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# Confusion within the DMCA: Resolving the Red Flag Knowledge Circuit Split

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## Confusion within the DMCA:

### Resolving the Red Flag Knowledge Circuit Split

#### Part I. Introduction

As of July 25, 2015, users were uploading over 400 hours of video content to YouTube's platform every minute.<sup>1</sup> This outrageous volume equates to more than 1,000 days of content uploaded every hour.<sup>2</sup> While YouTube is a powerhouse service provider offering a platform for uploading and viewing video content, the above statistic only addresses one service provider among many. YouTube's prominence is a testament to how prevalent the internet has become as a medium for posting videos to share information and entertain the masses, among other reasons. With the constantly evolving nature of the internet comes the necessity to develop the law surrounding the internet to protect users' rights. Service providers, like YouTube, have become a hotbed for instances of copyright infringement. Many instances are insignificant or receive no attention and fly under the radar, but if someone were to sneak a video camera into the movie theater and upload the latest blockbuster to a service provider to monetize the views for himself, the movie's producers will want to cut that off and seek a remedy for the damages incurred.

In order to protect service providers from facing liability for those 400 hours of video uploaded each minute,<sup>3</sup> Congress passed the Digital Millennium Copyright Act (DMCA).<sup>4</sup>

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<sup>1</sup> Mark R. Robertson, 500 HOURS OF VIDEO UPLOADED TO YOUTUBE EACH MINUTE [FORECAST] (Nov. 13, 2015), <http://tubularinsights.com/hours-minute-uploaded-youtube/>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Capital Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 81 (2d Cir. 2016).

Within this law, Congress created a safe harbor which protects service providers from liability for copyright infringement when their users upload infringing material on the service provider's site and the service provider is unaware of the infringement.<sup>5</sup> In order to prevent service providers from accessing this safe harbor, copyright holders can offer to prove evidence that the service provider had "actual knowledge that the material or an activity using the material on the system or network is infringing."<sup>6</sup> Alternatively, opposing parties to a service provider (i.e. copyright owners) can prove the service provider was "aware of facts or circumstances from which infringing activity is apparent."<sup>7</sup> This element of the statute, commonly referred to as the red flag knowledge provision, has created confusion among the courts in deciding when exactly the service provider meets the provision.

In *Columbia Pictures Indus. v. Fung*, the Ninth Circuit created a standard for what constitutes red flag knowledge.<sup>8</sup> Although red flag knowledge must relate to particular infringing activity, the court did not indicate that the activity must involve the particular works that the plaintiff brought suit over.<sup>9</sup> Further, the court held that material uploaded onto a service provider's network can be so "current and well-known" that its infringing nature would be objectively obvious to a reasonable person.<sup>10</sup> In *Capital Records, LLC v. Vimeo, LLC*, the Second Circuit strayed from the Ninth Circuit's opinion on two issues regarding red flag knowledge.<sup>11</sup> The Second Circuit held that the service provider lacked red flag knowledge because the evidence did not relate to the specific videos at issue in this suit.<sup>12</sup> Further, the court

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<sup>5</sup> *Id.*

<sup>6</sup> 17 U.S.C. § 512 (1998).

<sup>7</sup> *Id.*

<sup>8</sup> *Columbia Pictures Indus. V. Fung*, 710 F.3d 1020 (9th Cir. 2013).

<sup>9</sup> *Id.* at 1043.

<sup>10</sup> *Id.*

<sup>11</sup> *Capital Records*, 826 F.3d at 99.

<sup>12</sup> *Id.*

held that the fact that an employee of the service provider viewed a video with famous copyrighted music was also insufficient to sustain the copyright holder's burden of showing red flag knowledge.<sup>13</sup>

Thus, the Second and Ninth Circuit are split on two issues related to red flag knowledge: (1) whether the service provider must be aware of the particular works included in the suit by the plaintiff to have red flag knowledge, and (2) whether content can be so famous or recognizable that it would be objectively obvious to a reasonable person that the content is copyrighted and has not been authorized to be used elsewhere. This comment will discuss the details of the DMCA, then analyze the sequence of the cases that led to this circuit split, as well as provide an argument for what the law should be.

## **Part II. Background**

### *A. The Digital Millennium Copyright Act*

In 1998, Congress enacted the DMCA in an effort to update domestic copyright law within the United States to keep up with the revolutionary digital age.<sup>14</sup> According to the legislative history of the act, Congress intended to clarify the potential liability faced by service providers who transmit audio and video content over their networks.<sup>15</sup> Service providers began to face the risk of unintentionally transmitting infringing content, so Congress wanted to clarify the liability that service providers face to prevent them from refraining to invest in the expansion

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<sup>13</sup> *Id.* at 96.

<sup>14</sup> *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 26 (2d Cir. 2012).

<sup>15</sup> *Capital Records*, 826 F.3d at 82.

of the speed and capacity of the internet.<sup>16</sup> The provisions of the DMCA accomplish two things to protect service providers.<sup>17</sup> First, the act immunizes service providers that qualify for its benefits from liability for copyright infringement caused by users posting on their websites if the service providers are unaware of the infringements.<sup>18</sup> Second, the act expressly relieves providers of any obligation to monitor postings and detect infringements as a condition for qualifying for the safe harbor.<sup>19</sup>

The DMCA established four safe harbors to protect service providers from liability.<sup>20</sup> Those four safe harbors are codified at 17 U.S.C. § 512.<sup>21</sup> The particular safe harbor that this comment discusses is 17 U.S.C. § 512(c)(1), which reads as follows:

**(1)** In general. A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider--

**(A)**

**(i)** does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

**(ii)** in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

**(iii)** upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

**(B)** does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

**(C)** upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.<sup>22</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 83.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 82.

<sup>21</sup> *Id.*

<sup>22</sup> 17 U.S.C. § 512 (1998).

As the text of the provision indicates, § 512(c)(1)(A)(i) is known as the “actual knowledge” requirement of the statute, because it requires that the service provider have actual knowledge of the infringing material.<sup>23</sup> The subsequent provision, § 512(c)(1)(A)(ii), is known as the “red flag knowledge” requirement because it dictates that, assuming a lack of actual knowledge, the service provider was not aware of any apparent infringing activity based on the circumstances.<sup>24</sup>

### *B. Chronological Development of the Circuit Split on Red Flag Knowledge*

The first noteworthy decision in the development of the split was *UMG Recordings, Inc. v. Shelter Capital Partners LLC*.<sup>25</sup> Universal Music Group (UMG) was a music publishing company that sued the service provider, Veoh Networks, who operated a publicly accessible website for sharing videos.<sup>26</sup> UMG filed suit for copyright infringement because Veoh permitted its users to download videos containing songs that UMG owned the copyrights for.<sup>27</sup> To upload a video onto Veoh’s network, users first had to register their account, requiring them to agree to Veoh’s terms and conditions telling the user not to upload infringing material.<sup>28</sup> Further, users received a message from Veoh ordering them not to upload infringing material prior to each

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<sup>23</sup> Stephen J. Wang, *DMCA Safe Harbors For Virtual Private Server Providers Hosting BitTorrent Clients*, 12 Duke L. & Tech. Rev. 163, 172 (2014).

<sup>24</sup> Duke Law Review by Wang at 172

<sup>25</sup> 667 F.3d 1022 (9th Cir. 2011).

<sup>26</sup> *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1026 (9th Cir. 2011).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 1027.

video upload.<sup>29</sup> While Veoh employees did not review the material or its tags before the video became available, Veoh employed technology to prevent blatant copyright infringement.<sup>30</sup>

The Ninth Circuit held that “the language and structure of the statute, as well as the legislative intent that motivated its enactment, clarif[ied] that § 512(c) encompasses the access-facilitating processes that automatically occur when a user uploads a video to Veoh.”<sup>31</sup> In other words, the court extended the safe harbor to the functions automatically performed by Veoh’s software when a user uploaded a video.<sup>32</sup> The court refused to accuse Veoh of infringement merely for having a category for music but lacking a license agreement from any major music company, upholding the integrity of the safe harbor.<sup>33</sup> The court noted that Congress made the policy decision that the DMCA procedures would place the policing burden on the copyright holders rather than the service providers.<sup>34</sup> Copyrighters know what they own and are better equipped to identify infringing copies than service providers like Veoh.<sup>35</sup> Therefore, the court held that a service provider’s general knowledge that its service could be used to share infringing material is insufficient to constitute actual or red flag knowledge under the DMCA safe harbor.<sup>36</sup> Even after someone notifies the service provider that a video infringed, the service provider has no duty to investigate further to search for and remove similar videos.<sup>37</sup>

The next landmark case in the progression of the split was the Second Circuit’s *Viacom Int’l, Inc. v. YouTube, Inc.*<sup>38</sup> Several plaintiffs filed a class action suit against YouTube over a

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<sup>29</sup> *Id.*

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

<sup>31</sup> *Id.* at 1031.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1036-37.

<sup>34</sup> *Id.* at 1038.

<sup>35</sup> *Id.* at 1037.

<sup>36</sup> *Id.* at 1038.

<sup>37</sup> *Id.* at 1039.

<sup>38</sup> 676 F.3d 19 (2d Cir. 2012).

period of years where they believed their copyrighted material was infringed on YouTube's video sharing platform.<sup>39</sup> The plaintiffs claimed red flag knowledge was not limited to a particular type of knowledge, and it requires less specificity than actual knowledge.<sup>40</sup> They argued that requiring awareness of specific infringements to meet the threshold of red flag knowledge defeats the purpose of red flag knowledge because it would be no different from actual knowledge.<sup>41</sup>

The Second Circuit affirmed that the red flag knowledge safe harbor required knowledge or awareness of specific infringing activity.<sup>42</sup> Contrary to the plaintiffs' argument, the court declared that the statutory language in both the actual knowledge and red flag knowledge provisions referred to "knowledge of specific and identifiable infringements."<sup>43</sup> Ruling along the same lines as the Ninth Circuit in *UMG Recordings*, the Second Circuit demanded the service provider had knowledge or awareness of specific infringing material because removal is only possible if the provider knows which particular items to remove.<sup>44</sup> The court established a specific knowledge or awareness trigger because it would be unreasonable to require removal if the service provider merely had a general awareness of the infringing content.<sup>45</sup>

The Second Circuit then addressed the plaintiffs' concern regarding the indistinguishability between actual knowledge and red flag knowledge provisions.<sup>46</sup> The difference is not between whether the service provider has specific or generalized knowledge,

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<sup>39</sup> *Id.* at 28.

<sup>40</sup> *Id.* at 31.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 26.

<sup>43</sup> *Id.* at 30.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 30-31.

<sup>46</sup> *Id.* at 31.



but rather on a subjective and objective standard.<sup>47</sup> A provider has actual knowledge, the court posited, when it actually or subjectively knew of the specific infringement.<sup>48</sup> A provider has red flag knowledge, on the other hand, when it “was subjectively aware of facts that would have made the specific infringement ‘objectively’ obvious to a reasonable person.”<sup>49</sup> Thus, both provisions apply to only specific instances of infringement, but actual knowledge rests on a subjective standard while red flag knowledge on an objective standard.<sup>50</sup> No court has held that the red flag provision requires less specificity than the actual knowledge provision, so the Second Circuit maintained that position as well.<sup>51</sup>

To clarify further, there were two instances of infringement in *Viacom* that the Second Circuit decided on.<sup>52</sup> Multiple surveys estimated that between sixty and eighty percent of content hosted by YouTube contained copyrighted material, but copyright owners only authorized around ten percent of that material.<sup>53</sup> The court ruled that this constituted general knowledge of infringement among YouTube, which was insufficient to identify specific instances.<sup>54</sup> Email correspondence, however, shared between YouTube owners in which they acknowledged specific infringing videos and failed to remove those videos was at least enough to send to a factfinder to determine if the owners had actual or red flag knowledge.<sup>55</sup>

The next case in the development of the common law on red flag knowledge was *Columbia Pictures Indus. V. Fung*.<sup>56</sup> Gary Fung ran a video streaming company that operated

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<sup>47</sup> *Id.*

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

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

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 32.

<sup>52</sup> *Id.* at 33.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> 710 F.3d 1020 (9th Cir. 2013).

multiple websites.<sup>57</sup> The plaintiff's infringement accusation rested on a peer-to-peer file sharing protocol that Fung employed called BitTorrent.<sup>58</sup> Fung used BitTorrent to acquire audio and video files to host on his website, many of which infringed on copyrights.<sup>59</sup> Fung acquired the files by soliciting them from users who uploaded them or by using automated processes to collect files from other torrent sites.<sup>60</sup> Three of Fung's websites were torrent sites that collected and organized torrent files to allow users to browse in and search the websites' collections.<sup>61</sup>

The Ninth Circuit held Fung ineligible for the § 512(c) safe harbor provisions.<sup>62</sup> Reiterating the statute, the court stated that "The § 512(c) safe harbor is available only if the service provider does not have actual knowledge that the material or an activity using the material on the system or network is infringing, . . . or is not aware of facts or circumstances from which infringing activity is apparent."<sup>63</sup> The court felt no need to even consider the adequacy or inadequacy of the notifications Fung received from the plaintiff because Fung had red flag knowledge of a broad range of infringing activity.<sup>64</sup> Fung actively encouraged infringement by urging users to upload and download copyrighted works, assisting those seeking to watch copyrighted films, and helping his users burn copyrighted materials onto DVDs.<sup>65</sup> Applying the standard made by the Second Circuit in *Viacom*, the Ninth Circuit found the material in question was sufficiently current and well-known that it would have been objectively

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<sup>57</sup> *Id.* at 1023.

<sup>58</sup> *Id.* at 1024.

<sup>59</sup> *Id.* at 1027.

<sup>60</sup> *Id.* at 1027-28.

<sup>61</sup> *Id.* at 1028.

<sup>62</sup> *Id.* at 1043.

<sup>63</sup> *Id.* (internal quotations omitted).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

obvious to a reasonable person that the material solicited was both copyrighted and not licensed to random members of the public.<sup>66</sup>

The Ninth Circuit's decision in *Fung* created the first glimpse of a split between the Second and Ninth Circuits. Both circuits applied the standard that red flag knowledge requires specific knowledge or awareness of particular infringing activity.<sup>67</sup> But the Second Circuit in *Viacom* only considered the knowledge of the clips-in-suit, because “[b]y definition, only the current clips-in-suit [were] at issue in [that] litigation.”<sup>68</sup> The Ninth Circuit, on the other hand, made no indication that the service provider must have red flag knowledge pertaining to the specific works that the plaintiff sued over.<sup>69</sup> While it may be clear that *Fung* had knowledge of all the infringement he induced and encouraged, the Ninth Circuit's decision left the gate open to service providers being liable for content not involved in the lawsuit.<sup>70</sup>

After *Fung*, the Second Circuit diverged even farther from the Ninth Circuit in its *Capitol Records, LLC v. Vimeo, LLC* decision.<sup>71</sup> Vimeo was an internet service provider that operated a website where members can post videos for the general public.<sup>72</sup> The plaintiffs filed suit because they owned copyrights in sound recordings and musical performances, which they alleged Vimeo was liable infringing those copyrights of the content posted on Vimeo's site.<sup>73</sup> Like YouTube, Vimeo users had to agree to Vimeo's terms and conditions prior to uploading videos, which involved agreeing not to post infringing material.<sup>74</sup> Vimeo properly adhered to removing

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<sup>66</sup> *Id.* at 1042.

<sup>67</sup> *Viacom*, 676 F.3d at 32; *Fung*, 710 F.3d at 1043.

<sup>68</sup> *Viacom*, 676 F.3d at 34.

<sup>69</sup> *Fung*, 710 F.3d at 1043.

<sup>70</sup> *Id.*

<sup>71</sup> 826 F.3d 788 (2d Cir. 2016).

<sup>72</sup> *Id.* at 81.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 84.

all videos for which copyright owners sent a takedown notice, but the plaintiffs in this case did not send a takedown notice for any of the videos in this suit.<sup>75</sup> The distinguishing fact about this case that leads to the circuit split was that Vimeo employed a team that located and removed videos that may contain content that violates its Terms of Service.<sup>76</sup> The court faced the question of “whether evidence of some viewing by Vimeo employees of videos that played all or virtually all of ‘recognizable’ copyrighted songs was sufficient to satisfy the standard of red flag knowledge.”<sup>77</sup>

The Second Circuit held that exposure by the employee of a service provider to a video that plays all or most of a “recognizable” copyrighted song was not sufficient to establish red flag knowledge.<sup>78</sup> The court applied the standard it created in *Viacom*, which states that “in order to be disqualified from the benefits of the safe harbor by reason of red flag knowledge under § 512(c)(1)(A)(ii), the service provider must have actually known facts that would make the specific infringement claimed objectively obvious to a reasonable person.”<sup>79</sup> The court elaborated that a “reasonable person” refers to an ordinary person that does not have any specialized knowledge or expertise concerning music or the laws of copyright.<sup>80</sup> The fact that an employee happened to see a video containing a copyrighted song that is recognizable was insufficient to make infringement obvious to an ordinary reasonable person.<sup>81</sup> The court relied on the evidence in the record, which lacked any specific information regarding how much of the video the employee viewed or for what reason he viewed it.<sup>82</sup> Further, the DMCA explicitly

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<sup>75</sup> *Id.* at 85.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 82.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 93.

<sup>80</sup> *Id.* at 93-94.

<sup>81</sup> *Id.* at 94.

<sup>82</sup> *Id.*

relieves service providers from the obligation to seek indications of infringement in § 512(m), so the court could not assume this was the reason for the employee's viewing.<sup>83</sup>

A substantial issue in *Capital Records* that affected the court's decision was who maintained the burdens of proof in deciding whether or not Vimeo was entitled to the safe harbor.<sup>84</sup> The safe harbor is an affirmative defense, so the burden rested on the defendant to prove it qualified for the safe harbor.<sup>85</sup> The burden then shifts to the plaintiff to prove that the defendant "should be disqualified based on the copyright owner's accusations of misconduct."<sup>86</sup> For example, when the copyright holder sends a takedown notification to a service provider and the service provider fails to adhere to the statute, the burden of proof rests on the copyright holder.<sup>87</sup> Thus, the copyright owner has the burden of showing the service provider acquired red flag knowledge and failed to remove the infringing matter.<sup>88</sup>

In *Capital Records*, the fact that a user posted a video on the service provider's site and an employee of the service provider viewed the video was insufficient for Vimeo to prove Capital Records had red flag knowledge.<sup>89</sup> The court first reasoned that the viewing might have been brief.<sup>90</sup> It was possible that the employee only viewed enough of the video to post a comment, hit the like button, or add it to a channel, all of which could have been too short to identify an infringing audio track.<sup>91</sup> There were several purposes for which the employee could have been viewing the video, such as applying a technical element, classifying the subject

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 95.

<sup>89</sup> *Id.* at 96.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

matter, checking for obscenities, or anything else that does not involve searching for copyright infringement.<sup>92</sup> Further, the fact that music is recognizable or famous is insufficient to demonstrate that the music was in fact recognized by a hypothetical ordinary individual who has no specialized knowledge in the field of music.<sup>93</sup> The court explained that “[s]ome ordinary people know little or nothing of music. Lovers of one style or category of music may have no familiarity with other categories. For example, 60-year-olds, 40-year-olds, and 20-year-olds, even those who are music lovers, may know and love entirely different bodies of music, so that music intimately familiar to some may be entirely unfamiliar to others.”<sup>94</sup> Employees of service providers also could not be assumed to have expertise in copyright law, such as distinguishing between illegal infringement and permissible parodies, nor could they be expected to know the likelihood that the user lacked authorization before uploading.<sup>95</sup>

Ensuring to address the recurring argument made by the plaintiffs in *Viacom* which questioned whether there is a difference between the actual knowledge and red flag knowledge provisions<sup>96</sup>, the Second Circuit explained that this standard of red flag knowledge does not render the statute superfluous because there is still a distinguishing difference between red flag knowledge and actual knowledge.<sup>97</sup> The court articulated that if an employee of the service provider has actual knowledge that would make infringement obvious, then that constitutes red flag knowledge and the service provider is not eligible for the safe harbor.<sup>98</sup> In the aforementioned scenario, the service provider cannot escape liability through the safe harbor by

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 96-97.

<sup>96</sup> *Viacom*, 676 F.3d at 31

<sup>97</sup> *Capital Records*, 826 F.3d at 97.

<sup>98</sup> *Id.*

claiming the employee who had the actual knowledge never thought of the obvious significance of what the employee knew in relation to infringement, because it was red flag knowledge.<sup>99</sup> Thus, if a copyright holder can prove the service provider's employee was aware of sufficient facts that make infringement obvious to a reasonable person, then the service provider is not protected by the safe harbor.<sup>100</sup>

In addition to pardoning Vimeo from red flag knowledge, the Second Circuit reaffirmed the works-in-suit principle it created in *Viacom*.<sup>101</sup> In *Capital Records*, the plaintiff failed to offer evidence that related directly to the videos at issue in the suit, so the existing evidence was insufficient to justify a finding of red flag knowledge.<sup>102</sup> This is the same principle that the Ninth Circuit failed to specifically align with in *Fung*.<sup>103</sup>

Summing up the current inconsistencies between the Second and Ninth Circuit, there are two issues that require settling. The first issue is whether a service provider must have knowledge specifically about content in the plaintiff's complaint to be eligible for the safe harbor. The Second Circuit created this requirement in *Viacom* and affirmed it in *Capital Records*, demanding that the service provider in both cases have knowledge about the videos mentioned in the suit.<sup>104</sup> The Ninth Circuit, however, failed to apply the same standard in *Fung*, because the service provider had red flag knowledge over infringing works, but not necessarily the same works that the plaintiff sued over.<sup>105</sup> The second issue between the two appellate courts is whether a service provider can gain red flag knowledge by looking at an infringing work.

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

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

<sup>101</sup> *Id.* at 99.

<sup>102</sup> *Id.*

<sup>103</sup> *Fung*, 710 F.3d at 1043.

<sup>104</sup> *Viacom*, 676 F.3d at 34; *Capital Records*, 826 F.3d at 99.

<sup>105</sup> *Fung*, 710 F.3d at 1043.

While both circuits applied the standard that a service provider has red flag knowledge if it was subjectively aware of facts that would have made the infringement objectively obvious to a reasonable person,<sup>106</sup> the Ninth Circuit held the material in question was sufficiently well-known to be objectively obvious to a reasonable person.<sup>107</sup> The Second Circuit, on the other hand, found the objectively obvious standard cannot be applied that way to instill red flag knowledge because people have different tastes and exposure to music, so there cannot be a reasonable person standard.<sup>108</sup>

### *C. Current Scholarship on Red Flag Knowledge*

Edward Lee conducted an analysis on the service provider's "awareness of infringement" aspect of the safe harbor.<sup>109</sup> Based on legislative history, Lee claims the "awareness" should be judged both subjectively and objectively.<sup>110</sup> By subjective, he believes they intended to assess the service provider's actual state of mind, and by objective, ask "whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances."<sup>111</sup> Based on the text, Congress intended to establish a high standard of knowledge to serve the purpose of the safe harbor, because a low standard would have opened the floodgates to constant litigation against service providers.<sup>112</sup> Lee conducted a dictionary definition analysis of "apparent," which means (1) readily seen; exposed to sight; open to view;

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<sup>106</sup> *Viacom*, 676 F.3d at 31,

<sup>107</sup> *Fung*, 710 F.3d at 1042.

<sup>108</sup> *Capital Records*, 826 F.3d at 96.

<sup>109</sup> Edward Lee, *Decoding the DMCA Safe Harbors*, 32 Colum. J.L. & Arts 233 (2009).

<sup>110</sup> Lee at 252.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 252-53.



visible, or (2) capable of being easily perceived or understood; plain or clear; obvious.<sup>113</sup> He concluded from the analysis that one is aware of apparent infringing activity when it is plain, clear, or obvious that infringement is occurring based on the facts.<sup>114</sup> Congress also intended for a high standard of awareness because the question of infringement is complex and they did not want to burden service providers with the task of determining what online content infringes on another's rights.<sup>115</sup> Thus, for infringing activity to be "apparent" under the red flag test, it must be clearly infringing, like a well-known pirating site.<sup>116</sup>

To apply his ideas, Lee posed a hypothetical scenario of a YouTube employee that stumbles upon a video with a thumbnail of Jerry Seinfeld entitled "Seinfeld" and asks whether this constitutes red flag awareness.<sup>117</sup> Based on his reading of the DMCA, Lee believes this does not constitute red flag awareness because "the employee's mere knowledge of a Jerry Seinfeld thumbnail image or screenshot on the website would not constitute being 'aware of facts from which infringing activity is apparent.' It is not plain, clear, or obvious that a mere screenshot of Jerry Seinfeld is copyright infringement."<sup>118</sup> While it is possible that the video contained a bootlegged episode, it could just be a single photograph or a random teaser thrown in to attract more views.<sup>119</sup> The content could also be a fair use of copyrighted material if the Seinfeld copyright holder authorized its use or if the video was just a parody.<sup>120</sup> Moreover, the DMCA does not require the service provider to conduct any further research in determining copyright

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<sup>113</sup> *Id.* at 253.

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

<sup>115</sup> *Id.* at 255.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 258.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 258-59.

<sup>120</sup> *Id.* at 259.

infringement, so the YouTube employee in this situation is relieved of that obligation.<sup>121</sup> Lee rapped up his take on the red flag knowledge provision by sensibly pointing out that the safe harbors need to be clarified because “an unclear safe harbor can act as a ‘trap’ for the wary by dangling the false prospect of immunity from liability in front of businesses who then invest millions of dollars in reliance on this false promise.”<sup>122</sup>

Robert J. Williams provided a thoughtful disposition on the DMCA and the court’s interpretation of it in the *New England Law Review*.<sup>123</sup> Despite Congress’s intentions to improve and clarify the relationships between copyright holders and service providers, the DMCA initially came out with much ambiguity.<sup>124</sup> He praised the Second Circuit for its decision in *Viacom* because it placed the state of the law on the proper path.<sup>125</sup> Williams claimed that “[t]he Second Circuit rightfully held item-specific knowledge of infringement is required” because it created a fairer environment for copyright owners.<sup>126</sup> Courts were reluctant to find apparent knowledge under the red flag test prior to *Viacom*, but the Second Circuit opened the gates for copyright owners to assert liability.<sup>127</sup> The court “differentiate[d] specific knowledge as requiring both a subjective and objective knowledge analysis under § 512(c)(1)(A)(ii), as opposed to specific knowledge under the § 512(c)(1)(A)(i) and general knowledge under § 512(c)(1)(A)(ii).”<sup>128</sup> Relying less on the general knowledge requirement and maintaining the high standard of specific proof provides copyright owners a greater opportunity to recover for

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

<sup>122</sup> *Id.* at 262.

<sup>123</sup> Robert J. Williams, *The Second Circuit Serves up Some Knowledge in Viacom v. YouTube*, 48 *New Eng. L. Rev.* 657 (2014).

<sup>124</sup> *Id.* at 670.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 671.

<sup>128</sup> *Id.*

infringement.<sup>129</sup> Overall, copyright holders are facing an uphill battle to prove infringement, but the Second Circuit realigned the DMCA more closely to Congress’s intentions by establishing a more accessible standard for the red flag test.<sup>130</sup>

Published in the *New York University Law Review*, Xiao Ma conducted a thorough analysis of the American red flag knowledge provision to compare to that of China’s.<sup>131</sup> With the internet encouraging copyright law to be a global issue, the requisite level of knowledge possessed by the service provider in determining its liability of online copyright infringement committed by its users has also been a major controversy in China.<sup>132</sup> One Chinese regulation used the terms “knows” or “reasonable ground to know” for limiting the liability of services that provide digital storage space.<sup>133</sup> Another regulation used the phrases “explicitly knows” and “should have known” for a service that provides searching or linking services, which aligns closely with the verbiage of the American red flag knowledge provision.<sup>134</sup>

Chinese courts have been running into the same issues and have issued split decisions on similar matters.<sup>135</sup> In one case, *IFPI v. Baidu*, the plaintiffs sued a service provider for providing links to a website that offered free downloading of infringing songs.<sup>136</sup> The court held that the plaintiff failed to notify the service provider of the infringing files and the service provider had no fault for searching and linking to the other websites because it “should not have known” of the infringing material.<sup>137</sup> In a similar case, *IFPI v. Yahoo*, the service provider was held liable

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 671-72

<sup>131</sup> Xiao Ma, *Establishing an Indirect Liability System for Digital Copyright Infringement in China: Experience from the United States’ Approach*, 4 *N.Y.U. J. of Intell. Prop. & Ent. Law* 253 (2015).

<sup>132</sup> *Id.* at 269.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 270.

<sup>136</sup> *Id.*

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

for aiding infringement by providing links to the third party websites for free music downloading.<sup>138</sup> Here, the music labels sent notices to the defendant including the name of the song, album and singer of each infringing file, which the court held were enough to locate the copyrighted music because the service provider, Yahoo, “should have known” of the infringement.<sup>139</sup> In a third case, *Fanya v. Baidu*, the copyright holder sent notices to the service provider demanding them to disconnect access to the infringing material, but the rights holder only provided the name of the song.<sup>140</sup> Such minimal information made it very difficult for the service provider to locate the copyrighted material.<sup>141</sup> Thus, Chinese courts have taken a similar stance to distinguish guilty service providers – those that have specific knowledge of the exact instances of infringement – from innocent service providers – those that have a mere general knowledge of infringement.

The Chinese courts formulated a solution to what constitutes “known” or “should have known” that can be considered while American courts wade through a similar issue.<sup>142</sup> The courts first agreed upon the point that the copyright holder must send a notice sufficient to locate the infringing material.<sup>143</sup> If the copyright holder can prove the sufficiency of the notice, the service provider has red flag knowledge of the infringement.<sup>144</sup> The second point related to situations in which the service provider provides a list to its users, viewers, listeners, etc.<sup>145</sup> The court pointed out that there are two methods upon which users can look for or stumble upon

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 270-71.

<sup>140</sup> *Id.* at 271.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 272.

content.<sup>146</sup> One method is the search box, which involves no bias among the content and only displays material based on the key words a user enters into the search box.<sup>147</sup> To attract users, however, it is very common for a service provider to promote material.<sup>148</sup> Thus, the second method by which users find content is from the service provider promoting lists such as “top 100 songs” or “featured videos of the day.”<sup>149</sup> Ma argues that the culpability between the two methods, searching versus promoting, is different.<sup>150</sup> The service provider must exercise a greater duty of care when providing lists to its users in cases where the infringing material is apparent from a glance at the list, in which case the service provider is required to disconnect it rather than turning a blind eye to infringement.<sup>151</sup> Meanwhile, a service provider will not face the same culpability for material discovered by searching with key words.<sup>152</sup>

Like American courts and professionals, Chinese legal professionals struggle to agree upon interpreting their regulations, debating whether the term “know” includes “should have known” or “have reason to know.”<sup>153</sup> Some argue “know” includes “should have known” because it prevents guilty service providers from escaping liability as easily if the standard were only based on actual knowledge.<sup>154</sup> Meanwhile, others disagree because interpreting it that way would incur too high a duty of care on the service providers.<sup>155</sup> Some subscribe to a third opinion that the knowledge requirement includes “have reason to know” because it invokes an awareness of facts or circumstances.<sup>156</sup> The Chinese courts concluded that the term “know” in

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

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

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

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

<sup>152</sup> *Id.*

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

<sup>154</sup> *Id.* at 272-73.

<sup>155</sup> *Id.* at 273.

<sup>156</sup> *Id.*

the regulation embraces the meaning of “explicitly know” and “should have known” to determine the service provider’s knowledge of copyright infringement committed by a third party.<sup>157</sup>

One expert, Ma noted, proposed the idea of a multifactor test for courts to consider when evaluating the relationship between the service provider and the third party user.<sup>158</sup> In applying the test, no one factor would be dispositive, but multiple factors could convince the court to impose liability on the service provider.<sup>159</sup> A sample list of the factors included (1) the extent of the service provider’s involvement, (2) knowledge of infringing activities, (3) intention of the service provider, (4) extent of infringement and lawful activities, (5) financial or other benefit of the service provider, (6) ability to prevent or deter infringement, and (7) due care of the service provider, and (8) a cost-benefit analysis.<sup>160</sup>

### **Part III. The Second Circuit Interpreted the Red Flag Knowledge Provisions Correctly and Should Be Followed on Both Issues**

The Second and Ninth Circuits delivered decisions that led to a split application of the law on two issues related to red flag knowledge. The first issue, evolving from the Second Circuit’s decision in *Viacom* and the Ninth Circuit’s decision in *Fung*, questions whether a service provider must have red flag knowledge of the specific work a plaintiff sued over to be stripped of protection from the DMCA safe harbor. The second issue, stemming from the Ninth Circuit’s decision in *Fung* and the Second Circuit’s subsequent decision in *Capital Records*,

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<sup>157</sup> *Id.* at 275.

<sup>158</sup> *Id.* at 288.

<sup>159</sup> *Id.*

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

questions whether content can be sufficiently “famous” that its infringing nature would be objectively obvious to a reasonable person. This analysis discusses in detail the appropriate decisions on each issue.

A. *The Second Circuit is correct in holding that red flag knowledge must be determined on a work-by-work basis for only the works-in-suit*

The Second Circuit in *Viacom* held that a service provider can only have red flag knowledge of content which the plaintiff included in the complaint.<sup>161</sup> The Second Circuit reaffirmed that principle in *Capital Records*.<sup>162</sup> The Ninth Circuit, however, failed to specify in *Fung* that the service provider could only have red flag knowledge over the works included in the suit.<sup>163</sup> The court found sufficient evidence in the record to strip Fung of protection from the safe harbor because he had red flag knowledge of his infringement and inducement of infringement, but the court associated that red flag knowledge with works not necessarily included in the complaint.<sup>164</sup> The Second Circuit correctly held courts should only be able to find red flag knowledge of the works included in the suit.

The application of the safe harbor provision and the determination of whether red flag knowledge applies is a fact-sensitive issue. There is no limit to the possible scenarios and circumstances that can exist in a case of copyright infringement. Taking into consideration the advancement of the internet and the constant development of technology, new situations will

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<sup>161</sup> *Viacom*, 676 F.3d at 34.

<sup>162</sup> *Capital Records*, 826 F.3d at 99.

<sup>163</sup> *Fung*, 710 F.3d at 1043.

<sup>164</sup> *Id.*

continue to arise. Thus, red flag knowledge should be adjudicated on a case-by-case basis, specifically evaluating the work for which the rights holder complains of infringement.

Evidence of general awareness of infringement is not sufficient to show the service provider had a particular awareness of infringement of the works-in-suit. While some cases can be clear instance of infringement by the service provider, the court must draw a line to protect innocent service providers. Platforms like YouTube and Vimeo provide incredible opportunities to connect and share content with the world, so they warrant protection from bad faith infringers who might use their platforms unlawfully. Many service providers are far too large to monitor infringers that fly under the radar, so the burden of policing should fall heavily onto the rights holders.

Holding copyright holders responsible for monitoring the infringement of their own copyrights makes good sense. The holders of the copyrights are the people reaping the benefit of those rights, and they should be more capable of finding culprits of infringement, along with having greater incentive. The courts can examine cases using the factors listed by *Ma* to ensure there is no ill will on the service provider's end, such as financial benefit and due care of the service provider.<sup>165</sup> While service providers should by no means be encouraging copyright infringement, they are merely a medium for the creation and publishing of creative content. The best way to protect this valuable system of producing, sharing, and viewing content is to establish a high standard of red flag knowledge and place a heavier burden on the rights holders than the service providers. This application of the law is consistent with Congress's intention to

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<sup>165</sup> *Ma* at 288.



hold awareness to a high standard to avoid burdening service providers with the task of finding and determining infringement.<sup>166</sup>

*B. The Second Circuit is correct in holding that an employee of the service provider viewing a video with “famous” music is insufficient to constitute red flag knowledge*

The Second Circuit in *Capital Records* held a service provider’s exposure to all or most of a “recognizable” song was insufficient to constitute red flag knowledge.<sup>167</sup> The Ninth Circuit in *Fung*, however, held that the material in question was sufficiently current and well-known that it would have been objectively obvious to a reasonable person that the content lacked authorization and infringed on another’s rights.<sup>168</sup> These two holdings beg the question of whether creative content, such as a song, can ever be sufficiently famous, well-known, or recognizable that a reasonable person would be aware that someone owns the copyright to that material and someone else infringes on those rights. Courts should follow the precedent set by the Second Circuit in *Capital Records* which stated the law should not expect a reasonable person to be capable of recognizing copyright infringement of a specific material upon exposure to it.<sup>169</sup>

In the case of *Capital Records*, whether the employee was aware that the music was famous and copyrighted should be a question of fact decided by the factfinder. The dispute should not be held to the standard of what might be objectively obvious to a reasonable person. The descriptive terms “famous” and “recognizable” are subjective adjectives that cannot be

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<sup>166</sup> Lee at 255.

<sup>167</sup> *Capital Records*, 826 F.3d at 82.

<sup>168</sup> *Fung*, 710 F.3d at 1042.

<sup>169</sup> *Capital Records*, 826 F.3d at 82.

adequately quantified or measured to settle a legal issue. Every person lives a different life, and many are not fluent or well-versed in the field of music. People can live their lives without exposure to what some or even most might consider “popular” music. Certain forms of media, such as radio or online music databases like Spotify, often dictate and sway what music is popular at any given time. A simple lack of access to those types of mediums is all it takes to remain unfamiliar with content that others consider “well-known.”

The Second Circuit identifies several valid reasons in *Capital Records* in support of denying service provider’s liability for stumbling upon alleged infringement of objectively well-known content.<sup>170</sup> The court accurately pointed out that average ordinary people may not know the first thing about music.<sup>171</sup> For those that are interested in music, many people pigeon-hole themselves into certain categories or genres and lack any exposure beyond those self-inflicted parameters.<sup>172</sup> Particularly, different age groups grow up in different decades and eras, thus developing different musical tastes.<sup>173</sup> The analysis the court applied for music can equally translate to other forms of copyrightable media, such as movies, television shows, and books. In the context of a service provider’s liability, the Second Circuit’s principles should be applied to all of these categories when determining whether a disputed content was objectively famous or recognizable.

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<sup>170</sup> *Id.* at 96.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

### *C. The Practical Ramifications of Implementing the Second Circuit's Solution*

The Second Circuit plausibly addressed the counterargument to the court's decision in *Capital Records*.<sup>174</sup> The plaintiffs in *Viacom* first presented the argument that raising the red flag knowledge standard defeats the purpose of the provision because it would consequently be no different than the actual knowledge provision.<sup>175</sup> The court explained that a service provider has red flag knowledge when it possesses actual knowledge that would make the infringement obvious.<sup>176</sup> Therefore, a copyright holder need not necessarily prove the service provider had actual knowledge of infringement to deny safe harbor eligibility, but the rights holder can merely prove the service provider was aware of facts that make infringement obvious to a reasonable person.<sup>177</sup>

There is concern that the Second Circuit's decision raised the red flag knowledge standard too high, but the standard should be high. Service providers deserve extensive protection from liability in these situations, and the court proved that the standard is not so extreme that it violates the text of the law as written by Congress. Copyright holders still maintain the opportunity to prove that a service provider was sufficiently aware of the infringing content and failed to expeditiously remove it from the provider's platform.

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<sup>174</sup> *Id.* at 97.

<sup>175</sup> *Viacom*, 676 F.3d at 31.

<sup>176</sup> *Capital Records*, 826 F.3d at 97.

<sup>177</sup> *Id.*

#### IV. Conclusion

The Second and Ninth Circuits are currently split on two important issues relating to red flag knowledge. First, the Ninth Circuit believes that “knowledge of a broad range of infringing activity” is sufficient to constitute red flag knowledge,<sup>178</sup> while the Second Circuit requires service providers to be aware of the specific works-in-suit to be shackled with red flag knowledge.<sup>179</sup> Second, the Ninth Circuit believes material posted on a service provider’s site can be so famous such that a reasonable person presented with the content would be capable of recognizing its infringement,<sup>180</sup> while the Second Circuit found that music cannot be so recognizable.<sup>181</sup> The Second Circuit took the correct stance on both fronts in deciding that service providers can only have red flag knowledge over the content for which the plaintiff sues,<sup>182</sup> and material cannot be sufficiently famous that a case of its infringement would be objectively obvious.<sup>183</sup> If the Supreme Court of the United States were to settle this dispute, they would have their work cut out for them because the Second Circuit provided the best roadmap for preserving the safety and business of the internet service providers.

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<sup>178</sup> *Fung*, 710 F.3d at 1043.

<sup>179</sup> *Viacom*, 676 F.3d at 34.

<sup>180</sup> *Fung*, 710 F.3d at 1043.

<sup>181</sup> *Capital Records*, 826 F.3d at 96.

<sup>182</sup> *Viacom*, 676 F.3d at 34.

<sup>183</sup> *Capital Records*, 826 F.3d at 96.