

No. 09-55902, No. 09-56777
Opinion Filed December 20, 2011
Before: Harry Pregerson, Raymond C. Fisher and Marsha S. Berzon,
Circuit Judges

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**UMG RECORDINGS, INC.; et al.,
Plaintiffs-Appellants**
v.
**SHELTER CAPITAL PARTNERS LLC, et al.,
Defendants-Appellees.**

On Appeal from the United States District Court
for the Central District of California, Western Division-Los Angeles
Honorable A. Howard Matz, District Judge
Case No. CV07-5744-AHM-AJW

**SUPPLEMENTAL RESPONSE OF VEOH NETWORKS, INC. TO
APPELLANTS' PETITION FOR REHEARING AND REHEARING *EN BANC*
PURSUANT TO THE COURT'S JUNE 7, 2012 ORDER**

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I. INTRODUCTION

Pursuant to the Court's Order dated June 7, 2012, Appellee Veoh Networks, Inc. ("Veoh") submits this supplemental brief in opposition to Appellants' ("UMG's") petition for rehearing and rehearing *en banc*. On December 20, 2011, the Panel of this Court issued its opinion in *UMG Recordings, Inc. v. Shelter Capital Partners, LLC*, 667 F.3d 1022 (9th Cir. 2011) ("*Shelter*") upholding the district court's grant of summary judgment to Veoh because it was protected by the Digital Millennium Copyright Act (DMCA) safe harbor provision of 17 U.S.C. §512(c). The Second Circuit subsequently issued its decision in a separate case involving §512(c) safe harbor. *Viacom International, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2nd Cir. 2012) ("*Viacom*"). This Court then directed the parties to submit supplemental briefing regarding two issues in light of the *Viacom* decision, and to address whether the Second Circuit's analysis of those issues affects the disposition of this case. For the following reasons, it does not.

II. THE SECOND CIRCUIT'S DISTINCTION BETWEEN ACTUAL AND "RED FLAG" KNOWLEDGE IS CONSISTENT WITH THE PANEL'S FORMULATION AND DOES NOT AFFECT DISPOSITION OF THIS CASE

The Court first asked the parties to address whether the Second Circuit drew the correct distinction between actual and "red flag" knowledge, and, if so, whether the distinction affects the disposition of this case. The Second Circuit's distinction

between actual and red flag knowledge for purposes of §512(c) is consistent with the Panel's decision, and does not affect the disposition of this case.

A. The Second Circuit Agreed With The Panel That Both Actual and Red Flag Knowledge Require Knowledge of Specific Instances of Infringement

First, the Second Circuit agreed with the Panel that knowledge for purposes of §512(c)(1)(A) requires knowledge of “specific and identifiable instances of infringement,” not a general awareness of infringement as advocated by UMG. *Viacom*, 676 F.3d at 32. Citing favorably the Panel's reasoning, the Second Circuit explicitly rejected the view “urged by the plaintiffs—that the red flag provision ‘requires less specificity’ than the actual knowledge provision.” *Id.* The *Viacom* court noted that this Panel's discussion was the “most explicit, discussion of the § 512(c) knowledge provisions” to date, and that “other cases are generally in accord.” *Id.* (citing *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 2011 WL 5104616, at *14 (S.D.N.Y. Oct. 25, 2011); (internal quotation omitted); *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1108 (C.D. Cal. 2009) (“*UMG II*”) (“[I]f investigation of ‘facts and circumstances’ is required to identify material as infringing, then those facts and circumstances are not ‘red flags.’”)).

While *Viacom* remanded for determination of whether YouTube had knowledge of specific infringements in suit based upon the evidence presented in

that case, as detailed in Section II.C below, here the district court and the Panel fully considered UMG's purported evidence of knowledge, and the Panel was "not persuaded" that it "warrants trial." *Shelter*, 667 F.3d. at 1038.

B. The Second Circuit's Distinction Between Actual and Red Flag Knowledge Is Consistent With This Court's Formulation

The Second Circuit used the terms "subjective" versus "objective" specifically to explain that

The difference between actual and red flag knowledge is thus **not between specific and generalized knowledge** but instead between a subjective and objective standard. In other words, the actual knowledge provision turns on whether the provider actually or 'subjectively' knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement 'objectively' obvious to a reasonable person.

Viacom, 676 F.3d at 31 (emphasis added).

Although this Panel did not use the terms "subjective" and "objective" to describe the difference between actual and red flag knowledge, the Second Circuit's distinction is consistent with the statutory language and this Panel's analysis, taking into consideration other requirements of §512. Like *Viacom*, this Panel also specifically rejected the notion that the difference between actual and red flag knowledge was the difference between specific and generalized knowledge. *Shelter*, 667 F.3d. at 1038 ("For the same reasons, we hold that Veoh's general knowledge that it hosted copyrightable material and that its

services could be used for infringement is insufficient to constitute a red flag.”).

Rather than using the terms “subjective” and “objective,” the Panel focused on the statutory language distinguishing between “actual knowledge” versus whether a service provider is “aware of facts and circumstances from which infringing activity is apparent.” *Id.* at 1035-36 (quoting §512(c)(1)(A)(ii)).

The Second Circuit’s formulation of actual knowledge as “subjective” and red flag knowledge as a subjective awareness of facts that would have made the specific infringement “objectively” obvious to a reasonable person, does not make a difference in this case. The Panel fully considered UMG’s purported examples of knowledge and determined that Veoh had neither actual (subjective) knowledge of alleged infringements nor was it aware of facts from which infringing activity was (objectively) apparent, as detailed in the next section. The Second Circuit’s recognition that 512(c)(1)(A)(i) and (ii) each do “independent work”, *id.* at 31, is also consistent with the Panel’s decision. *Shelter*, 667 F.3d at 1040 (providing examples of distinction).

C. There Is No Evidence That Veoh Had Either Actual Knowledge (Subjectively Knew) of Specific Infringements or Was Aware of Facts From Which Such Infringement Was (Objectively) Apparent

Although the Circuits agreed that §512(c) requires knowledge of specific instances of infringement, the *Viacom* court remanded for a determination of whether YouTube had such knowledge, finding that disputed evidence existed in

the record that could lead a jury to conclude that YouTube had knowledge of specific infringements owned by Viacom that it did not promptly take down. Specifically, the *Viacom* court focused on internal YouTube reports and correspondence discussing specific content from which it found that a reasonable juror could have concluded that YouTube both “knew of the presence of Viacom-owned material on YouTube” and that it believed the clips to be infringing, but allegedly failed to promptly remove them. *Viacom*, 676 F.3d. at 33. The *Viacom* court thus remanded to the district court to determine whether “any specific infringements of which YouTube had knowledge or awareness correspond to the clips-in-suit in these actions.” *Id.* at 33-34 (noting that “[b]y definition, only the current clips-in-suit are at issue in this litigation.”)

By contrast, UMG presented no evidence to create a triable issue of fact about whether Veoh failed to promptly remove suspected infringements of UMG material. The Panel fully considered UMG’s “purported evidence of Veoh’s actual or apparent knowledge of infringement” and determined that none of it warranted trial. *Shelter*, 667 F.3d at 1038.

In its April 10, 2012 letter (Dkt. 57-1) providing notice of the *Viacom* decision to the Court, UMG cited two pieces of purported “evidence” of “Veoh’s knowledge or awareness of specific instances of infringement.” (Dkt. No. 57-1, note 1.) Specifically, UMG first cites to RE 582-665, arguing that “Veoh

purchased search terms for specific infringing content on its service.”¹ UMG then cites RE 1233-34, communications amongst Veoh employees regarding a general awareness that there existed unauthorized content on Veoh, and asking how to deal with music videos. Both the district court and the Panel considered these items and the remaining evidence presented and found no disputed facts about whether Veoh had knowledge of specific UMG infringements.

First, as the district court and Panel found, there was no evidence that the search terms associated with Veoh’s key word advertising created a disputed fact about Veoh’s knowledge. Veoh’s purchase of certain search terms through Google AdWords were related to artists which Veoh was also authorized to stream through its relationship with SonyBMG. *Shelter*, 667 F.3d at 1038-39; *UMG II*, 665 F. Supp. 2d at 1109. The Panel found that even if the specific terms were not associated with authorized content on Veoh (which they were), this still would not be enough to create disputed facts for trial:

We are not persuaded that UMG’s other purported evidence of Veoh’s actual or apparent knowledge of infringement warrants trial...UMG argues that Veoh’s purchase of certain search terms...demonstrates knowledge of infringing activity because some of the terms purchased, such as ‘50 Cent,’ ‘Avril Lavigne’ and ‘Britney Spears,’ are the names of UMG

¹ UMG’s suggestion that Veoh was intentionally seeking to use UMG associated terms blatantly misrepresented the deposition testimony of Veoh’s former head of marketing, who testified that she had never even seen the search term list and was very unfamiliar with it. [RE 189; 374–376.] The district court recognized that “UMG misconstrue[d]” this deposition testimony. *Shelter* 677 F.3d at 1109, n.12.

artists. However, artists are not always in exclusive relationships with recording companies, so just because UMG owns the copyrights for some Britney Spears songs does not mean it owns the copyright for all Britney Spears songs. Indeed, 50 Cent, Avril Lavigne and Britney Spears are also affiliated with Sony–BMG, which gave Veoh permission to stream its videos by these artists. Furthermore, even if Veoh had not had such permission, we recognize that companies sometimes purchase search terms they believe will lead potential customers to their websites even if the terms do not describe goods or services the company actually provides...Accordingly, Veoh’s search term purchases do little to demonstrate that it knew it hosted infringing material.

Shelter, 667 F.3d at 1038-39. This determination is fully consistent with *Viacom*’s requirement that knowledge requires knowledge of specific infringing activity.

Second, in light of its rejection of UMG’s “general knowledge approach” the Panel found that “merely hosting a category of copyrightable content, like music videos, with the general knowledge that one’s services could be used to share infringing material, is insufficient to meet the actual knowledge requirement under § 512(c)(1)(A)(i).” *Shelter*, 667 F.3d at 1038. Fully consistent with *Viacom*’s requirement that knowledge requires knowledge of specific infringing activity, the district court explicitly found that this general awareness was not enough to find Veoh ineligible for the safe harbor:

UMG nevertheless argues that Veoh is ineligible for the safe harbor because its founders, employees, and investors knew that widespread infringement was occurring on the Veoh system. But even if this were true and undisputed, UMG cites no case holding that a provider’s general awareness of infringement, without more, is enough to preclude application

of section 512(c). No doubt it is common knowledge that most websites that allow users to contribute material contain infringing items. If such general awareness were enough to raise a ‘red flag,’ the DMCA safe harbor would not serve its purpose of ‘facilitat[ing] the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age,’ and ‘balanc[ing] the interests of content owners, on-line and other service providers, and information users in a way that will foster the continued development of electronic commerce and the growth of the Internet.’ S. Rep. 105-190, at 1-2 (1998); H.R. Rep. 105-551(II), at 21. See also *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 794 n.2 (9th Cir. 2007).

UMG II, 665 F.Supp. 2d at 1111.

The Panel agreed, holding that “in the knowledge context it is not enough for a service provider to know as a general matter that users are capable of posting unauthorized content; more specific knowledge is required.” *Shelter*, 667 F.3d at 1041. This too is fully consistent with *Viacom’s* holding that §512(c)(1)(A) requires knowledge of specific instances of infringement.

Finally, with respect to UMG’s remaining purported evidence of knowledge—none of which indicates knowledge of specific instances of infringement as required by *Viacom*—the Panel reviewed the district court’s order and the evidence and found that: “[w]e are not persuaded that UMG’s other purported evidence of Veoh’s actual or apparent knowledge of infringement warrants trial.” *Shelter*, 667 F.3d at 1038. As the Panel noted:

UMG has ‘never disputed that when Veoh became aware of allegedly infringing material as a result of the RIAA’s DMCA

notices, it removed the files.’ *Id.* at 2036. Rather, it argues that Veoh had knowledge or awareness of other infringing videos that it did not remove. The district court found that UMG failed to rebut Veoh’s showing ‘that when it did acquire knowledge of allegedly infringing material—whether from DMCA notices, informal notices, or other means—it expeditiously removed such material.’

Shelter, 667 F.3d at 1036 (citing *UMG II*, 665 F.Supp.2d at 1107).

III. THIS COURT PROPERLY HELD THAT VEOH DID NOT HAVE THE “RIGHT AND ABILITY TO CONTROL” THE ALLEGEDLY INFRINGING ACTIVITY

The Court also asked the parties to address the right and ability to control requirement of §512(c)(1)(B). As discussed below, both Circuits agreed that the DMCA’s right and ability to control provision is narrower than the common law standard. Given the facts of this case the Panel properly held that, as a practical matter, Veoh did not have the ability to control the allegedly infringing activity until it became aware of such activity. It is also clear that under the Second Circuit’s formulation, there is no evidence that Veoh exerted the type of “substantial influence” over infringing activity required to establish the right and ability to control for purposes of the DMCA.

A. Both Circuits Held That §512(c)(1)(B) Is Not Coextensive With The Common Law Standard For Vicarious Liability

Both the Panel and the Second Circuit rightly held that §512(c)(1)(B)’s “right and ability to control” provision is narrower than the common law of vicarious liability, and requires “something more” than the general ability to

remove or block access to material posted on the service provider's website.

Viacom, 676 F.3d at 38; *Shelter*, 667 F.3d at 1043.

The Second Circuit indicated that the requisite “something more” involves a service provider “exerting substantial influence” on the activities of users, including “purposeful, culpable expression and conduct” as set forth in *Grokster*. *Viacom*, 676 F.3d at 38. There is no evidence whatsoever to indicate that Veoh exerted substantial influence over infringing activity or engaged in purposeful, culpable expression and conduct to induce infringement. Rather UMG relies entirely on evidence of the type of control—Veoh's control over its own system—that was specifically rejected by the *Viacom* court.

The Panel and the district court also properly rejected UMG's argument that Veoh's “right and ability” to implement filtering software, either “standing alone or even along with Veoh's ability to control users' access” was sufficient to disqualify Veoh from Section 512(c) safe harbor, in light of §512(m), which provides that “[n]othing in this section shall be construed to condition the applicability of subsections (a) through (d) on. . . a service provider monitoring its service or affirmatively seeking facts indicating infringing activity. . .” *UMG II*, 665 F.Supp.2d at 1113; *Shelter*, 667 F.3d at 1042; *Viacom*, 676 F.3d at 23 (acknowledging that §512(m) forbids conditioning DMCA safe harbor on “affirmative monitoring by a service provider.”) As stated by the Panel: “§ 512(m)

cuts against holding that Veoh's general knowledge that infringing material could be uploaded to its site triggered an obligation to 'police' its services to the 'fullest extent' possible." *Id.* at 1042. With respect to the filtering that Veoh did implement, the district court found there to be no evidence in the record that Veoh failed to immediately take down any files after they were identified as the filter, *UMG II*, 665 F.Supp. 2d at 1118, and UMG makes no such argument on appeal.

B. The Panel Properly Held That As a Practical Matter, Veoh Did Not Have The Ability To Control Infringing Activity Unless It Was Aware of Such Activity

Here, the Panel determined that as a practical matter Veoh lacked the requisite control. *Shelter*, 667 F.3d at 1041. As the Panel found:

Where, as here, it is a practical impossibility for Veoh to ensure that no infringing material is ever uploaded to its site, or to remove unauthorized material that has not yet been identified to Veoh as infringing, we do not believe that Veoh can properly be said to possess the "needed powers ... or needed resources" to be "competen[t] in" exercising the sort of "restraining domination" that § 512(c)(1)(B) requires for denying safe harbor eligibility.

Id.

Here the Panel's holding recognized that as a practical matter Veoh lacked the ability to control infringements until it was aware of them. "[A] service provider may, as a general matter, have the legal right and necessary technology to remove infringing content, but until it becomes aware of specific unauthorized material, it cannot exercise its 'power or authority' over the specific infringing

item. In practical terms, it does not have the kind of ability to control infringing activity the statute contemplates.” *Shelter* 667 F.3d at 1041.

This is particularly appropriate in light of the absence of any evidence that Veoh exerted influence or otherwise induced users to infringe UMG’s copyrights, and the Panel’s holding that there was no evidence that Veoh had willfully buried its head in the sand to avoid obtaining specific knowledge of infringements. *Id.* at 1043. Indeed, as the Panel explained:

Of course, a service provider cannot willfully bury its head in the sand to avoid obtaining such specific knowledge. Viewing the evidence in the light most favorable to UMG, as we must here, we agree with the district court there is no evidence that Veoh acted in such a manner. Rather, the evidence demonstrates that Veoh promptly removed infringing material when it became aware of specific instances of infringement.

Id. at 1043.

As stated by the Panel, its decision was also specifically informed by §512(m), which confirms that Veoh’s entitlement to safe harbor cannot be premised on a failure to “police” its website “to the fullest extent possible.” *Shelter*, 667 F.3d at 1042. *Viacom* also acknowledged that “§512(m) is explicit: DMCA safe harbor protection cannot be conditioned on affirmative monitoring by a service provider.” *Viacom*, 676 F.3d at 23.

In response to the Panel’s question, its holding in this case that as a practical matter Veoh did not have the kind of ability to control infringing activity that the

statute contemplates until it became aware of infringing material, does not render Section 512(c)(1)(B) a nullity, because it properly addresses situations—not present in this case—in which a service provider engages in affirmative acts sufficient to exercise control over infringing activity, and yet fails to act to address such activity.

C. The Second Circuit’s Analysis of The Control Issue Does Not Affect Disposition of This Case

The Second Circuit provided two examples of the type of “substantial influence” over infringing activity required to establish the right and ability to control for purposes of the DMCA: the court’s finding of control in *Cybernet Ventures* and inducement of copyright infringement under *Metro–Goldwyn–Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). *Viacom*, 676 F.3d at 38. There is no such evidence in this case.

In fact, UMG never even argued that Veoh induced infringement either on appeal, or to the district court in opposing Veoh’s motion for summary judgment. UMG did not argue that Veoh induced infringement for good reason—there was no evidence UMG could present to create a material factual dispute regarding inducement. While the Panel evaluated and rejected the sufficiency of UMG’s allegations that the investor defendants induced infringement (*Shelter*, 667 F.3d at 1045-47), the Panel had no reason to analyze inducement with respect to Veoh, as

UMG never raised it, and in any event, there is no evidence in the record to support it.

The *Viacom* court cited *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F.Supp.2d 1146 (C.D.Cal.2002), as the “only” court that to date has found that a service provider had the right and ability to control infringing activity under § 512(c)(1)(B). *Viacom*, 676 F.3d at 38. But as the district court found, none of the factors found to constitute the substantial influence, and “something more” in *Cybernet* are present here, including the service provider’s pre-screening of sites before it allowed users to even use its age verification services, providing extensive direction with respect to the content at issue, prohibiting the proliferation of identical sites, and exercising control in a variety of other ways. *UMG II*, 665 F.Supp.2d at 1114. These “other ways” included extensive monitoring programs and editorial and substantive control over what was uploaded. Moreover, *Cybernet* was a district court case not binding on this Court, involving a defendant that engaged in far more control and direction over the specific infringing content permitted through its service.

Similarly, there is nothing of record here to indicate that Veoh induced infringement, and UMG did not argue inducement either on appeal or in the district court. The Supreme Court has premised infringement for inducement “on purposeful, culpable expression and conduct”—none of which is present here.

Metro–Goldwyn–Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 937; *Shelter* 667 F.3d at 1046.

While the Second Circuit determined that it was “prudent” to remand to the district court to determine whether the plaintiffs had adduced evidence of control, there is no such evidence in this case, and instead UMG relies entirely on common law theories of control that were specifically rejected by both this Panel and the *Viacom* court.

IV. CONCLUSION

The Second Circuit opinion in *Viacom* remanding the district court’s decision in part based on facts distinct from this case, does not present any new analysis to disturb the Panel’s conclusion that Veoh is entitled to Section 512(c) safe harbor. UMG’s Petition for a rehearing or *en banc* hearing should be denied in its entirety.

Dated: June 28, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), and the Court's February 16, 2012 Order setting Veoh's word limit for 3800 words or 15 pages (Dkt. No. 59), I certify that this brief is proportionately spaced with one inch margins on all four corners, using Microsoft Word 2007 in 14-point font size and Times New Roman font style, with a total of 3,559 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(6).

Dated: June 28, 2012

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9th Circuit Case Number(s) 09-55902, 09-56777

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