Disney, Fox, CBS, Lions Gate, EA, among others); JA-IV:182-84(¶¶1-6) (clips uploaded on behalf of Warner Brothers Records); JA-IV:192-94(¶¶5-8) (clips posted by music groups, studios, and *amicus* CBS); JA-IV:230-232 (uploading by NBC Universal, Atlantic Records, and *amicus* Disney); JA-IV:317 (uploading by *amicus* CBS); JA-IV:384-386 (uploading by *amici* CBS and Warner Brothers, among others).

Viacom did not want to take down anything close to all clips of its material from YouTube, and it gave BayTSP detailed, variable, and confidential instructions about which clips should and should not be removed. JA-IV:529-589, 599, 602, 611-615, 648-654; SJA-VII:1746-47; SJA-V:1026-27(¶130); JA-II:758(¶1.69). In October 2006, for example, MTV instructed BayTSP not to remove any clips of its programs under 2½ minutes long. JA:IV-529-534, 586-88.

Acting on Viacom's instructions, BayTSP looked at, but refrained from taking down, innumerable videos it identified as containing Viacom material, including many clips from prominent works-in-suit like *The Daily Show*, *The Colbert Report*, and *South Park*, among dozens of other Viacom shows. JA-IV:591-597, 658; JA-VI:719-740. Viacom's executives felt "very strongly that [they didn't] want to stop the colbert and daily clips." JA-IV:583; *see also* JA-IV:447-449. Viacom told BayTSP not to issue takedown notices for such clips so long as they were less than five minutes long (that was later changed to three minutes). JA-IV:586; SJA-VIII:2077. Similarly, in November 2006, Viacom decided to leave up ("pass on") 315 of the 316 *South Park* clips that BayTSP found on YouTube. JA-IV:591-597; *see also* SJA-IX:2087. As MTV's former president testified, "[w]hile we were issuing takedown notices against some of the content, there was other content which we were allowing to continue to be on YouTube."

JA-IV:442; JA-IV:656 (BayTSP to Viacom: “we are leaving a majority of the content on YouTube”).

Even after suing YouTube, Viacom continued its policy of deliberately allowing clips to remain on the service. In June 2007, for example, Paramount instructed BayTSP to “turn a blind eye” to user-uploaded clips from *Transformers*, even though “they don’t look like teasers or trailers.” JA-VI:744; *see also* JA-V:43; JA-IV:274. Viacom did not share with YouTube the detailed and ever-changing instructions it gave to BayTSP. JA-IV:459. The only way that YouTube knew which clips Viacom actually wanted to remove at any given time was from the takedown notices it received.

Viacom left its content on YouTube for various reasons. SJA-VI:1245-48. It wanted to reap the promotional benefits that having videos on YouTube provided. JA-VI:751, 753; SJA-IX:2104-06; SJA-VI:1299. Viacom also had trouble distinguishing user-posted clips from marketing clips that Viacom had uploaded itself, and it wanted to “err on the side of leaving up some infringing material rather than being overly aggressive and taking down one of the many approved clips.” JA-IV:604-605; SJA-IX:2108. Viacom left up “many, many clips” that it concluded were possible fair uses. JA-VI:748. Viacom also used its leave-up policies to try to gain leverage in its licensing negotiations with YouTube. SJA-VI:1338; SJA-IX:2091, 2102.

Viacom's leave-up practices further belie its claims of red-flag knowledge. If Viacom did not think that a clip was so clearly infringing that BayTSP should request its immediate takedown, it cannot be that YouTube was required to unilaterally remove that clip or else lose the safe harbor. That is particularly so given that Viacom told YouTube—and said publicly—that it wanted its content to stay up. JA-V:236(¶8); SJA-VI:1250-51(¶135). Far from constituting a red flag, the appearance of Viacom material on YouTube would suggest that Viacom had put it there itself or had decided it wanted the clip to remain.

4. YouTube Did Not Have Knowledge Of The Specific Infringements Alleged.

Particularly against this backdrop, plaintiffs' cursory suggestions that YouTube had the particularized knowledge that the DMCA requires do not come close to carrying plaintiffs' burden.

a. Plaintiffs have no evidence of specific knowledge.

Viacom claims that it presented evidence sufficient to create a jury question on specific knowledge. Viacom Br. 39-40. It did not. The handful of documents Viacom cites do not refer to any specific clips, let alone create a triable issue about whether YouTube knew that any of plaintiffs' clips-in-suit were infringing.¹⁹

¹⁹ For instance, Viacom claims that prior to Google's acquisition of YouTube, Credit Suisse "estimated the percentage of views that were of infringing material." Viacom Br. 39. That is untrue. Credit Suisse was evaluating the fairness of Google's proposed purchase price of YouTube; it was not providing an

- b. YouTube's "track" feature did not confer knowledge of infringement.

Focusing on music publishing, class plaintiffs make the strange argument that YouTube knew that publishing rights were being infringed in any video that its record-label partners "tracked" using YouTube's content-claiming systems. Class Br. 17-20, 42.

YouTube gives copyright owners three options for each video they claim: (1) "block" it from appearing on YouTube; (2) "monetize" it by allowing advertising to be run alongside the video; (3) "track" it with no monetization. JA-IV:151(¶¶7, 24). In choosing the "track" option, a copyright owner is telling YouTube that it wants to leave the video up—but does not want advertising displayed. JA-V:230-231(¶7). There are many reasons why copyright holders choose to track videos: for example, they may want promotional exposure for their material but have contractual limits on their right to monetize, or they may have licensed a work to a third party and want to audit royalty payments. JA-V:230-231(¶7); JA-IV:163-164(¶31). The track option can also be used where YouTube's policies do not allow monetization. JA-IV:188(¶9). For music videos,

infringement analysis of YouTube videos. SJA-VI:1287-94; JA-II:219-244; SJA-VIII:1970-72. Credit Suisse did not even try to measure the amount of "premium" content legitimately on YouTube as a result of marketing efforts, acquiescence, or fair use. JA-II:228; Schapiro Opp. Ex. 212. And its fairness opinion certainly does nothing to suggest that Google had knowledge of any specific infringing clips.

YouTube protects publishers' interests by allowing its record-label partners to monetize videos *only* where the label represents that it has accounted for the relevant publishing rights. JA-III:225, 483.

Plaintiffs' effort to transform YouTube's conservative monetization policies into knowledge of specific infringements is meritless.²⁰ A track claim by a record label does not tell YouTube who owns the relevant composition rights, much less whether those unknown publishers object to the video's presence. JA-V:231(¶8). There is no reason to assume that the composition is being infringed. The user who posted the video (and who in so doing expressly affirmed that she had the rights to upload it (JA-IV:167-168(¶¶7-8))) certainly could have had a license from the publisher. JA-V:228-229(¶3). Publishing rights, moreover, are frequently shared among different owners, each of whom has the independent right to license the work. Alternatively, YouTube itself may have a license with the relevant publisher(s) but may not be able to identify the composition. JA-V:229(¶4). The

²⁰ The documents that plaintiffs cite (Class Br. 19) simply describe YouTube's policies. They illustrate that record labels can choose to use the track feature where monetization is not an option and neither the label nor YouTube have information that the composition is unauthorized. They do not suggest that YouTube somehow "discouraged" the labels from blocking videos that it knew were infringing.

use of the composition might also be a fair use.²¹ Whatever the scenario, YouTube’s *lack* of knowledge about the status of the publishing rights is not knowledge of infringement. JA-V:230-231(¶¶7-8).²² All that YouTube knows as a result of video being “tracked” is that the only rights-holder who has come forward has instructed that the video remain up. Where YouTube *does* have information that a publisher believes a given video is infringing (usually via a DMCA notice), it removes that video—even if all the other rights holders have consented to its presence. JA-V:227(¶¶3, 7).

Finally, plaintiffs’ arguments are entirely hypothetical. They offer no evidence that any of their clips-in-suit was the subject of a “track” instruction. That failure of proof alone disposes of this issue.

C. YouTube Properly Responds To Takedown Notices.

Because YouTube did not know that any of the clips-in-suit were infringing, its duty to “expeditiously” remove those clips was triggered only when it received proper takedown notices. It “is uncontroverted that when YouTube was given the

²¹ Many of the publisher-plaintiffs clips-in-suit fall into that category. *See* JA-V:810 (*e.g.*, Schapiro Ex. 196A/196B; 197A/197B; 199A/199B; 200A/200B; 201A/201B; 202A/202B; 207A/207B).

²² Audible Magic, which YouTube used to help identify music videos, did not provide any information about publishing rights. Audible Magic identifies sound recordings, not musical compositions, and it was not set up to correlate sound records to music-publisher information. JA-V:229-230(¶¶5-6); JA-V:221(¶3); JA-V:692.

notices, it removed the material.” SPA:26; *see also* SPA:10. Plaintiffs nevertheless fault YouTube for not searching for and removing clips *not* identified in takedown notices. Class Br. 45-46. Like every other court to have faced this argument, the district court correctly here rejected it. SPA:31-32.

The DMCA requires copyright owners to identify “the material that is claimed to be infringing”—including “information reasonably sufficient to permit the service provider to locate the material.” §512(c)(3)(A)(iii); *accord* H.R. Rep. 105-551(II), at 55. Service providers, in turn, must expeditiously remove the material that owners identify. §512(c)(1)(C). Nothing in the statute requires providers to respond to takedown notices by searching for *other* potentially infringing items “beyond the specific materials that the [plaintiff] identified.” *UMG II*, 665 F. Supp. 2d at 1109-10. To the contrary, it is well settled that the copyright owner must “provide the specific location of the allegedly infringing works in each instance for notice to be effective.” *Wolk*, 2011 WL 940056, at *5.²³

That rule applies with particular force here. In *UMG II*, because one of the artists whose work was identified in plaintiffs’ notices had itself uploaded a video to the service, searches for that artist’s works would “not necessarily unearth only

²³ As Judge Stanton recognized (SPA:32), while copyright holders may provide a “representative list” of the copyrighted *works* claimed to be infringed, there is no similar provision for identifying the allegedly infringing material that “is to be removed.” *Compare* §512(c)(3)(A)(ii) *with* §512(c)(3)(A)(iii).

unauthorized material.” *Id.* at 1110 & n.13. As described, plaintiffs’ authorization of material on YouTube far exceeds anything contemplated in that case, and doing searches for such material would (and did) find countless authorized and otherwise non-infringing videos. *E.g.*, SJA-IX:2126 (fewer than 6% of videos reviewed by BayTSP using Viacom keywords resulted in takedown notices). YouTube, by taking down the videos identified in plaintiffs’ notices, did exactly as the DMCA requires.²⁴

D. YouTube Did Not Have Control Over The Alleged Infringing Activity Coupled With A Direct Financial Benefit.

Under §512(c)(1)(B), a service provider loses safe-harbor eligibility only if the plaintiff shows both that the service provider received “a financial benefit directly attributable to the infringing activity” and that “the service provider had the right and ability to control such activity.” Plaintiffs can show neither control nor financial benefit.

1. The DMCA Does Not Codify Vicarious Liability.

Plaintiffs’ control argument rests on the premise that the DMCA simply codified the common law of vicarious liability. Viacom Br. 42-43; Class Br. 48-50. That premise is wrong. In enacting the safe harbors, Congress intended that

²⁴ Ignoring all of this, plaintiffs say that their notices provided “more than enough information for YouTube to identify and locate the material wherever it resided on its website.” Class Br. 45. But the documents plaintiffs cite do not remotely support that proposition—or even speak to that question. JA-III:388(¶64); SJA-V:1186-87(¶64).

some service providers who might otherwise be held vicariously liable at common law would be protected by the statute. The legislative history makes clear that “Section 512(c) limits the liability of qualifying service providers for claims of direct, vicarious and contributory infringement.” H.R. Rep. 105-551(II), at 53; *id.* at 50; S. Rep. 105-190, at 20. Plaintiffs’ codification argument would undermine that legislative purpose by making the safe harbor available only to service providers that cannot be held vicariously liable in the first place.

Plaintiffs rely on legislative history relating to a preliminary version of the bill. H.R. Rep. 105-551 (Part I), at 26 (May 22, 1998). But the suggestion that the DMCA would codify the control element of vicarious liability was omitted from the committee reports describing the law as it was ultimately enacted.²⁵ That was no accident. In the final statute, Congress abandoned its prior effort to “embark[] upon a wholesale clarification” of vicarious liability, and elected “instead, to create a series of ‘safe harbors’” that would function independently of the common law. S. Rep. 105-190, at 19. Under that approach, the DMCA’s “limitations of liability apply if the provider is found to be liable under existing principles of law.” H.R. Rep. 105-551(II), at 50. Plaintiffs’ bid to engraft the broadest common-law

²⁵ The early House Report that plaintiffs cite actually undermines their broader codification argument. That report described the aim of changing the common law, not codifying it: “the current criteria for finding contributory or vicarious liability are made clearer and somewhat more difficult to satisfy.” H.R. Rep. 105-551(I), at 13; *see also id.* at 25.

formulations onto the DMCA thus is exactly what Congress rejected. *UMG II*, 665 F. Supp. 2d at 1115-16 (explaining that relying on the early House report “would contradict” the statute as enacted and rejecting argument that DMCA’s control test codifies the common-law standard).

Because the DMCA does not duplicate the common law, the control provision “requires its own statutory analysis.” *Id.* at 1115. As Judge Stanton recognized, that inquiry focuses on particular instances of alleged infringing activity and, at least in a case like this, requires some knowledge of that activity. SPA:28-29. The court got it right on the facts here. YouTube hosts hundreds of millions of user-uploaded videos, a small fraction of which are claimed to be infringing; it cannot exercise practical control over the infringing activity at issue unless it has some antecedent awareness of the individual materials or activities that are alleged to be infringing.

Plaintiffs are wrong to suggest that this commonsense understanding of the “control” provision renders it “entirely duplicative” of the DMCA’s knowledge provisions. *Viacom Br.* 41. An online service that directs or exercises controlling influence over the primary infringer, for example, by actively soliciting infringing material, or by acting as the principal in an agency relationship, may control the infringing activity even though it may not have knowledge. Cf. BLACK’S LAW DICTIONARY (6th ed. 1991) (defining “control” as “the ability to exercise a

restraining or directing influence over something”). But there is nothing like that here. *Infra* 85-92.

Regardless of how the DMCA’s control test is applied, moreover, it at a minimum requires that the service provider have the practical ability to have prevented the alleged infringing activity at issue. *Io*, 586 F. Supp. 2d at 1151. As courts have consistently recognized, that ability must come through means *other than* the provider’s ability to exercise generalized control over its system, to terminate abusive users, to remove known infringing items, or to monitor its service. Those abilities are either prerequisites to DMCA protection or, in the case of monitoring, expressly *not* required for safe-harbor eligibility. *Hendrickson*, 165 F. Supp. 2d at 1093-94 (“the ‘right and ability to control’ the infringing activity, as the concept is used in the DMCA, cannot simply mean the ability of a service provider to remove or block access to materials posted on its website or stored in its system”); *Io*, 586 F. Supp. 2d at 1151-52 (any “contrary holding would render the DMCA internally inconsistent”); *UMG II*, 665 F. Supp. 2d at 1115.

2. Legal And Practical Considerations Defeat Plaintiffs’ Allegations Of Control.

Plaintiffs point to three things that they claim show YouTube’s ability to control: community-flagging, keyword searching, and Audible Magic filtering. *Viacom Br.* 44-45; *Class Br.* 51. None of those provide a legal or practical basis for a finding of control under the DMCA.

- a. A finding of control cannot be based on a service provider's unwillingness to affirmatively search out potential infringement.

Plaintiffs' control arguments are irreconcilable with §512(m). Reviewing videos flagged by users, running keyword searches, and deploying filtering technology are all ways that a service provider can monitor its service or affirmatively seek facts indicating infringing activity. But, as a matter of law, such affirmative measures cannot be the basis for depriving a service provider of the safe harbor. The "availability of superior filtering systems or the ability to search for potentially infringing files" cannot establish a disqualifying right and ability to control under the DMCA. *UMG II*, 665 F. Supp. 2d at 1113.

Ignoring the case law and the statutory text, Viacom posits that §512(m) applies only to service providers "unaware of ongoing infringement." Viacom Br. 46-47. There is no support for that claim. As described above, it is common knowledge that some of the material submitted to any 512(c) service will be infringing; indeed, that is the premise of the safe harbor. Subsection (m) was enacted to make clear that—despite that reality—a service provider has no duty to "investigate possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing." S. Rep. 105-190, at 52. If that provision protects only providers unaware (even generally) that infringement may be occurring on their services, it protects no one.

- b. Keyword searching and community flagging do not give practical control over infringement.

Viacom argues that by “searching for keywords associated with copyrighted content (*e.g.*, ‘South Park’)” and by using community flagging, YouTube could have controlled infringement. Viacom Br. 44-45. While those steps cannot constitute control as a matter of law, plaintiffs also ignore the facts in suggesting that they were practical options for YouTube to have prevented the infringements alleged here.

YouTube could not manually review the massive volume of videos on the service in an effort to determine which might be infringing. As one of Viacom’s own agents testified, on “a big website such as YouTube’s . . . the volume would preclude any process that involves a manual review of videos.” SJA-VII:1733; SJA-VII:1740-41 (Viacom witness testifying that manual-review on Viacom-owned video-service would have been “cost-prohibitive”). The court in *Io*, looking at a much smaller service, held that “no reasonable juror could conclude that a comprehensive review of every file would be feasible.” *Io*, 586 F. Supp. 2d at 1153.

Far from mitigating the problems with manual review, keyword-searching exacerbates them. To administer a comprehensive keyword-searching program, YouTube would first have to know what content to search for. The range of potential searches for the innumerable copyrights in existence is limitless. It would

include every television show, movie, song, and sporting event in the world. YouTube then would have to determine which keywords to use. The wide-ranging and generic keywords that plaintiffs claim are linked to their narrow slice of content—including “bar-b-q,” “chevrolet,” “gary,” “gaz,” “liverpool,” “money,” “nestor,” “smile,” “stages,” “subways,” and “williams,” among others (JA-VI:53-60)—illustrates the hopelessness of that task.

Keyword searching is also both over- and under-inclusive. It finds countless videos that are not infringing, including commentaries, parodies, authorized promotional clips, or videos that have nothing to do with the content at issue. [x---

----- REDACTED -----
-----x]; SJA-VIII:1856-57. It

also misses videos whose metadata do not reference the keyword.²⁶ The experiences of Viacom’s agent, BayTSP, reflect these difficulties. BayTSP explained that “[k]eyword enforcement is something we as a company would never employ because it would create a series of false positives.” JA-VI:69. BayTSP

²⁶ Citing a March 2006 instant message, Viacom claims that a YouTube employee “put a stop to efforts to implement software that would notify copyright owners when infringing videos were uploaded.” Viacom Br. 12. That is not so. The feature discussed in the document did not identify “infringing videos”; it merely alerted users when videos with tags matching their designated keywords were uploaded. JA-II:112. At that time, YouTube had already launched features that did the same thing, and YouTube adopted those features (despite their limitations) as part of its copyright-protection system. JA-V:203-204(¶¶2-6).

told Viacom that more than 80% of the videos located using keyword searches would not actually contain content from the targeted program. JA-VI:72; JA-VI:67-68. In practice, the number of false positives found when searching Viacom-related keywords on YouTube was even higher.²⁷

Plaintiffs' argument also incorrectly assumes that those reviewing the results of keyword searches would be readily able to distinguish legitimate from illegitimate videos. Determining infringement is not just a matter of looking at the video; it requires knowledge about who uploaded it, whether the material is protected by copyright, who owns the copyright(s), whether one of the copyright owners authorized the use, and whether that use is fair or otherwise permitted by law. H.R. Rep. 105-551(II), at 57-58; SPA:19. Particularly given the amount of fair-use material on YouTube and widespread practice of plaintiffs (and other content owners) uploading and licensing their material to be on YouTube, YouTube could not "have accurately identified the infringing content in question." *Id.*, 586 F. Supp. 2d at 1153.

Viacom itself acknowledged that keyword searching for Viacom content on YouTube would unearth a tremendous amount of non-infringing material. In a February 2007 letter, Viacom's general counsel expressly invited the ACLU,

²⁷ For example, when BayTSP searched for the term "Colbert," it found 400 videos, only 44 of which were determined to actually contain content from *The Colbert Report*. JA-VI:75; *see also* JA-VI:114 (similar for "South Park").

which had expressed concern about Viacom indiscriminately removing YouTube videos, to visit YouTube, “search on ‘Jon Stewart’ or ‘South Park’ and see the clips that remain”—clips that Viacom “did not take down” because it believed they likely were fair uses. JA-VI:748.

- c. Plaintiffs’ own problems determining authorization confirm YouTube’s inability to control.

Viacom’s claim that YouTube “could easily have discovered and removed” infringing videos (Viacom Br. 45), is further refuted Viacom’s *own* difficulties distinguishing authorized clips containing Viacom content from allegedly infringing ones. *Cf. Io*, 586 F. Supp. 2d at 1153 (service provider’s lack of control demonstrated by plaintiffs’ inability “to readily identify which of it works allegedly were infringed”).

Viacom recognized that without elaborate internal record-keeping, it would have no hope of figuring out which videos it had authorized to appear on YouTube.²⁸ In an effort to prevent the removal of authorized clips, Viacom tried to maintain internal “whitelists” of approved YouTube accounts. JA-IV:796-802;

²⁸ *E.g.*, JA-IV:533-534 (Viacom requesting that VH1 marketers provide list of “everything that you have seeded thusfar as we ... don’t want to have notices sent for content we seeded”); SJA-VII:1744 (BayTSP requesting from Viacom “[c]opies of materials being pos[t]ed so we can distinguish between authorized and un-authorized materials”); SJA-VII:1746-47 (Paramount to BayTSP: “Please do not initiate takedown actions without express prior written approval from us.”); JA-IV:506-507 (Paramount marketing executive unaware of all the account names Paramount used to upload material to YouTube).

JA-IV:212(¶5), 388, 391-407; JA-V:283-287. But Viacom’s marketing practices were so extensive that its lists were consistently inaccurate (JA-IV:212-216(¶5(a)-(f)); JA-IV:394-395), and its copyright enforcers often had little idea which clips and YouTube accounts Viacom had authorized.²⁹

Not surprisingly, therefore, Viacom routinely made mistakes in sending takedown notices, demanding that YouTube remove videos that Viacom and its agents had uploaded. JA-IV:211(¶3); 319-380, 394-395; JA-V:45; JA-VI:706-717; SJA-VII:1759-60. Those mistakes sometimes targeted *other copyright owners’* authorized material (JA-IV:197-198(¶17-18), 201-205), leading one frustrated record label to complain about Viacom’s “blatant abuse of the DMCA takedown statute” (JA:IV:206-208). At other times, Viacom’s errors resulted in the suspension of its own YouTube accounts or those of its marketing agents. JA-IV:196-197(¶¶15-16), 320-323; *see also, e.g.*, JA-IV:200, 381-383; SJA-VI:1310.

Viacom’s difficulties extend to this case, in which Viacom mistakenly sued YouTube over scores of authorized clips. JA-II:726(¶¶149-151). After YouTube’s

²⁹ *E.g.*, JA-IV:604-606 (Paramount executive explaining that “I need to speak to the publicity dep’t before confirming which [videos] should be taken down”); SJA-VII:1750 (BayTSP informing Paramount that “[w]e are going to hold off on removing the clips on YouTube cause we do not know which videos Marketing has put up”); SJA-VII:1752-54 (Paramount email questioning whether YouTube clips from Paramount movie were authorized); SJA-VII:1756-57 (BayTSP unable to determine whether clips from Paramount movie were authorized); JA-IV:470-471 (BayTSP representative agreeing that “there’s no way to tell from a full episode [on YouTube] whether or not the person that uploaded it had authority”).

discovery efforts unearthed many Viacom-uploaded clips-in-suit, Viacom tried to withdraw them, only to discover even more, which its lawyers had missed in their previous analyses. JA-IV:42-53; JA-IV:216-218(¶¶6-13). To this day, Viacom continues to assert infringement claims against clips that it was responsible for posting on YouTube in the first place. JA-IV:218-219(¶14); JA-VI:645-647(¶11). When Viacom belatedly admitted in summary judgment briefing that “there remain clips in suit that Viacom had authorized to appear on YouTube” (JA-II:727(¶152)), that concession contradicted one of its earlier sworn declarations (JA-V:195(¶26)) and a verified interrogatory response (SJA-VIII:1832-33).

Viacom’s serial misidentifications bear directly on the control inquiry. In finding that the service provider lacked practical control, one recent decision relied on the fact that the plaintiff had dropped a single work that it had originally claimed were infringed. *Id.*, 586 F. Supp. 2d at 1153. Viacom’s problems go far beyond that. Both before and during this litigation, Viacom has been unable to determine which clips on YouTube containing its material were authorized and which were not. Viacom made these mistakes despite far-superior knowledge of its copyrights, licenses, and uploading practices, and against the backdrop of Rule 11. If Viacom cannot effectively distinguish what it authorized from what it did not, YouTube has no chance of doing so. These facts also further belie Viacom’s

baseless assertion that it “offered to work with YouTube to ensure that it knew precisely which clips were authorized” (Viacom Br. 45 n.5). *Supra* 48 n.16.

Putative class plaintiffs have similar difficulties in determining which uses of their works on YouTube are authorized. *E.g.*, SJA-VII:1762 (Cherry Lane asking whether a clip on YouTube had been licensed); SJA-VII:1771, 1775 (Cherry Lane licensing director unable to tell whether YouTube clip was licensed); JA-IV:697-698 (Stage Three must check extensive licensing database before sending takedown notices); JA-IV:756-758 (Cal IV “probably not” able to acquire information about licenses granted by co-owners of work-in-suit); SJA-VII:1782-83 (describing “multi-step process” for determining whether a clip on YouTube is authorized). Further complications flow from plaintiffs’ use of a global network of sub-publishers to license their compositions, a system that makes it difficult even for plaintiffs to determine whether a video is unauthorized. JA-IV:722-724; SJA-VI:1431; SJA-VII:1638, 1725-26, 1768. Determining authorization is not the only problem; some plaintiffs have even had to retain professional musicologists to determine whether clips even contain content from their compositions. JA-IV:736-739; JA-IV:701-704; SJA-VIII:1805-06. It is not surprising, therefore, that class plaintiffs, like Viacom, sent various takedown notices to YouTube for videos that were actually authorized. JA-IV:731-734; SJA-VII:1695, 1786-87; SJA-VIII:1793-97.

- d. Plaintiffs' allegations about Audible Magic are baseless and irrelevant.

Plaintiffs' assertion that YouTube "had the ability to forestall virtually all infringing activity" by using Audible Magic's fingerprinting technology (Viacom Br. 45-46; Class Br. 21-23) is irrelevant. As a matter of law, the "'right and ability' to implement filtering software ... cannot be the basis for concluding that [a service provider] is not eligible for the section 512(c) safe harbor." *UMG II*, 665 F. Supp. 2d at 1113.

But plaintiffs also ignore basic facts about Audible Magic. Audible Magic was designed to identify sound recordings on "peer-to-peer" networks, not audiovisual works or musical compositions on sites like YouTube. JA-V:183(¶¶11-13, 19, 21). When YouTube licensed Audible Magic in October 2006, it was the *first* user-generated-content website to do so. JA-V:684-685, 707-708. At that time, Audible Magic had millions of sound recordings in its databases, but *no* movies or television shows. JA-V:706-707; JA-VI: 304-309, 315-316.

Plaintiffs certainly weren't using Audible Magic to protect their content. Viacom had no contact with Audible Magic until December 2006—when YouTube introduced them. JA-VI:322-323; SJA-VIII:1859-60. And although Audible Magic can identify only content for which it has "reference fingerprints" (JA-IV:153(¶5)), Viacom did not provide any such fingerprints to Audible Magic until at least April 2007. JA-VI:318, 321. (Paramount did so even later, and then

only as a one-time “test.” JA-VI:387-389; JA-VI:399, 402-404.) None of the putative class plaintiffs *ever* did so. SJA-VIII:1902-03, 1914, 1920, 1938-39, 1945-46, 1954-55, 1962-63. Thus, even if YouTube had used Audible Magic more widely in early 2007, it would not have identified any of plaintiffs’ material, much less the allegedly infringing clips over which they have sued. JA-VI:384-385; JA-VI:399-400.

There is no support for plaintiffs’ claim that YouTube refused to give content owners access to Audible Magic unless they also licensed content to YouTube. JA-IV:155(¶9); JA-V:236(¶7); JA-VI:159, 162-164). Whatever internal debates YouTube may have had about how best to deploy Audible Magic (JA-VI:164-165), plaintiffs cannot point to a single written communication from YouTube to any content owner evidencing YouTube’s supposed unwillingness to make Audible Magic available in the absence of a content-licensing deal. Various content owners (both with and without content-license agreements) used Audible Magic solely to block content on YouTube. JA-IV:155(¶10); JA-VI:172-174, 220-223; JA-VI:155-156.

Viacom’s claim that YouTube refused to filter for the MPAA (Viacom Br. 13), while similarly irrelevant, is equally false. Viacom ignores the extensive documentary record, which shows that the YouTube and the MPAA amicably discussed filtering solutions throughout 2006. SJA-VIII:1862-79, 2072-73. Those

discussions culminated in a January 31, 2007 email in which Dean Garfield of the MPAA told Viacom that YouTube was—and always had been—willing to work with Viacom and the MPAA to test filtering solutions. JA-VI:422.³⁰

Viacom now claims that YouTube told the MPAA in February 2007 “that it would not use Audible Magic to prevent copyright infringement unless Viacom agreed to a license deal.” Viacom Br. 16. That allegation is made up. The “support” that Viacom cites is an email from Google’s general counsel Kent Walker, which says no such thing. JA-II:671-674. Mr. Walker explained to Viacom that Google was still evaluating filtering tools and was “open to discussing your possible participation in these tests.” JA-II:674. Later that year, the MPAA and Viacom tested, and lavishly praised, YouTube’s new video-fingerprinting technology. JA-V:221-222(¶¶4-6); SJA-VIII:1897.

As Mr. Walker’s letter explains, moreover, YouTube had legitimate technological concerns about using Audible Magic to identify television shows and movies. JA-II:673-674. Audible Magic had no experience at that task, and

³⁰ Citing Garfield’s deposition, Viacom claims that “YouTube’s own general counsel even acknowledged that [copyright-infringing] material was a ‘major lure’ for their users.” Viacom Br. 20. Viacom’s attribution is remarkable given that Garfield himself testified that “I don’t recall which person specifically said that.” JA-II:635. Indeed, Garfield could not say when the comment was supposedly made or even the speaker’s gender. SJA-VIII:1888-94. This testimony constitutes unreliable and inadmissible hearsay, as there is no foundation for the party-admission exception.

YouTube found it was often unreliable. JA-IV:155-156(¶¶11-12); JA-VI:203-205. Viacom’s own agent came to the same conclusion.³¹ Meanwhile, YouTube was at work building a better solution: Content ID, which was designed specifically to identify audio-visual content on YouTube. JA-V:221(¶2). YouTube developed Content ID because it believed it would be more effective for copyright owners than any existing technology. JA-IV:156-160(¶¶13-19). As soon as Content ID launched in October 2007, YouTube made it freely available to copyright owners without any condition of a content-licensing deal. JA-IV:160-161(¶¶21-23); JA-V:222-223(¶¶7-9).

Plaintiffs’ story—that YouTube was using Audible Magic to run some kind of protection racket even as it devoted enormous resources to building a more effective technology for the benefit of all copyright holders—makes no sense. YouTube’s development and use of advanced fingerprinting tools confirm its good faith, and are no basis for disqualifying it from the safe harbor.

3. YouTube Did Not Receive A Financial Benefit Directly Attributable To The Alleged Infringements.

Even if YouTube had the right and ability to control, it would not lose safe-harbor protection because it does not derive a “financial benefit directly

³¹ See JA-VI:337 (Oct. 2006: “We have not found [Audible Magic] to be very effective in video content recognition”), JA-VI:340 (Nov. 2006: “Utilizing this technology on non music content ex: television or movies has not produced an acceptable level of results”).

attributable to the infringing activity.” §512(c)(1)(B). Plaintiffs proceed on the incorrect assumption that the DMCA codifies the expansive “draw” standard that some courts have adopted under the common law. Viacom Br. 47-48; Class Br. 53-55. The DMCA adopts a narrower, more practical financial-benefit test, which YouTube readily passes.

a. The DMCA rejects the “draw” test.

Because Congress did not intend the DMCA to replicate the standards for vicarious liability, the statute’s control-plus-financial-benefit provision must be applied to give service providers greater protection than does the common law. 3 NIMMER § 12B.04[A][2][b]. The legislative history confirms that Congress wanted to reject a common-law “draw” test, not codify it. The committee reports do not refer to the draw test and instead instruct courts applying the DMCA’s financial-benefit provision to “take a common sense, fact-based approach, not a formalistic one.” H.R. Rep. 105-551(II), at 54-55; S. Rep. 105-190, at 44. The reports (*id.*) then set out in detail Congress’ expectation of what would and would not constitute a financial benefit under the statute:

In general, a service provider conducting a legitimate business would not be considered to receive a “financial benefit directly attributable to the infringing activity” where the infringer makes the same kind of payment as non-infringing users of the provider’s service. Thus, receiving a one-time set-up fee and flat, periodic payments for service from a person engaging in infringing activities would not constitute receiving a

“financial benefit directly attributable to the infringing activity.” Nor is [subsection (c)(1)(B)] intended to cover fees based on the length of the message (per number of bytes for example) or by connect time.

The framework Congress described cannot be squared with the common-law cases on which plaintiffs rely. In *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263 (9th Cir. 1996), for example, the court allowed a vicarious-liability claim against a swap meet that rented booths at which vendors sold infringing items, even though infringing vendors made the same kind of payment as did non-infringers. Whatever the merits of that approach at common law, it is inconsistent with the DMCA. The same is true of advertising. Plaintiffs suggest that any service that relies on advertising has a disqualifying financial benefit if any user was attracted by unauthorized material—no matter how insignificant that draw, how many users came to view authorized material, or how much value was generated from legitimate content. That is not what Congress intended.³²

- b. YouTube has a legitimate business model that is protected by the DMCA.

As the legislative history explains, the DMCA’s financial-benefit test distinguishes between service providers “conducting a legitimate business” and

³² The Ninth Circuit thus went astray when it suggested, without analysis, that the DMCA’s financial-benefit test codifies the common law. *CCBill*, 488 F.3d at 1117. The court considered none of the points above; the issue was not even briefed by the parties or addressed by the district court. No court outside the Ninth Circuit has followed that aspect of *CCBill*, and this Court should not do so.

those whose value “lies in providing access to infringing material.” H.R. Rep. 105-551(II), at 54; S. Rep. 105-190, at 44-45. Services that have no real value other than facilitating infringement or that are intentionally skewed to profit from infringement fall on the wrong side. Services with legitimate business models—that derive genuine financial gain from non-infringing activity and that do not favor infringing uses—are protected. YouTube is unquestionably the latter.

YouTube hosts an enormous amount of indisputably non-infringing material. JA-V:165-179(¶¶1-22); JA-II:692-693(¶¶37-44); JA-II:770(¶¶1.103-1.104). And YouTube generates significant value from those authorized videos. Starting in 2006, YouTube entered into thousands of partnership agreements with content owners, under which YouTube shares the revenue derived from advertising run against videos claimed by those owners. JA-IV:180-181(¶¶9-10). These deals generated approximately 35 percent of YouTube’s revenue between 2007 and 2009. JA-IV:187(¶5). Most of YouTube’s other revenue comes from advertisements run on its home page and on the pages listing the results of users’ search queries. *Id.* It is undisputed that YouTube’s advertising offerings have never favored infringing uses of the service over non-infringing ones. JA-IV:188(¶11); JA-II:766(¶1.93).³³

³³ As a further sign of its good faith, YouTube has since January 2007 restricted ads on pages where videos are watched (“watch-page ads”) to videos expressly claimed by a content partner and designated for monetization. JA-

YouTube’s advertising-based business model is not merely legitimate, it is industry standard. Other video-hosting services (including those that Viacom operates), as well as most other websites relying on user-submitted content earn revenue in the same way. JA-IV:189(¶12). It is inconceivable that the DMCA’s financial-benefit provision categorically excludes the accepted business model of services hosting user-posted material. The statute, after all, “was intended to facilitate the growth of electronic commerce, not squelch it.” *Io*, 586 F. Supp. 2d at 1154. YouTube is just the type of “legitimate” service—with a broad range of non-infringing uses that provide educational, cultural, and political benefits to its users and economic value to itself—that Congress wanted the DMCA to protect.

E. Plaintiffs’ Claims Arise By Reason Of Storage At The Direction Of A User.

Plaintiffs argue that 512(c) offers no protection whatsoever to services like YouTube whose systems make material stored at users’ direction more accessible to the public. Viacom Br. 50; Class Br. 4. As the district court recognized, plaintiffs’ argument is contrary to the text and all the case law, and would categorically exclude from the safe harbor countless legitimate websites that have long relied on the DMCA. SPA:23-25.

IV:188(¶9). Even before limiting watch-page ads in this way, YouTube received the same rates for such ads regardless of the videos next to which the ads appeared. JA-IV:188(¶10).

Section 512(c)(1) applies to infringement claims that arise “by reason of the storage at the direction of a user of material that resides on a system or network controlled by” the service provider. Courts have uniformly found that this provision is not limited to mere storage, but also protects functions that allow user-uploaded material to be more readily accessed by users. *E.g.*, *Corbis*, 351 F. Supp. 2d at 1110-11; *Costar Group, Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 701-02 (D. Md. 2001). Two recent cases squarely hold that a video-hosting service that operates much like YouTube is covered by 512(c). *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 620 F. Supp. 2d 1081 (N.D. Cal. 2008) (“*UMG I*”); *Io*, 586 F. Supp. 2d 1132. These rulings explain that 512(c) covers “software functions” “directed toward facilitating access to materials stored at the direction of users.” *UMG I*, 620 F. Supp. 2d at 1088.

It is well settled, therefore, that a service provider is not excluded from 512(c) merely because it gives users access to videos “as a means of distribution ... and not just storage.” *Io*, 586 F. Supp. 2d at 1146-47; *see also Wolk*, 2011 WL 940056, at *3 (“The protections offered by § 512(c) extend to where the service provider offers online tools permitting users to interact with user-submitted content.”); *UMG I*, 620 F. Supp. 2d at 1092 (512(c) covers functions “undertaken to make it easier for users to view” videos stored at users’ direction).

Those decisions apply squarely to this case. Plaintiffs’ clips-in-suit were posted on YouTube “through an automated process which is initiated entirely at the volition” of its users. *Io*, 586 F. Supp. 2d at 1148; *see* JA-V:162(¶5). The reproduction, distribution, and display of those clips occur via software functions triggered automatically in response to user requests. JA-V:161-164(¶¶2-11). Those functions—the same ones at issue in *UMG I* (620 F. Supp. 2d at 1084-85)—are eligible for safe-harbor protection under 512(c). After all, “if providing access could trigger liability without the possibility of DMCA immunity, service providers would be greatly deterred from performing their basic, vital, and salutary function—namely, providing access to information and material for the public.” *Id.* at 1089.

Plaintiffs ignore these on-point authorities in favor of an approach that would protect only “passive providers of storage.” Plaintiffs’ radical argument not only has no support in the case law, it is contrary to the “structure and language” of the statute, which make clear that service providers “seeking safe harbor under Section 512(c) are not limited to merely storing material.” *Io*, 586 F. Supp. 2d at 1147. Congress expressly chose not to limit the definition of “service providers” eligible for protection under 512(c) to services that refrain from making “modification” to user-stored content. *Compare* §512(k)(1)(B) *with*

§512(k)(1)(A). Congress would not have made that choice if only passive storage lockers were meant to be covered by 512(c).

In addition, the DMCA’s notice-and-takedown regime requires service providers to be able to “disable access” to user-uploaded material. §512(c)(1)(C). That presupposes that providers will make such material accessible to the public, not merely store it. *UMG I*, 620 F. Supp. 2d at 1089-90.

Viacom points to §512(c)(1)’s “by reason of” language, arguing that it incorporates some notion of proximate cause. *Viacom Br.* 53. Even if that were so, it would not bolster plaintiffs’ position. Plaintiffs’ infringement claims *do* have a sufficient causal link to storage. SPA:28. The software functions that supposedly give rise to liability—the conversion of user-posted videos into various file formats; the streaming of those videos in response to playback requests; the use of a computer algorithm to automatically display thumbnails of clips “related” to the one that the user selects for viewing—are all designed to facilitate access to user-stored material. Claims targeting such functions arise “by reason of the storage at the direction of a user of material,” no matter what precise concept of causation applies. *UMG I*, 626 F. Supp. 2d at 1092 (“providing access to materials

stored at the direction of users ... is closely related to, and follows from, the storage itself”).³⁴

In short, nothing plaintiffs say supports a result that would categorically close the 512(c) safe harbor to YouTube and many other prominent service providers (including Amazon, eBay, and Facebook) that rely on its protections.³⁵ That result would undermine the DMCA’s purpose “to facilitate the robust development and worldwide expansion of electronic commerce.” *Id.*, 586 F. Supp. 2d at 1148 (quoting S. Rep. 105-190, at 1-2).

II. PLAINTIFFS MAKE NO VIABLE INDUCEMENT CLAIM.

A finding that YouTube qualifies for the safe harbor protects it against all of plaintiffs’ claims, including inducement. The DMCA bars “liability for *all*

³⁴ Plaintiffs contend that encoding user-stored videos into formats used to make them viewable on mobile devices is unprotected. *Viacom Br.* 54; *Class Br.* 57. There is no support for that assertion and it makes no sense: YouTube is not excluded from the safe harbor because it facilitates access to user-stored materials through Internet-enabled devices other than personal computers. *UMG I*, 620 F. Supp. 2d at 1084 (applying 512(c) to conversion of videos into the MPEG-4 format used by “some portable devices”).

³⁵ Plaintiffs’ reliance on §512(n) and *CCBill* is misplaced. *Viacom Br.* 53-54. Judge Stanton correctly held that 512(c) protects functions undertaken by a service provider as a means of facilitating access to user-stored material. *SPA-27-28*. Those functions are “separate and distinct” from those covered by the other safe harbors. §512(n). Likewise, nothing in *CCBill* supports plaintiffs’ pinched construction of 512(c). YouTube is not seeking “blanket immunity” for functions unrelated to the safe harbor (or to plaintiffs’ claims). *CCBill*, 488 F.3d at 1116-17. Instead, YouTube seeks protection against claims that target functions covered by 512(c), and that protection is precisely what the district court afforded. *SPA-28*.

monetary relief for direct, vicarious and contributory infringement.” H.R. Rep. 105-551(II), at 50; S. Rep. 105-190, at 20 (emphasis added). Inducement is a form of contributory liability (*Grokster*, 545 U.S. at 930), and it would be contrary to the basic immunity conferred by the safe harbor to categorically exclude such claims from DMCA protection.

The district court, moreover, was correct in finding that the inducement principles developed in *Grokster* “have little application here” given all the steps YouTube took to qualify for safe-harbor protection. SPA:24-26. That conclusion does not convert the safe harbor “into a haven for intentional piracy.” *Viacom Br.* 30.³⁶ A service with the “intent to promote infringing uses” that *Grokster* requires (545 U.S. at 931) is not going to take all the steps that the DMCA requires—including expeditiously taking down known or alleged infringements and terminating repeat offenders—and almost certainly will have practical control over the infringing activity. Not surprisingly, no court has ever held a DMCA-compliant service liable for inducement. *Cf.* SPA:24.

³⁶ Viacom’s assertion that the purpose of the DMCA was to protect against “massive piracy” (*Viacom Br.* 28) distorts the legislative history. The sentence that Viacom quotes is not about the safe-harbors provisions at all, but instead addresses the *separate title* of the legislation implementing certain treaty obligations. S. Rep. 105-190, at 8. As the next paragraph of the committee report explains, the purpose of safe harbors was very different—to “limit[] the liability of service providers” so 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.” *Id.*

But even if there were no safe harbor, YouTube could not be held liable for inducement. The undisputed evidence makes clear that YouTube is worlds away from the kinds of pirate services that have been condemned under *Grokster*. Viacom’s half-hearted bid for summary judgment on its inducement claim (Viacom Br. 57-60) fails as a matter of law.³⁷

A. Viacom Dilutes The *Grokster* Standard.

Grokster sets out a clear—and strict—standard for inducement liability: “We hold that one who distributes a device with the object of promoting its use to infringe copyright, *as shown by clear expression or other affirmative steps taken to foster infringement*, is liable for the resulting acts of infringement by third

³⁷ Viacom also asks this Court to rule that it is entitled to summary judgment on direct and vicarious infringement. Viacom Br. 55-57, 60-61. Those claims were not addressed below, in part because Viacom conceded that YouTube’s potential liability was relevant only insofar as the DMCA does not apply. If this Court were to reverse, Viacom’s direct and vicarious claims can and should be addressed in the first instance by the district court. Those claims suffer from a host of defects: among other things, Viacom failed to prove infringement by submitting its actual copyrighted works or any of the allegedly infringing clips; Viacom’s direct infringement claims are defeated by the absence of the volitional conduct required by *Cartoon Network LP, LLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008); Viacom has not and cannot show that YouTube had the “practical ability” to “stop or limit the directly infringing conduct” required for vicarious liability (*Perfect 10 v. Amazon.com*, 508 F.3d at 1173); and even assuming that the Ninth Circuit’s “draw” test were applicable, Viacom has not proven that YouTube’s traffic was actually attributable to users coming to view material that was infringing Viacom’s copyrights (*cf. Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004)). YouTube has also raised various affirmative defenses that would have to be considered in connection with Viacom’s claims.

parties.” 545 U.S. at 919 (emphasis added). Plaintiffs cannot meet that standard, and so try to weaken it.

Viacom asserts that the only relevant question is “whether Defendants intended to bring about ... infringement by operating YouTube.” Viacom Br. 57. Whatever that means, it diverges from *Grokster*. Inducement liability requires “promoting” or encouraging infringement. *Grokster*, 545 U.S. at 931 (“promote infringing uses”); 935 (“promoting infringement”); 936 (“object of promoting its use to infringe”); 940 n.13 (“intended and encouraged the product to be used to infringe”). Viacom also overlooks *Grokster*’s repeated admonitions that the inducer must actively seek to further that unlawful objective “by clear expression or other *affirmative steps* taken to foster infringement.” *Id.* at 936-37 (emphasis added); *id.* at 924, 935, 938 (requiring “active steps” taken to encourage infringement); 937 (inducement requires “culpable expression and conduct”). Finally, Viacom ignores the Court’s requirement that there be a causal connection between the inducing conduct and the infringing acts at issue. *Id.* at 919, 937 (defendant liable only for “the *resulting* acts of infringement by third parties”) (emphasis added).

Viacom’s watered-down approach threatens to undermine the careful balance that the Supreme Court struck in formulating the inducement rule. The Court was “mindful of the need to keep from trenching on regular commerce or

discouraging the development of technologies with lawful and unlawful potential.” *Grokster*, 545 U.S. at 937. Only a strict standard could assure that inducement liability “does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.” *Id.*

B. Plaintiffs Cannot Meet The Actual *Grokster* Standard.

Measured against the actual standard for inducement, plaintiffs’ claims fail. The evidence overwhelmingly establishes the legitimacy of YouTube’s operations and negates any suggestion that it purposefully encouraged infringement. The district court did not say otherwise. Without pointing to any actual evidence, Judge Stanton suggested that *the most* a juror could find “from plaintiffs’ submissions” was that YouTube “welcomed” infringing materials. SPA:9. But, as the court suggested, such feelings, even if harbored by some at some unidentified point in time, are not inducement. Inducement liability requires “affirmative steps taken to foster infringement.” *Grokster*, 545 U.S. at 919. “Welcoming” is a passive state of mind quite different from affirmatively soliciting or encouraging users to infringe. One does not infringe copyright or lose safe-harbor protection merely by welcoming the conduct of others. As the court ultimately recognized, moreover, the *Grokster* model simply “does not comport” with the undisputed facts about YouTube. SPA:25.

1. YouTube Never Encouraged Infringement.

To “establish inducement liability, it is crucial to establish that the distributors ‘communicated an inducing message to their ... users.’” *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 801 (9th Cir. 2007); *cf. Grokster*, 545 U.S. at 937 (“The classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations.”). Viacom does not even argue that YouTube communicated such a message. Viacom Br. 59 n.6. The undisputed record is precisely to the contrary.

As all the contemporaneous documents confirm, YouTube was founded with the lawful purpose of allowing users to share personal (and other authorized) videos. Whereas the *Grokster* defendants deliberately tried to capture users they knew had engaged in massive infringement (545 U.S. at 939), YouTube sought to build a community around the idea of sharing personal or user-created videos. JA-IV:65(¶¶3-6, 15-16); JA-IV:107(¶¶2-13, 19, 22), 117-126, 133, 141, 148; JA-V:205(¶2). An early mission statement, written by the founders, describes YouTube’s goal to “become the primary outlet of user-generated content on the Internet.” JA-IV:136.

In keeping with its founding objectives, YouTube has always solicited the posting of authorized materials. JA-IV:109-110(¶¶8-9), 128-130; JA-V:57-62. Plaintiffs cannot point to a single communication in which YouTube encouraged

its users to infringe copyright. Chad Hurley’s statement to his co-founders in September 2005—“we should never promote piracy or tell [users] how to do it” (JA-IV:147)—is the opposite of an inducing message. YouTube followed that advice; its communications to users have consistently sought to *discourage* infringement. JA-IV:107(¶¶11, 15-17), 127, 131-132, 141-144, 146, 149-150; JA-IV:165(¶¶5-10, 24, 27-28); JA-V:207-208(¶¶6), 210-213.

Evidence of an inducing message was integral in *Grokster* (545 U.S. at 924-25, 937-38), as it has been in the subsequent cases in which inducement liability has been found. *Arista Records LLC v. Lime Grp. LLC*, 715 F. Supp. 2d 481, 510-12 (S.D.N.Y. 2010); *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 152-53 (S.D.N.Y. 2009); *Columbia Pictures Indus., Inc. v. Fung*, 2009 WL 6355911, at *11-14 (C.D. Cal. Dec. 21, 2009). Plaintiffs’ failure of proof on that point dooms their inducement claims. *Perfect 10 v. Amazon.com*, 508 F.3d at 1170 n.11 (holding that plaintiffs could not show inducement “because Google has not promoted the use of its search engine specifically to infringe copyrights”).

2. YouTube Actively Worked To Stop Infringement.

Far from “active steps” to promote infringement, YouTube took many affirmative measures to *combat* copyright abuse:

- YouTube’s founders repeatedly removed videos that looked to them like infringing material (e.g., JA-IV:111-113(¶¶15-17), 141-144; JA-V:206-207(¶¶4, 6), 210-213);

- YouTube’s founders wrote to users reminding them not to upload professional material that they did not have the rights to post (*e.g.*, JA-IV:112-113(¶17); JA-IV:127, 145; JA-IV:172(¶23));
- YouTube provides extensive information to educate users about how not to violate copyright law (JA-IV:166-168(¶¶5-10));
- YouTube implemented a rigorous and efficient notice-and-takedown program that made it easy for copyright owners to send takedown notices (JA-IV:170-172(¶¶16-22));
- YouTube used hashing technology to prevent the uploading of videos identical to those taken down for copyright reasons (JA-IV:173(¶25));
- YouTube terminates the accounts of users who receive multiple copyright “strikes” and removes all videos posted from those accounts (JA-IV:173-176(¶¶27-31));
- YouTube implemented a time limit on most user-uploads to prevent the posting of full length movies and television shows (JA-IV:169(¶12));
- YouTube built its own fingerprinting tools, including a state-of-the-art Content ID system, to help copyright owners find and manage their content (JA-IV:152(¶¶2-3)).

There has never been a finding of inducement where an online service took *any* meaningful action to deter copyright infringement—let alone where the service did all that YouTube has done.

3. YouTube Is Full Of Non-Infringing Material.

The legitimacy of YouTube’s purpose and operations is reinforced by the overwhelming amount of non-infringing material available on the service. In addition to user-created videos of every imaginable variety, YouTube hosts authorized videos from movie and television studios, record labels, music

publishers, news organizations, government entities, and sports leagues—and from the plaintiffs themselves. JA-V:166-179(¶¶3-22); JA-IV:180-181(¶¶9-10).

Viacom does not seriously dispute this (JA-II:692-693(¶¶37-44); JA-II:762(¶1.80)), but claims that “the existence of noninfringing material on YouTube does not alter the liability inquiry.” Viacom Br. 60. While a service’s mere *capacity* for lawful use may not provide blanket immunity against inducement (*Grokster*, 545 U.S. at 933-34), evidence of how a product is actually used is directly relevant to whether the plaintiff has proven inducement in the first place. Evidence that a service was used overwhelmingly for infringement was central in every case where inducement liability was found. *Grokster*, 545 U.S. at 922-23; *Lime Group*, 715 F. Supp. 2d at 495-96, 512-13; *Usenet.com*, 633 F. Supp. 2d at 151-52. Here, the reverse is true: the staggering scale of YouTube’s non-infringing uses confirms its legitimate operations, sets it apart from any inducing service, and defeats any inference that it “depended on massive infringing use.” *MGM Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 989 (C.D. Cal. 2006).

4. Plaintiffs’ Evidence Does Not Satisfy *Grokster*.

The scant evidence that Viacom musters in support of its inducement claim (Viacom Br. 59-60) is entirely insufficient.

Viacom repeats its distortion of an instant-message in which Steve Chen mused about “scraping myspace” to build up YouTube’s user numbers. JA-I:832.

As discussed above (supra 11-12), Chen's statement had nothing to do with copyright and his idea was never implemented. JA-V:201. This document is irrelevant.

Viacom also rehashes its arguments about community-flagging and filtering. We have already refuted plaintiffs' factual distortions on those points, but Viacom also ignores the law. *Grokster* made clear that inducement cannot be "merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses." 545 U.S. at 939 n.12. It was not simply the *Grokster* defendants' failure to filter that rendered them liable. It was their unwillingness to do *anything* to "impede the sharing of copyrighted files"—including the fact that neither defendant "blocked anyone from continuing to use its software to share copyrighted files" and one defendant actively impeded third parties' efforts to monitor unlawful use of its network. *Id.* at 926-27. The opposite is true here. JA-IV:170-177(¶¶17-33). YouTube's extensive copyright-enforcement regime is the antithesis of inducement.

Viacom claims that YouTube has a "significant financial incentive to encourage infringement"—because it relies on advertising. Viacom Br. 59. Such arguments would condemn virtually every Internet business, a result that the Supreme Court surely did not intend. *Grokster* did not suggest that an advertising-based revenue model is presumptively unlawful. 545 U.S. at 940. Instead, this

factor comes into play only where a company's business model confirms that its "principal object" is that its technology be used to infringe. *Id.* at 926. That is not the case here. Unlike the services at issue in *Grokster*, YouTube has countless legitimate uses that keep its millions of users coming to the site. Such a service can run advertising without raising an inference of unlawful intent.³⁸

Finally, Viacom argues that "the legitimate uses of YouTube's technology were dwarfed by the forbidden ones." Viacom Br. 60 n.7. There is no support for that claim in the record, and certainly not in the one document that Viacom cites.³⁹ Guesses about the amount of "copyrighted" material on YouTube do not speak to the inducement question—whether YouTube took active steps to purposefully encourage users to infringe. *Grokster* expressly held that "mere knowledge of infringing potential or of actual infringing uses" is insufficient for inducement. 545 U.S. at 937.

³⁸ That YouTube's advertising offerings suggest no intent to encourage infringement is confirmed by its roster of legitimate advertisers—including major media companies like Viacom itself, which spent over a million dollars buying ad space on YouTube before and after bringing this lawsuit. JA-IV:186-187(¶4); JA-II:729(¶169-171). The fact that Viacom and other major copyright owners advertise on YouTube is totally inconsistent with plaintiffs' effort to brand YouTube as a pirate site bent on encouraging infringement.

³⁹ The document is a lone employee's speculation in an instant-message. It was not scientific, empirical, or anything other than purely anecdotal. Nor did it purport to be a statement about the quantity of *infringement*. The employee used the term "copyrighted" to refer to "material that looks to be professionally produced." JA-VI:458-459. As Viacom's own actions confirm, the fact that professional material was on YouTube does not mean it was infringing.

Viacom's assertion is further belied by the numerical evidence in the record. Plaintiffs collectively identified approximately 79,000 allegedly infringing clips-in-suit. But, even assuming (counterfactually) that all those clips were infringing, that total would represent less than two *hundredths* of one percent (0.02%) of the over 500 million videos uploaded to YouTube. JA-IV:173(¶26). Similarly, fewer than 1% of the clips that have appeared on YouTube have been the subject of a takedown request. JA-IV:173(¶26).

The evidence Viacom did not present is equally revealing. In *Grokster*, *Fung*, and *Usenet*, the plaintiffs offered expert statistical analysis purporting to establish that an overwhelming majority of the material on those services was infringing. Although Viacom retained those same experts, it did not submit a report from them in support of summary judgment. The reason is obvious: no serious expert could conclude that YouTube was overwhelmingly used to infringe. Viacom itself understood that before it filed this lawsuit, when its senior executives fervently wanted to buy YouTube (JA-VI:429, 434-438)), and concluded that "consumption of 'branded' content on YT is low" (SJA-VIII:2038), while its own general counsel acknowledged that "the difference between YouTube's behavior and Grokster's is staggering" (JA-VI:424).

CONCLUSION

YouTube, which has pioneered efforts to protect copyright while maintaining an open environment for creative, political, and personal expression, is exactly the kind of service that Section 512(c) was enacted to protect. The district court's judgment should be affirmed.

Respectfully submitted.

David H. Kramer
Michael H. Rubin
Bart E. Volkmer
WILSON SONSINI GOODRICH & ROSATI
650 Page Mill Road
Palo Alto, CA 9430
(650) 493-9300

/s Andrew H. Schapiro
Andrew H. Schapiro
A. John P. Mancini
Brian M. Willen
MAYER BROWN LLP
1675 Broadway
New York, NY 10016
(212) 506-2500

Counsel for Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A), because it is written in 14-point Times New Roman font, and with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), because it contains 20970 words, excluding the portions excluded under Fed. R. App. P. 32(a)(7)(A)(iii). This count is based on the word-count feature of Microsoft Word.

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s/ Brian M. Willen
Brian M. Willen
MAYER BROWN LLP
1675 Broadway
New York, NY 10019
Tel: (212) 506-2500
bwillen@mayerbrown.com