

10-3270-cv

10-3342-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

10-3270-cv

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

Plaintiffs-Appellants,

(caption continued on inside cover)

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

BRIEF OF AMICI CURIAE
INTELLECTUAL PROPERTY LAW PROFESSORS IN SUPPORT
OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL

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December 10, 2010

—against—

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

Defendants-Appellees.

10-3342-cv

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 FRANCAIS DE TENNIS, THE MUSIC FORCE MEDIA GROUP LLC, SIN-DROME RECORDS, LTD., on behalf of themselves and all others similarly situated, MURBO MUSIC PUBLISHING, INC., STAGE THREE MUSIC (US), INC., THE MUSIC FORCE, LLC,

Plaintiffs-Appellants,

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

Plaintiffs,

—against—

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

Defendants-Appellees.

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TABLE OF CONTENTS

	<u>Page</u>
LIST OF AMICI CURIAE INTELLECTUAL PROPERTY LAW PROFESSORS.....	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF CONSENT TO FILE	vii
STATEMENT OF INTEREST.....	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. Introduction	3
II. The “Red Flags” Provision Imposes an Obligation to Draw Reasonable Inferences from Evidence of Infringement.....	8
A. The Legislative History of Section 512 Indicates That Congress Intended to Impose Burdens on Both Copyright Owners and ISPs in Combating Infringement	8
B. The “Red Flags” Provision Subjects ISPs to a “Reason to Know” Standard	10
III. Repeated Takedown Notices Can Give Rise to an Obligation to Use Filters Already in Place	18
CONCLUSION.....	26
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS	28

TABLE OF AUTHORITIESPage**CASES**

<i>A & M Records, Inc. v. Napster, Inc.</i> , 239 F.3d 1004 (9th Cir. 2001).	23
<i>Arista Records LLC v. Doe</i> , 604 F.3d 110 2d Cir. 2010)	11
<i>Corbis Corp. v. Amazon.com, Inc.</i> , 351 F. Supp. 2d 1090 (W.D. Wash. 2004)	16, 22
<i>CoStar Group, Inc. v. LoopNet, Inc.</i> , 373 F.3d 544 (4th Cir. 2004)	22
<i>Demetriades v. Kaufmann</i> , 690 F. Supp. 289 (S.D.N.Y. 1988)	13
<i>Fonovisa, Inc. v. Cherry Auction, Inc.</i> , 76 F.3d 259 (9th Cir. 1996)	13
<i>Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc.</i> , 443 F.2d 1159 (2d Cir. 1971)	5, 11, 12
<i>Hall v. E.I. Du Pont De Nemours & Co., Inc.</i> , 345 F. Supp. 353 (E.D.N.Y. 1972)	13
<i>Hendrickson v. Amazon.com, Inc.</i> , 298 F. Supp. 2d 914 (C.D. Cal. 2003)	26
<i>Io Group, Inc. v. Veoh Networks, Inc.</i> , 586 F. Supp. 2d 1132 (N.D. Cal. 2008).	16, 22
<i>Marobie-FL, Inc. v. Nat'l Ass'n of Fire & Equip. Distribs.</i> , 983 F. Supp. 1167 (N.D. Ill. 1997)	9
<i>Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.</i> , 545 U.S. 913 (2005)	12
<i>Playboy Enters., Inc. v. Frena</i> , 839 F. Supp. 1552 (M.D. Fla. 1993)	8
<i>Perfect 10, Inc. v. CCBill LLC</i> , 488 F.3d 1102 (9th Cir. 2007)	21

Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995)9

Screen Gems—Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F. Supp. 399 (S.D.N.Y. 1966)12

Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).22

UMG Recordings, Inc. v. Veoh Networks Inc., 665 F. Supp. 2d 1099 (C.D. Cal. 2009).25

Viacom Int’l Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010)*passim*

STATUTES

17 U.S.C. § 512.....*passim*

LEGISLATIVE MATERIALS

H.R. Rep. No. 104-204 (1996).....16

H.R. Rep. No. 105-551 (1998)*passim*

S. Rep. 105-190 (1998).....6, 8, 10, 14, 21

OTHER AUTHORITIES

Alfred C. Yen, *Third-Party Copyright Liability After Grokster*, 91 Minn. L. Rev. 184 (2006).....12, 19, 20

Dan B. Dobbs, *The Law of Torts* 908 (2000)13

Edward Lee, *Decoding the DMCA Safe Harbors*, 32 Colum. J.L. & Arts 233 (2009).....6

Jane C. Ginsburg, *Separating the Sony Sheep from the Grokster Goats*, 50 Ariz. L. Rev. 577 (2008).....10, 12, 17, 24

Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* (2010)6, 13, 16

Oxford English Dictionary (2d ed. 1989)	15
Peter S. Menell & David Nimmer, <i>Legal Realism in Action: Indirect Copyright Liability's Continuing Tort Framework and Sony's De Facto Demise</i> , 55 UCLA L. Rev. 143 (2007)	10, 12
Restatement (Second) of Torts § 291 (1965)	19
Restatement (Second) of Torts § 877 (1979)	13, 19
Restatement (Second) of Torts §12 (1965)	14
Restatement (Second) of Torts § 290 (1965)	16
Restatement (Third) of Torts § 3 (2010)	19, 23
Restatement (Third) of Torts § 19 (2010)	18, 20
Webster's Third New International Dictionary of the English Language Un- abridged (2002)	15, 16

STATEMENT OF CONSENT TO FILING

Amici are authorized to file this brief pursuant to Fed. R. App. P. 29(a), as all parties have consented to its filing.

STATEMENT OF INTEREST

Amici curiae are law professors who teach and write about copyright law and Internet law at law schools throughout the United States. Amici have no personal stake in the outcome of this case, but rather have an interest in ensuring that the Copyright Act is interpreted and applied in a manner that does not undermine the protections afforded to or the obligations imposed upon owners, users, and distributors of copyrighted works under the Act.¹

SUMMARY OF ARGUMENT

Sections 512(c) and (d) of the Copyright Act grant Internet Service Providers (ISPs) an important but limited immunity from liability for damages resulting from the acts of their users. Key among the limitations are that the ISP not know of infringing activity, or be aware of facts or circumstances from which infringing activity is apparent. The district court decision below threatens to abandon these conditions by granting ISPs immunity for any infringing activity that is not specifically identified in a takedown notice in the form provided in Section 512(c)(3).

The district court's implicit modification of the statute is in error and should be reversed. However, this Court should also take this opportunity to clarify the

¹ Pursuant to Local Rule 29.1 of the United States Court of Appeals for the Second Circuit, amici hereby certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person other than amici contributed money intended to fund preparing or submitting the brief.

scope of Section 512(c)(1)(A)(ii), the so-called “red flags” provision, which has confused both scholars and the courts. Drawing on contributory copyright infringement’s roots in tort law, it is possible to identify both the evidentiary standard supplied by Section 512(c)(1)(A)(ii) and a test for applying it in future cases, as the technological balance between ISPs, copyright owners, and the public continues to shift. Section 512(c)(1)(A)(ii) should be read as providing a “reason to know” standard, under which ISPs lose their immunity if they know or have reason to know of infringing activity on their sites and fail to take reasonable measures in response.

As courts have recognized, there must be limits on the extent to which knowledge or awareness of evidence of infringement will strip an ISP of its immunity and subject it to liability for infringement; indeed, that was one of the concerns that motivated enactment of Section 512. For example, it cannot be the case that the mere ability to predict with certainty that infringement will occur somewhere on an ISP’s site dissipates the Section 512 immunity. The relevant threshold for making an ISP’s knowledge or information actionable can be obtained from the law of torts, from which secondary copyright liability was derived. An ISP should lose its Section 512 immunity if, in balancing the risk of harm to copyright owners, the severity of that harm, and the burden of preventing that harm given the infor-

mation that the ISP has, a reasonable person would take steps to respond to the apparent infringement.

The evolution of filtering technology has significantly lowered the burden of response for ISPs, thus lowering the amount of information necessary to trigger ISP's obligation to act. In other words, whereas in 1998, even repeated notices of infringement might not have constituted a "red flag" with respect to other instances of the same content, it is likely that they do now, as they likely give ISPs information as to infringing activity that can be readily acted upon with little spillover costs for other users or for the ISP itself. At a minimum, this case should be remanded with instructions to determine whether the parties met their burden of production on the question of whether YouTube knew or had reason to know of facts which would have readily permitted it to remove infringing material, and nonetheless failed to do so.

ARGUMENT

I. Introduction

Section 512 of the Copyright Act represents a careful balance by Congress of various interests affected by the advent of the digital age. Passed in 1998 as part of the Digital Millennium Copyright Act, Section 512 offered copyright owners an expedited remedy for infringement, provided users with some procedural protections, and offered Internet Service Providers (ISPs) important but limited immunity

for the infringing acts of users. The decision below threatens to undo that compromise by effectively negating important elements of the statute. Where Congress was clear that an ISP's knowledge or awareness of infringing activity could void its immunity, the district court imposed a new bright-line rule: in the absence of takedown notices for particular files, ISPs bear no liability for infringement.

The district court thus cast aside two important limits on the immunity provided by Section 512. First, that immunity is not available where the ISP has "actual knowledge that the material . . . is infringing."² The plaintiffs presented evidence below of such actual knowledge, requiring at least a determination as to whether the plaintiffs met their burden on that issue. The plaintiffs also presented evidence that YouTube failed to satisfy the second condition for immunity, namely that the ISP not be "aware of facts or circumstances from which infringing activity is apparent."³ But the district court largely disregarded the parties' factual submissions,⁴ apparently concluding that plaintiffs who claim ISP liability in the absence of a takedown notice specifically identifying each file at issue fail to state a claim

² 17 U.S.C. § 512(c)(1)(A)(i).

³ *Id.* § 512(c)(1)(A)(ii).

⁴ *See, e.g., Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 526 (S.D.N.Y. 2010) ("On these cross-motions for summary judgment I make no findings of fact as between the parties . . ."). Nor did the district court interpret the evidence submitted on disputed issues of material fact in the light most favorable to the plaintiffs.

for relief.⁵ But if that were the case, Section 512(c) could start with subparagraph (1)(C).⁶

The district court's failure to consider the evidence proffered by the plaintiffs in support of their actual knowledge claim is clear error. But this Court should also take the opportunity to clarify the standard in Section 512(c)(1)(A)(ii)—the so-called “red flags” test. That provision has confounded courts and scholars alike since it was adopted. The puzzle is this: what sort of awareness falls short of actual knowledge but is still sufficient to subject an ISP to liability? Many, including the court below, have concluded that there are only two options: either “red flags” require awareness that specifically identified files at particular locations are “obviously infringing,” or “red flags” can arise from mere generalized awareness that infringement is occurring somewhere on the ISP's site.

Believing itself to be faced with a choice between these two options,⁷ the district court chose the former.⁸ Some scholars have similarly concluded that inter-

⁵ “In this case, it is uncontroverted that when YouTube was given the notices, it removed the material. It is thus protected ‘from liability for all monetary relief for direct, vicarious and contributory infringement’ subject to the specific provisions of the DMCA.” *Id.*

⁶ The district court also inexplicably added a knowledge element to Section 512's exception for vicarious infringement liability, § 512(c)(1)(B), which it then held plaintiffs failed to properly plead. *See* 718 F. Supp. 2d at 527. Knowledge is not typically required to show vicarious liability, *see Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971), and there is no reference to knowledge in Section 512(c)(1)(B).

preting the “red flags” test as requiring anything less than awareness of specific, obviously infringing material would be tantamount to liability for the mere potential for infringement.⁹ But these analyses all share the common flaw of collapsing one or more elements of the Section 512(c) immunity together. Saying that an ISP is “aware of facts from which an act of infringement is obvious” is barely distinguishable from saying that the ISP knows of infringement.¹⁰ Instead, the text, context, and history of Section 512 point to a more nuanced interpretation of the “red flags” provision that maintains its role as a distinct condition for immunity. As set forth below, an ISP loses its Section 512(c) immunity under the “red flags” test if it

⁷ *Viacom Int’l*, 718 F. Supp. 2d at 519 (“Thus, the critical question is whether the statutory phrases . . . mean a general awareness that there are infringements (here, claimed to be widespread and common), or rather mean actual or constructive knowledge of specific and identifiable infringements of individual items.”).

⁸ *Id.* at 523 (“The tenor of the foregoing provisions is that the phrases ‘actual knowledge that the material or an activity’ is infringing, and ‘facts or circumstances’ indicating infringing activity, describe knowledge of specific and identifiable infringements of particular individual items. Mere knowledge of prevalence of such activity in general is not enough.”).

⁹ See 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12B.04[A][1]; Edward Lee, *Decoding the DMCA Safe Harbors*, 32 Colum. J.L. & Arts 233, 253 (2009).

¹⁰ See Section II.B below. Indeed, the district court opinion goes further and seems to suggest that the only way an ISP could obtain such actual knowledge is through the takedown notices specified in Section 512(c)(3). *Id.* at 524 (potential for even apparently infringing files to be authorized or subject to fair use defense). Requiring takedown notices as a prerequisite to liability contradicts the text of Section 512 and Congress’s intent. See S. Rep. 105-190 at 45 (“Section 512 does not require use of the notice and take-down procedure.”); H.R. Rep. No. 105-551 pt. 2 at 54 (same).

is aware of sufficiently specific evidence of infringing activity that a reasonable person would take action to respond to that infringement.¹¹

Congress clearly intended the “red flags” test to supply an independent condition for immunity, separate from actual knowledge. But the distinction between “actual knowledge” and the “red flags” test has only recently emerged as a significant issue in litigation under Section 512. That is because it is only within the last several years that technology has sufficiently advanced such that ISPs can become aware of evidence of infringement with the specificity needed to efficiently find and remove the infringing material, without either receiving a takedown notice or otherwise gaining actual knowledge of the infringing file. Previously, scanning a site would have involved either inaccurate technological tools or human review. But given the improved accuracy and efficacy of filters and other technological tools, it is now possible that an ISP might know something less than the specific address of an infringing file, and yet still be able to easily and precisely remove infringing content. The “red flags” test should remove immunity from those ISPs that refuse to take action in such circumstances. This case thus presents this Court with

¹¹ This brief does not address any of the asserted bases for liability in the case, such as direct infringement, inducement, or vicarious liability, nor does it canvass the factual submissions of the parties. The focus is on the legal standard to be applied to the “red flags” limitation on immunity.

a timely opportunity to imbue Section 512(c)(1)(A)(ii) with the meaning it was originally intended to have.

II. The “Red Flags” Provision Imposes an Obligation to Draw Reasonable Inferences from Evidence of Infringement

A. The Context of Section 512 Indicates That Congress Intended to Impose Obligations on Both Copyright Owners and ISPs in Combating Infringement

Section 512 was adopted in the midst of a technological upheaval that fundamentally altered the copy calculus. The World Wide Web was just a few years old at that point, and the Internet had been in widespread use only a little bit longer. But they had existed long enough to generate substantial questions about how traditional copyright enforcement would be extended into the digital realm. Copyright owners were concerned that the speed and anonymity of online distribution and the ease of reproduction threatened to make existing legal remedies nugatory. ISPs, in turn, became concerned that they might be held directly liable for infringing material placed on their servers, or transiting across their systems, at the direction of users that they were unable as a practical matter to control. Indeed, one early decision,¹² cited in the legislative history of Section 512,¹³ concluded that an ISP

¹² *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

¹³ H.R. Rep. No. 105-551 pt. 1 at 11; S. Rep. 105-190 at 19.

in effect published the material on its system to the wider network, and therefore was directly liable for the infringing copies and displays so made.¹⁴

Such a conclusion made sense in the world of print publishing, where, due to the costs of production and distribution, there is little chance that a publisher would publish something without having a meaningful opportunity to review it. Print publishing is relatively slow and resource-intensive; access to the publisher's facilities is therefore jealously guarded by employees who select from the available material a limited amount for publication, and edit its content for maximum impact. The limitations of print publishing, however, do not apply to the Internet. The low cost of storage and distribution allows ISPs to, in essence, turn over their facilities to all comers with no review whatsoever; and the sheer volume of user submissions often renders prior review of that material impossible. Indeed, it is this feature of immediate distribution of vast amounts of information that is one of the unique features of the Internet.

Congress sought in Section 512 to preserve the special nature of the Internet while simultaneously offering content owners new tools to combat online infringement. Copyright owners received an expedited process to remove material believed

¹⁴ See *Frena*, 839 F. Supp. at 1556. Two other contemporaneous decisions, cited with approval in the legislative history, see H.R. Rep. No. 105-551 pt. 1 at 11, disagreed with this conclusion. See *Marobie-FL, Inc. v. Nat'l Ass'n of Fire & Equip. Distribs.*, 983 F. Supp. 1167 (N.D. Ill. 1997); *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

to be infringing, the “takedown” notices provided for in Section 512(c)(3). ISPs were given a limited immunity from damages for direct infringement claims. Secondary infringement liability, however, was left largely intact.¹⁵ Far from the district court’s interpretation of Section 512(c) as little more than a notice-and-takedown provision under which the sole burden of enforcement falls on copyright owners,¹⁶ the legislative history indicates that Congress intended Section 512 to create incentives for copyright owners and ISPs to actively cooperate to combat infringement.¹⁷

B. The “Red Flags” Provision Subjects ISPs to a “Reason to Know” Standard

Clauses (c)(1)(A)(i) and (ii) of Section 512 establish two conditions an ISP must meet, among others, in order to claim immunity from damages for the in-

¹⁵ See H.R. Rep. No. 105-551 pt. 1 at 11; Jane C. Ginsburg, *Separating the Sony Sheep from the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 Ariz. L. Rev. 577, 591 (2008); Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 Stan. L. Rev. 1345, 1369 (2004); Peter S. Menell & David Nimmer, *Legal Realism in Action: Indirect Copyright Liability's Continuing Tort Framework and Sony's De Facto Demise*, 55 UCLA L. Rev. 143, 168 (2007).

¹⁶ See *Viacom Int'l*, 718 F. Supp. 2d at 523-24.

¹⁷ See S. Rep. 105-190 at 45 (“‘notice and takedown’ procedure is a formalization and refinement of a cooperative process”); S. Rep. 105-190 at 40 (“Title II preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment”); H.R. Rep. No. 105-551 pt. 2 at 49 (same).

fringing acts of users. First, the ISP must not have “actual knowledge” of the infringing activity. And second, the ISP must not be “aware of facts or circumstances from which infringing activity is apparent.” The existence of these two separate conditions makes it clear that the second condition imposes a distinctly lower threshold than “actual knowledge” of infringement. The exact nature of that threshold can be determined by examining the language of the statute and the law of secondary infringement liability, which formed the backdrop for Section 512.

Congress intended Section 512 to immunize ISPs from damages claims for direct liability, but otherwise to largely codify existing secondary liability law.¹⁸ Section 512(c)’s text reflects this purpose. Under well-established copyright law, a person is contributorily liable for the infringing acts of another if that person, “with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct.”¹⁹ Clauses (c)(1)(A)(i) and (ii) of Section 512 set forth the knowledge element of contributory liability: “knowing or having reason to know” of infringing activity;²⁰ the material support element is codified in the predicate of paragraph (c)(1), which applies only to “material that resides on a system or net-

¹⁸ See H.R. Rep. No. 105-551 pt. 1 at 11.

¹⁹ *Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

²⁰ See *Arista Records LLC v. Doe*, 604 F.3d 110, 118 (2d Cir. 2010).

work controlled or operated by or for the service provider.”²¹ Subparagraph (c)(1)(B) essentially codifies the test for vicarious liability.²² As a result, Section 512’s safe harbor largely provides shelter only for some direct infringement claims; ISPs that meet the criteria for contributory or vicarious liability would likely fail to meet the conditions for immunity under Section 512 as well.²³

Congress, in “incorporating and building on” the existing doctrine of contributory liability,²⁴ also built upon that doctrine’s heritage in tort law that provides for liability for contributory tortfeasors.²⁵ Contributory infringement liability arises

²¹ See Lemley & Reese, *supra*, at 1371-72 (“This essentially mirrors the basic test for contributory infringement, which allows liability if a defendant knows or has reason to know of infringing activity and materially contributes to that activity.”); Menell & Nimmer, *supra*, at 168 (Section 512(c) “codified both traditional aspects of contributory infringement”).

²² Menell & Nimmer, *supra*, at 168.

²³ See Ginsburg, *supra*, at 591 (“[T]he threshold requirements for immunity closely track the traditional elements of secondary liability.”).

²⁴ H.R. Rep. No. 105-551 pt. 1 at 11.

²⁵ It is widely recognized that contributory infringement liability has its origin in the law of torts. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (“[T]hese doctrines of secondary liability emerged from common law principles and are well established in the law.”); *Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); *Screen Gems—Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 (S.D.N.Y. 1966) (“[C]ommon law concepts of tort liability are relevant in fixing the scope of the statutory copyright remedy.”); Alfred C. Yen, *Third-Party Copyright Liability After Grokster*, 91 Minn. L. Rev. 184, 212 (2006) (“Courts agree that third-party copyright liability is a descendant of common law tort.”); Menell & Nimmer, *supra*, at 151-53 (“[I]ndirect copyright doctrines emerged in tort law’s image.”).

from the basic principle of contributory tortfeasor liability,²⁶ under which a person is liable to third parties when that person, for example, permits another “to act upon his premises or with his instrumentalities, knowing *or having reason to know* that the other is acting or will act tortiously.”²⁷ Under basic tort law, an actor has “reason to know” of a fact when “the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists.”²⁸ In other words, a “reason to know” standard is triggered when an actor has enough evidence of a fact that a reasonable person, or a person with the superior knowledge of the actor, would infer its existence and govern his or her behavior accordingly. It does not require any particular heightened threshold of obviousness or certainty.

The “red flags” test thus allows for liability where a reasonable person would conclude that infringement is occurring. The legislative history generally

²⁶ There are authorities indicating that contributory infringement liability derives from enterprise liability. *See Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996); *Demetriades v. Kaufmann*, 690 F. Supp. 289, 292 (S.D.N.Y. 1988); 3 Nimmer on Copyright § 12.04[A][3]. This is incorrect, as enterprise liability is a form of strict liability akin to vicarious liability. *See* Dan B. Dobbs, *The Law of Torts* 908 (2000) (defining “enterprise liability” as “the strict liability of business enterprises for harms perceived to be recurrently associated with their operation”); *Hall v. E.I. Du Pont De Nemours & Co., Inc.*, 345 F. Supp. 353, 376 (E.D.N.Y. 1972) (enterprise liability related to vicarious liability).

²⁷ Restatement (Second) of Torts § 877(c) (1979) (emphasis added).

²⁸ *Id.* § 12(1).

supports this understanding. Congress indicated that the “red flags” test looks to what the reasonable person would conclude from facts and circumstances—“whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances”²⁹—not to whether infringement has been proven beyond all doubt. But Congress also sought to insulate ISPs from a more exacting standard: whether the ISP *should have known* of infringement. Tort law traditionally divides actors with constructive knowledge into two distinct categories, those who have “reason to know” and those who “should know” of the existence of a fact.³⁰ The latter is a broader standard; an actor who “should know” of a fact has an obligation to ascertain the fact in question, whereas an actor subject to a “reason to know” standard has no such obligation.³¹ Congress clearly rejected the “should know” standard for ISPs;³² indeed, the statute itself provides that none of the ISP immunities shall be conditioned on “a service provider monitoring its

²⁹ S. Rep. 105-190 at 44; H.R. Rep. No. 105-551 pt. 2 at 53.

³⁰ See Restatement (Second) of Torts §12 (defining “reason to know” and “should know”).

³¹ *Id.* cmt. a.

³² See H.R. Rep. No. 105-551 pt. 1 at 25 (rejecting “should know” standard); S. Rep. 105-190 at 48 (service providers “have no obligation to seek out copyright infringement”); H.R. Rep. No. 105-551 pt. 2 at 57 (same).

service or affirmatively seeking facts indicating infringing activity.”³³ In doing so, Congress selected the alternative “reason to know” standard.

The language of the statute reflects this design. Under Section 512(c)(1)(A)(ii), an ISP loses its immunity if it is “aware of facts or circumstances from which infringing activity is apparent.” Dictionaries list two relevant sets of definitions for “apparent.” The most common definition is “[a]ppearing to the senses or mind, as distinct from (though not necessarily opposed to) what really *is*; seeming. Contrasted with *real*.”³⁴ Under this sense of “apparent,” infringement is apparent if it is “supported by credible evidence of genuine existence”³⁵—the sort of evidence, in other words, that would lead a reasonable person to conclude that infringement is taking place. The “red flags” provision thus incorporates the “reason to know” standard from tort law.

Some scholars have looked to other definitions of “apparent,” such as “capable of being readily perceived by the sensibilities or understanding as certainly

³³ 17 U.S.C. § 512(m).

³⁴ 1 Oxford English Dictionary 563 (2d ed. 1989). The Oxford English Dictionary lists this as the “commonest sense now.” *Id.* Although this definition is the sixth one given, definitions in the Oxford English Dictionary are listed in the chronological order in which they appeared. *See id.* at xxix.

³⁵ Webster’s Third New International Dictionary of the English Language Unabridged 102-03 (2002) (“[R]eadily manifest to the senses or mind as real or true and supported by credible evidence of genuine existence but possibly distinct from or contrary to reality or truth . . . —distinguished from *actual*.”).

existent or present,”³⁶ in order to justify a higher threshold for establishing a “red flag” under Section 512.³⁷ Under that interpretation, an ISP loses immunity under the “red flags” test only if it is aware of facts or circumstances that make it certain or obvious that infringing activity is occurring. But the problem with that interpretation is that the “red flag” test would then collapse into the “actual knowledge” exception of Section 512(c)(1)(A)(i). The purpose of a “reason to know” standard such as the “red flags” test is to provide for situations in which an actor has all the evidence a reasonable person would need to form a conclusion that a fact exists, but fails to do so.

It is therefore wholly incongruous to insist on a higher level of evidence for a *reason* to know than is required for actual knowledge. Knowledge of a fact requires simply that one be conscious of the existence of the fact, even if there is “a varying degree of chance that it may not exist.”³⁸ Absolute certainty is not required. If the “red flag” test required proof that the actor was subjectively aware of facts that made it obvious or certain that a particular activity or file was infringing,

³⁶ Webster’s Third New International Dictionary, *supra*, at 102; see 3 Nimmer on Copyright § 12B.04[A][1] at 12B-53 n.20 (quoting David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. Copyright Soc’y 449 (1999)); Lee, *supra*, at 253.

³⁷ Some courts have similarly held that the “red flags” test sets a high bar. See *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1148 (N.D. Cal. 2008); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1108 (W.D. Wash. 2004).

³⁸ Restatement (Second) of Torts § 290 cmt. b (1965).

there would be almost no distinction between such a test and actual knowledge, as any person faced with such evidence could hardly avoid subjectively concluding that the fact in question existed. Indeed, as a practical matter, the two would likely be identical in terms of proof. The statute cannot bear this reading.

The “red flags” provision therefore removes ISP immunity under Section 512(c) when the ISP is aware of facts or circumstances from which a reasonable person would conclude that infringing activity is occurring. This understanding of the “red flags” test has the virtue of giving separate meaning to that provision and preventing an easy end-run around the exceptions to immunity. Under the district court’s reading of the statute, it is a simple matter to deny awareness of “red flags” by pointing out various ways in which, despite appearances, infringement is not absolutely certain. For example, any apparently infringing file might be authorized, or could potentially be a fair use.³⁹ Under the correct reading of the “red flags” provision, however, the issue is not whether the infringing nature of the activity is beyond doubt, but rather whether a reasonable person would believe that it exists.

³⁹ *Viacom Int’l*, 718 F. Supp. 2d at 524 (ISP “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”). *But see* Ginsburg, *supra*, at 598 (“Such an interpretation would allow the service provider to ‘turn a blind eye’ to infringements because the provider could claim that the possibility that some files might be fair use means that infringement can never be ‘apparent’ as to any file.”).

III. Repeated Takedown Notices Can Give Rise to an Obligation to Use Filters Already in Place

Correctly interpreting the “red flags” provision does not solve the problem of how to apply it in a given factual scenario. The difficulty is that any given ISP can predict with certainty that infringement is occurring somewhere on its network, and thus may be said to have actual knowledge of, or be aware of facts or circumstances indicating, infringing activity. But the exceptions to Section 512 immunity cannot be read so broadly, or they would swallow the rule. The district court’s solution to this dilemma was to require that actual knowledge and awareness of facts or circumstances include knowledge of the specific web addresses of particular infringing files⁴⁰—the kind of information that a takedown notice under Section 512(c)(3) typically provides. That interpretation would preserve the Section 512(c) immunity, but at the expense of the Section 512(c)(1)(A) exceptions.

The solution again lies in the tort roots of contributory liability. Liability for contributory tortfeasors is based not simply on their knowledge of and material support for tortious activity,⁴¹ but also on the reasonableness of their responses in light of the alternatives. That is, tort law assesses the liability of contributory tort-

⁴⁰ *Viacom Int’l*, 718 F. Supp. 2d at 523.

⁴¹ Restatement (Second) of Torts § 877(c); *see also* Restatement (Third) of Torts: Phys. & Emot. Harm § 19 (2010) (“The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party.”).

feasors “subject to the general rules of negligence,”⁴² under which the burdens of the precautions necessary to avoid foreseeable harm to third parties must be weighed in determining the reasonableness of a person’s actions.⁴³ Where the burdens are too high in relation to the expected benefits, no liability exists. “On balance, the law itself must take care to avoid requiring excessive precautions of actors relating to harms that are immediately due to the improper conduct of third parties, even when that improper conduct can be regarded as somewhat foreseeable.”⁴⁴

These principles of general negligence law form part of the basis for contributory infringement doctrine,⁴⁵ and are thus incorporated within Section 512 as well. Under both contributory infringement doctrine and Section 512, a finding of “knowledge” or “awareness” of infringement depends on whether the evidence of infringement in a particular case permits a reasonable response that neither sweeps too broadly nor imposes excessive costs on the alleged secondary infringer. While

⁴² Restatement (Second) of Torts § 877 cmt. b; *see also* Yen, *supra*, at 215 (“Contributory liability is a form of fault-based liability because it mimics tort law’s inquiry into a defendant’s potential negligence.”).

⁴³ *See* Restatement (Third) of Torts: Phys. & Emot. Harm § 3 (2010) (negligence weighs “the burden of precautions to eliminate or reduce the risk of harm”).

⁴⁴ *Id.* § 19 cmt. g (2010); *see also* Restatement (Second) of Torts § 291 cmt. a (“The problem involved may be expressed in homely terms by asking whether ‘the game is worth the candle.’”).

⁴⁵ *See* Yen, *supra*, at 215 (“Contributory liability is a form of fault-based liability because it mimics tort law’s inquiry into a defendant’s potential negligence.”).

the statutory text of Section 512(c)(1)(A) does not expressly define or set the parameters of a reasonable response, this element of contributory infringement law explains the outcomes of the cases to date that have held that the defendant did not lose its immunity based on its knowledge or awareness of various alleged acts of infringement. In most of those cases, the plaintiffs asserted knowledge or reason to know of infringing activity that arose from general or indirect evidence. But in copyright law as in tort law, the burdens of responding to generalized, inchoate risks are often excessive. For example, while it may be foreseeable “that some number of motorists, while driving on the state's highways, will speed, drive drunk, or fall asleep, and thereby will fail to navigate curves or otherwise allow their cars to leave the highway,” that does not obligate the state “to design curves and erect barriers that would protect against such out-of-control vehicles,” because the cost of doing so would be excessive in comparison to the cost of encouraging drivers to drive more carefully.⁴⁶ It is not that the state lacks knowledge that accidents will occur; it lacks a reasonable and proportionate remedy for the knowledge that it does have.

Similar concerns arise with respect to secondary liability in copyright law. An ISP might have unspecific or uncertain evidence of infringement and still be

⁴⁶ Restatement (Third) of Torts: Phys. & Emot. Harm § 19 cmt. g (2010); *see also* Yen, *supra*, at 233 (manufacturers of automobiles, guns, alcohol, and cigarettes not automatically liable as batterers).

unable to take any cost-effective measures to combat it. This is particularly true if the evidence arises as a result of a cursory routine review by a low-level employee. Congress was especially concerned that liability might be imposed in such a situation, which could have posed an insurmountable burden to operating a human-compiled directory of websites or to monitoring a site for inappropriate content. Congress therefore noted in the legislative history that liability would only arise in such cases if the infringement was “obvious,” such as a “‘pirate’ site,” such that “online editors and catalogers would not be required to make discriminating judgments about potential copyright infringement.”⁴⁷ It would pose too much of a burden on ISPs to have to train employees making brief cataloging visits to sites to recognize the sometimes subtle signs of copyright infringement.

Cases interpreting Section 512 have reached similar outcomes. Thus, the Ninth Circuit rejected claims that a web host and a credit card processor had sufficient awareness of infringing activity because some of the hosted sites were named “illegal.net” and “stolencelebritypics.com,” and some offered password-hacking software.⁴⁸ The Fourth Circuit rejected contributory liability for an ISP whose employees scanned uploaded photographs for only “a few seconds,” primarily to look

⁴⁷ H.R. Rep. No. 105-551 pt. 2 at 57-58; S. Rep. 105-190 at 48-49.

⁴⁸ *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007).

for duplicates.⁴⁹ The Western District of Washington found no awareness of a red flag where the defendant web services provider hosted vendor sites that featured photographs of celebrities, which the plaintiff argued that the defendant should have known were copyrighted, owned by the plaintiff, and infringing.⁵⁰ The Northern District of California found no liability for the defendant's failure to remove pornographic photographs that were registered with the Copyright Office, looked "professionally created," and failed to have a legally required certification attached to them.⁵¹ In all of these cases, liability would have forced the non-expert employees of the ISPs to scour uploaded content on a daily basis for ambiguous signs of infringement, a costly and inefficient endeavor.

The counterpoint to all of this, however, is that if the costs of preventing harm are *low* relative to the benefits, then even general knowledge might suffice to create liability for a reasonable ISP. For example, general information that infringement was occurring would likely be sufficient for a site that failed the *Sony* test—that was incapable of substantial noninfringing uses⁵²—because even the drastic remedy of shutting down the site would not be disproportionately costly

⁴⁹ *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 556 (4th Cir. 2004).

⁵⁰ *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1108-09 (W.D. Wash. 2004).

⁵¹ *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1148-49 (N.D. Cal. 2008).

⁵² *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

compared to the harm.⁵³ There is thus no hard-and-fast rule in tort law or in copyright law what level of specificity is required to obligate an ISP to take action.

The distinction is critical in this case. Among the allegations made by the plaintiffs here is that the defendants failed to use filters and search tools to respond to evidence of infringing activity.⁵⁴ The technology in question apparently works by recognizing patterns in the content of the file, thereby reducing the number of “false hits” that a simple keyword or title search would produce. These automated features may reduce the cost to YouTube of taking remedial action in response to repeated notices or other reasons to know of infringement.⁵⁵ In the past it might have been difficult or impossible to block subsequent uploads of such material, or detect other existing copies on the system, without either using up a substantial amount of the ISP’s resources or sweeping in too much extraneous material. But the evidence in the record below indicates that YouTube sold its ability to perform just such screening *as a service* to copyright owners. Consequently, the burden of using its *already deployed technology* to respond to repeated takedown requests for

⁵³ See, e.g., *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001).

⁵⁴ This is not to exclude other potential bases for losing immunity under the “red flags” test or some other provision of Section 512.

⁵⁵ See Restatement (Third) of Torts (Phys. & Emot. Harm) § 3 cmt. f (2010) “[E]ven if the severity of expected harm is low, the person can be negligent if the likelihood of harm is high and the burden of risk prevention limited.”).

the same material would have been minimal. At the very least, summary judgment for the defendants was inappropriate on this issue.

It is important to clearly distinguish situations in which an ISP's failure to use filters in response to repeated notices may give rise to liability. Section 512(m) provides that “[n]othing in this section shall be construed to condition the [ISP immunities] on . . . a service provider monitoring its service or affirmatively seeking facts indicating infringing activity” The district court apparently concluded that requiring an ISP to perform any review at all of its system, no matter how easy or at what stage, “would put the provider to the factual search forbidden by § 512(m).”⁵⁶ But this conflates a prophylactic investigation with a responsive investigation. Section 512(m) addresses the former: ISPs need not, in order to retain their immunity, investigate their users or networks in the absence of any grounds to conclude the existence of infringement. But Congress was clear that once the ISP becomes aware of a “red flag,” it may have an obligation to investigate further.⁵⁷ Indeed, Section 512(c)(1)(A)(iii) requires ISPs to “act[] expeditiously” in response to a “red flag” by “remov[ing], or disabl[ing] access to, the

⁵⁶ *Viacom Int'l*, 718 F. Supp. 2d at 528-29.

⁵⁷ H.R. Rep. No. 105-551 pt. 1 at 26 (“Once one becomes aware of [suspicious] information, however, one may have an obligation to check further.”); S. Rep. 105-190 at 44 (“However, if the service provider becomes aware of a ‘red flag’ from which infringing activity is apparent, it will lose the limitation of liability if it takes no action.”); H.R. Rep. No. 105-551 pt. 2 at 53 (same); Ginsburg, *supra*, at 598 (§ 512(m) “should not entitle the service provider to remain militantly ignorant”).

material” in question, actions which necessarily require first identifying the material.⁵⁸ If the ISP has filtering technology in place, it is obligated to use it.⁵⁹

Although at least one court has addressed the issue of whether a defendant’s use of filtering software affects its immunity under Section 512(c), the question was a bit different than the one presented here. In *UMG Recordings, Inc. v. Veoh Networks Inc.*,⁶⁰ the plaintiffs argued that the defendant’s failure to search its index constituted the “red flag”—not that the defendant should have *responded* to “red flags” by using filters.⁶¹ Furthermore, although the discussion is brief, it is not clear from the opinion whether the filter could identify particular pieces of content,⁶² meaning that the burden of using it may still have outweighed any benefits. Here, by contrast, there is evidence that the pattern-matching software employed by YouTube is sufficiently precise that it is commercially viable for sale as a service to content owners.

⁵⁸ The obligation to respond to takedown notices is set forth elsewhere in the statute. *See* 17 U.S.C. § 512(c)(1)(C).

⁵⁹ This is not to suggest that the use of a filter, or a decision to purposefully avoid using filters, would immunize an ISP from all liability. The question in each case would be whether the ISP had knowledge or awareness of infringement that permitted a reasonable response.

⁶⁰ 665 F. Supp. 2d 1099 (C.D. Cal. 2009).

⁶¹ *Id.* at 1111-12.

⁶² *Id.* at 1112.

There are several ways a “red flag” might arise obligating an ISP to respond. One way, relevant in this case, is that the ISP might have in the past received notices of infringement pursuant to Section 512(c)(3). The receipt of such notices could give an ISP using filtering or other technologies sufficient knowledge or awareness of the infringing nature of other files containing the same content. Nothing in the statute prevents Section 512(c)(3) notices from operating in this fashion. Section 512(c)(3)(B)(i) prohibits *inadequate* takedown notices from being considered evidence of knowledge or “red flags” under Section 512(c)(1)(A).⁶³ The purpose of that prohibition is to prevent Section 512(c)(1)(A) from becoming an end-run around the detailed notice requirements set forth in Section 512(c)(3). But no similar concern exists with respect to *adequate* takedown notices, particularly repeated adequate takedown notices. There is nothing in Section 512(c) that requires copyright owners to engage in the Sisyphean task of sending notice after notice for the same material when a simpler solution is in the hands of the ISP.

CONCLUSION

This Court should reverse the district court, and in so doing, take this opportunity to clarify the role of Section 512(c)(1)(A)(ii) as a separate condition for im-

⁶³ *Hendrickson v. Amazon.com, Inc.*, 298 F. Supp. 2d 914 (C.D. Cal. 2003), is therefore not on point. Hendrickson’s takedown notice was *not* compliant with Section 512(c)(3); and even if it had been, as the court noted, there was “no evidence to suggest that Amazon had the ability to know that an infringing sale by a third party seller would occur” in the future, such that it could block the sale. *Id.* at 918. For example, Amazon lacked filters or pattern-recognition searches.

munity under Section 512. Section 512(c)(1)(A)(ii), properly understood, obviates a service provider's immunity where that service provider has sufficient evidence of infringing activity such that a reasonable person would take action in response to it.

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Viacom v. YouTube, Inc.

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