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File Sharing is Dead! Long Live File Sharing! Recent Developments in the Law of Secondary Liability for Copyright Infringement

by
CHRISTIAN E. MAMMEN[*]

It has been only ten years since the *A&M Records v. Napster*[1] decision ushered in the modern era of digital online media for consumers. Since then, some companies have matured into viable businesses, notably Apple's iTunes[2] and YouTube. Others have

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* Resident Scholar, U.C. Hastings College of the Law. I wish to thank Adriana Cervantes and Brandy Worden, the Comm/Ent Executive Symposium Editors, as well as my co-panelists Lila Bailey, Andrew Bridges, and Kelly Klaus, for their extremely helpful comments and insights into this subject. I also wish to thank my law clerk, Pamela Ng, for her valuable contributions to this article.

1. 239 F.3d 1004 (9th Cir. 2001)

2. Apple launched iTunes as standalone music-management software in January 2001. Press Release, Alicia Awbrey & Nicole Scott, Apple, Inc., Apple Introduces iTunes–World's Best and Easiest to Use Jukebox Software (Jan. 9, 2001), www.apple.com/pr/library/2001/jan/09itunes.html. Apple then launched the iTunes Store in April

taken the cat-and-mouse game of file sharing from the peer-to-peer technology of Napster to bit-torrent technology and, more recently, to cloud computing and storage.

In its December 2010 issue, *Wired* magazine proclaimed: "The age of stealing music via the Internet is officially over. It's time for everybody to go legit. The reason: We won."[3] The *Wired* article argues that, in the past ten years, the usability and pricing of "legit" digital media providers have improved to the point that it is no longer worth the hassle of pirating downloads. In other words, the article claims, consumers now get everything they want from the above-board services.

Yet the industry's battle against digital media piracy continues. This article, which is an expansion of remarks from a panel discussion at the 2010 UC Hastings Comm/Ent Symposium, examines five reported decisions in cases brought by content providers against online media providers, alleging secondary liability for copyright infringement. The results in those cases have varied, often seemingly in line with the quality of the defendant's "attitude." After summarizing those cases, this article concludes by attempting to extrapolate several themes to look for in future cases.

I. Historical Background

A. The *Sony* Betamax Case

Even the *Napster* case stood on the shoulders of law created by predecessor technology. Our story starts with *Sony Corp. v. Universal City Studios*[4]—the Betamax[5] case. This case involved the question of whether the use of videocassette recorders ("VCR") to record copyrighted television shows was permissible. Although most

2003. John Borland, *Apple Unveils Music Store*, CNET NEWS, (Apr. 28, 2003, 12:16 PM) http://news.cnet.com/Apple-unveils-music-store/2100-1027_3-998590.html.

3. Paul Boutin, *The Age of Music Piracy is Officially Over*, WIRED, Nov. 29, 2010, *available at* http://www.wired.com/magazine/2010/11/st_essay_nofreebird.

4. 464 U.S. 417 (1984).

5. In the early 1980s, there were two competing formats for videocassettes, Video Home System ("VHS") and Betamax. VHS was supported by JVC and Betamax was supported by Sony. Michael A. Cusumano, et al., *Strategic Maneuvering and Mass-Market Dynamics: The Triumph of VHS over Beta*, 66 BUS. HIST. REV., 51, 52 (1992). Although many considered Betamax to be technically superior, it lost in the marketplace. *Id.* A similar battle was fought twenty-five years later between two competing formats for high-definition Digital Versatile Discs ("DVD"), between HD-DVD and Blu-Ray. Again, one format emerged the winner—here, it was Blu-Ray. Martin Fackler, *Toshiba Concedes Defeat in the DVD Battle*, N.Y. TIMES, Feb. 20, 2008, *available at* http://www.nytimes.com/2008/02/20/technology/20disc.html.

home users of VCRs used them merely for "time-shifting" (i.e., recording a show to watch it later), some users built libraries of shows they had recorded.[6] The district court ruled that noncommercial home recording of broadcast television was permissible fair use.[7] The Ninth Circuit reversed, holding that home use was not fair use and therefore constituted copyright infringement.[8] The Ninth Circuit noted that the primary purpose of VCRs was to record television shows, of which "virtually all"[9] were copyrighted material. Accordingly, the court concluded that VCRs were not "suitable for any substantial noninfringing use."[10] As such, Sony was liable for contributory infringement and charged with knowledge of the end-users' infringement because it was obvious that people were using their VCRs for infringement—the "most conspicuous use." In reaching this conclusion, the court imported the concept of "substantial noninfringing [use]" from patent law.[11] The Supreme Court reversed, holding that home noncommercial time-shifting by consumers is fair use[12] (i.e., this is a "substantial non-infringing use").[13] Therefore, Sony could not be held liable for contributory infringement.[14]

B. The DMCA

In 1998, Congress enacted the Digital Millennium Copyright Act ("DMCA").[15] The DMCA includes four "safe harbor" provisions permitting online content providers to escape infringement liability based on infringing content that passes through their systems.[16] These safe harbors are available to "service providers"[17] who have implemented and publicized a policy of terminating repeat infringers.[18] However, these service providers do not have an

6. *Sony*, 464 U.S. at 423.
7. *Id.* at 425.
8. *Id.* at 427.
9. Universal City Studios, Inc. v. Sony Corp. of America, 659 F.2d 963, 975 (9th Cir. 1981).
10. *Id.* at 428.
11. *Id.* at 442.
12. *Id.* at 455.
13. *Sony*, 464 U.S. at 456.
14. *Id.*
15. 17 U.S.C. §§ 512–1301 (2010).
16. 17 U.S.C. § 512.
17. 17 U.S.C. § 512(k)(1)(B).
18. 17 U.S.C. § 512(i)(1)(A).

independent duty to search for infringing content.[19] Two of the safe harbor provisions, sections 512(c) and (d), are of particular interest here.[20]

Section 512(c) applies to "hosting" services. It protects service providers from liability if they (i) neither know[21] nor have reason to know[22] that hosted material is infringing; (ii) are unable to control what users post (or, if they can control the posting of content, they have no direct financial benefit from the postings);[23] (iii) devise, implement, and publicize a policy for terminating service to repeat infringers;[24] (iv) do not undercut the effectiveness of standard technological protection measures;[25] and (v) comply with the requirements for notice and takedown procedures.[26]

Section 512(d) provides a safe harbor to "information location tools," such as providers that provide links to online locations containing infringing information or the means to locate infringing material.[27] Section 512(d) has the same safe harbor requirements as section 512(c).[28]

C. The *Napster* Case

In 2001, the Ninth Circuit handed down the first appellate decision concerning online peer-to-peer file sharing of MP3s.[29] In *Napster,* users undisputedly directly infringed copyrights on the recordings they were sharing[30] and the court held that the users' acts of copying likely did not constitute fair use.[31] Napster, who provided a website, servers, indexing, and tech support,[32] was preliminarily

19. 17 U.S.C. § 512(m).

20. The other two safe harbor provisions, sections 512(a) and (b), protect, respectively, service providers who merely provide the transmission medium and who provide intermediate, temporary system caching.

21. 17 U.S.C. § 512(c)(1)(A)(i).

22. 17 U.S.C. § 512(c)(1)(A)(ii).

23. 17 U.S.C. § 512(c)(1)(B).

24. 17 U.S.C. § 512(i)(1)(A).

25. 17 U.S.C. § 512(i)(1)(B).

26. 17 U.S.C. § 512(c)(1)(C).

27. 17 U.S.C. § 512(d).

28. *Id.*

29. A&M Records, Inc. v. Napster Inc., 239 F.3d 1004 (9th Cir. 2001).

30. *Id.* at 1013–14.

31. *Id.* at 1019.

32. *Id.* at 1011–12.

enjoined because it was likely liable for contributory and vicarious infringement.[33]

Contributory infringement arises when someone knowingly encourages and assists infringement.[34] That is, they know of specific act(s) of infringement, fail to block them, and assist other users by providing a site and facilities for the infringement.[35] Under *Sony*, the fact that a machine or technology "could be and [was] used to infringe" is not enough to support a finding of contributory infringement.[36]

Vicarious infringement arises when the defendant has a direct financial interest, combined with the right and ability to supervise (e.g., in the use of search indices), and fails to act to block the infringement.[37] In *Napster*, the Ninth Circuit held that DMCA section 512(d) provided no safe harbor against the preliminary injunction, and the court noted that "serious questions regarding Napster's ability to obtain shelter" under the safe harbor.[38] In particular, the Ninth Circuit questioned (1) whether Napster was an Internet service provider, (2) whether "official" notice of infringement was required, and (3) whether Napster had a DMCA-compliant copyright compliance policy. Thus, the Ninth Circuit largely affirmed the preliminary injunction.[39]

D. The *Grokster* Case

Four years later, the Supreme Court weighed in on these issues in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*[40] Grokster offered a peer-to-peer file sharing service that was theoretically capable of both lawful and unlawful use.[41] The FastTrack and Morpheus (Gnutella) technologies used by Grokster enabled users to send requests for files directly to other users.[42] The files are then transmitted directly from peer-to-peer and Grokster itself provides no servers.[43] Rather, users installed the software, which enabled them to

33. *Id.* at 1020, 1024.
34. *Id.* at 1019.
35. *Napster,* 239 F.3d at 1021–22.
36. *Id.* at 1020; *See* Sony Corp. v. Universal City Studios, 464 U.S. 417, 456 (1984).
37. *Napster*, 239 F.3d at 1023.
38. *Id.* at 1025.
39. *Id.* at 1029.
40. 545 U.S. 913 (2005).
41. *Id.* at 918–19.
42. *Id.* at 921.
43. *Id*. at 922.

access the network.[44] An index could be found on a "supernode" computer, which would enable downloads from other peers in the network.[45] Although there were many potential noninfringing uses, a study showed that more than 90 percent of the files exchanged via Grokster were copyrighted.[46] Unlike in *Sony*, Grokster had clearly stated an objective to use the network for the purpose of infringement.[47] The Supreme Court held that liability for inducing infringement arises where there is a clear expression or affirmative steps to further infringement, but that mere knowledge of potential infringement is not enough to create liability.[48] In other words, only "purposeful, culpable expression and conduct" generates liability.[49] The Supreme Court found Grokster liable because its service was aimed at a known source of demand for infringement (i.e., former Napster users). Grokster made no effort to develop filtering tools and its financial interests were advanced via the increased ad revenue that accompanied the high-volume traffic brought by trade in infringing files.[50]

The Supreme Court further held that contributory infringement consisted of intentionally inducing or encouraging another to infringe and that vicarious infringement required a financial interest in the infringement coupled with a failure to stop the infringer.[51] *Grokster* was distinguishable from the *Sony* case, insofar as Sony had no stated intent to promote infringement.[52] Thus, the *Grokster* court (re)interpreted the *Sony* case, stating that it is possible for one to be held liable even with substantial noninfringing use. Instead, it opened the possibility for indirect infringement even when there are some theoretically possible noninfringing uses.[53]

E. RIAA Direct-Infringer Enforcement

For a number of years following the *Grokster* decision, attention turned to the recording industry's enforcement efforts against direct

44. *Id.* at 921.
45. *Id.*
46. *Id.* at 922.
47. *Id.* at 923–24.
48. *Id.* at 937.
49. *Id*.
50. *Id.* at 939–40.
51. *Id.* at 930.
52. *Id.* at 938.
53. *Id.* at 934.

infringers.[54] Since late 2009, attention has turned back to the issue of secondary liability for service providers. While the range of available technology has expanded since *Napster* in 2001, some of the old technology is still around. Current cases involve peer-to-peer technology, such as that used in *Grokster*, newer and faster bit-torrent technology, and various forms of cloud computing.

II. Recent Cases

Against this background, this article considers five recent cases decided between September 2009 and June 2010 that address the issue of secondary liability for online file sharing. The five cases represent a range of old and new technologies, but a couple of distinct themes emerge.

A. Veoh

In September 2009, the Central District of California issued a ruling in *UMG Recordings, Inc. v. Veoh Networks, Inc.*[55] The court granted summary judgment in favor of Veoh on the basis of its DMCA safe harbor defense.[56]

Veoh provides a video hosting site[57] similar to YouTube. Launched in late 2005 or early 2006,[58] the content uploaded to Veoh includes: (1) user-generated content; (2) unlicensed, infringing content; and (3) licensed, copyrighted "partner" content.[59] Veoh does not charge users and, as of 2009, has not turned a profit.[60] Veoh breaks the content into "chunks,"[61] and formats uploaded videos into

54. *See* David Kravets, *Copyright Lawsuits Plummet in Aftermath of RIAA Campaign*, WIRED, (May, 18, 2010, 1:24 PM) http://www.wired.com/threatlevel/2010/05/riaa-bump (charting number of copyright infringement filings from 1993-2009, including increase in filings during RIAA enforcement campaign from 2004-2008).

55. 665 F. Supp. 2d 1099 (C.D. Cal. 2009).

56. *Id.* at 1101.

57. *Id.* at 1100.

58. *Id.* at 1101.

59. *Id.*

60. *Id.* at 1102.

61. *Uploading Videos Using the Veoh Uploader*, VEOH, http://www.veoh.com/help (last visited Dec. 15, 2010).

the Adobe Flash format.[62] Users can then watch the videos as streaming downloads or they can download whole video files.[63]

It was undisputed that some users uploaded infringing content to Veoh.[64] However, Veoh included a prohibition on copyright infringement in its "Terms of Use," and had a robust notice-and-takedown capability, such that it was usually able to take down infringing content the same day that it received notice of infringing content and a request that it be removed.[65]

In ruling for Veoh on the 512(c) safe harbor defense, the court analyzed four issues. First, on the requirement of actual knowledge or reason to know of infringement, the court held that in this context, "knowledge" means specific, actual knowledge of infringement by a specific posting. The court also held that "reason to know" requires the existence of red flags that require *no effort* from the service provider to follow up or investigate in determining whether there is an actual infringement.[66] In other words, "reason to know" requires "willful ignorance of [a specific act of] readily apparent infringement."[67] Thus, the *entire* burden fell on the copyright holder to ensure that the provider has the requisite knowledge. Moreover, giving the provider information about categories, search terms, tags, or even artist names is not enough to provide the requisite knowledge—unless the notice-provider is asserting, for example, that *all* posted works by a named artist are infringing.[68] In contrast with Napster, where 70 percent to 87 percent of all content was infringing, only 5 percent to 10 percent of Veoh's content was infringing.[69] A general awareness that some small percentage of content infringes is insufficient to establish the requisite knowledge for liability.[70]

Second, Veoh was found to act expeditiously to remove infringing content when it did obtain actual knowledge of such material.[71] In the

62. Io Group, Inc. v. Veoh Networks, Inc., 586 F. Supp. 2d 1132, 1139 (N.D. Cal. 2008).

63. *Playing Videos in Veoh Web Player*, VEOH, http://www.veoh.com/help (last visited Dec. 15, 2010).

64. *See Veoh*, 665 F. Supp. 2d at 1111.

65. *Id.* at 1102.

66. *Id.* at 1108.

67. *Id.*

68. *Id.* at 1110.

69. *Id.* at 1111.

70. *Id.* at 1111.

71. *Id.* at 1112.

few instances where Veoh received specific notice of infringing videos, they were "promptly removed."[72]

Third, the court found that Veoh did not have the right and ability to control its users' content.[73] Specifically, the court held that this provision requires more than a mere ability to remove infringing content, to implement filtering software, or to do automated searches.[74] This "something more" as required by the DMCA might include, for example, prescreening sites and providing advice, neither of which Veoh was shown to do.[75]

Finally, Veoh implemented a policy to terminate repeat infringers.[76] The court noted that the policy must block repeated acts of actual infringement, not merely repeated potential infringements. Thus, the court deemed it sufficient to count "strikes" only when notice-and-takedown letters were received.[77] Moreover, a policy is reasonable even if it treats as one "strike" a notice covering multiple acts of infringement, and declines to treat defective or deficient notice-and-takedown letters as strikes.[78] Additionally, automated filters are too unreliable and too unverifiable to provide a basis for determining infringement "strikes."[79]

B. Fung

Three months later, the Central District of California issued a decision in *Columbia Pictures Industries, Inc. v. Fung*.[80] Fung operated a number of websites that used bit-torrent technology. Bit-torrent is considered an evolutionary modification of peer-to-peer because the download of a large file happens simultaneously from many users in what is called a "swarm."[81] Fung provided websites that enabled users to locate "dot-torrent" files they wished to download.[82] The lists of files provided on the website exhibited an awareness of possible infringement. The lists had titles such as "Box

72. *Id.* at 1118.
73. *Id.* at 1112.
74. *See id.* at 1112–13.
75. *Id.* at 1114; *See Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1181–82 (C.D. Cal. 2002).
76. *Veoh*, 665 F. Supp. 2d at 1103.
77. *Id.* at 1116.
78. *Id.* at 1116–17.
79. *Id.* at 1117–18.
80. No. CV 06-5578, 2009 WL 6355911, at *1 (C.D. Cal. Dec. 21, 2009).
81. *Id.* at *2.
82. *Id.* at *3.

Office Movies," "High Quality DVD Rips," etc.[83] The plaintiffs estimated that 95 percent of downloads conducted through Fung's websites were infringing.[84] Again, it was undisputed that a number of users were committing indirect infringement.[85]

The court granted summary judgment against Fung, finding that he had induced copyright infringement and was not entitled to a DMCA safe harbor.[86] To support its finding of inducing infringement, the court focused on Fung's purposeful conduct and intent to encourage infringement.[87] In particular, Fung's messages to users (such as the category names for downloads) showed intent.[88] Additionally, he provided assistance to users committing infringement, including technical support.[89] Also, somewhat tautologically, the court notes that he implemented technical features that promoted infringement because those technical features facilitated filesharing.[90] Fung's business model depended on massive infringing use, and the court found he had an "ostrich-like refusal" to gain knowledge about the extent of infringement on his sites.[91]

Fung claimed entitlement to safe harbors under sections 512(a), (c), and (d).[92] The court rejected subsections (a) and (c) out of hand as inapplicable to Fung's services.[93] The court then ruled that Fung was not eligible for section 512(d) safe harbor.[94] On the actual knowledge factor, the court held that "Fung was aware that infringing material was available on the Defendant websites," that 90 percent to 95 percent of the available content was infringing, and that the content was organized by clearly infringing categories. The court also found that Fung failed to introduce facts showing a lack of a reason to know.[95] Unless the percentage of infringing content somehow bears on the court's analysis, this ruling seems to be inconsistent with the *Veoh* ruling.

83. *Id.*
84. *Id.* at *4.
85. *Id.*
86. *Fung*, at *15, *18.
87. *Id.* at *10.
88. *Id.* at *11.
89. *Id.* at *12.
90. *Id.* at *14.
91. *Id.* at *15.
92. *Id.* at *15–16, n.26
93. *Id.* at *16, n.26.
94. *Id.* at *16.
95. *Id.* at *17.

On the second and third elements of the safe harbor analysis, the court found that Fung did not act expeditiously to remove or disable the material, and that Fung's websites actually *encouraged* repeat infringers.[96]

C. RapidShare

In May 2010, the Southern District of California issued a ruling in *Perfect 10, Inc. v. Rapidshare A.G.*[97] RapidShare is a German based service that provides Internet-based "lockers" for users to store content online that can be accessed and downloaded by anyone with the "key" to the "locker."[98] RapidShare does not provide any kind of indexing services for data that is stored in its lockers, though some third-party sites do exist with that information.[99] Perfect 10 owns copyrighted nude photographs.[100] The company has been involved in a series of infringement lawsuits concerning the unauthorized republication of those photos online. Instead of a fully compliant notice-and-takedown letter, Perfect 10 gave a compact disc ("CD") of images to RapidShare and asked that those images be taken down.[101] Perfect 10 did not provide links or other specific information about where the images could be found in RapidShare's system.[102] RapidShare nonetheless did the best it could to remove the photos.[103]

Unlike LimeWire and Fung, RapidShare could not assert the DMCA safe harbors because it had not registered a DMCA agent with the Copyright Office.[104]

Perfect 10 alleged direct infringement by RapidShare, but the court disagreed.[105] The court found that RapidShare does not make the files in its lockers publicly available and does not index those files.[106] Direct infringement by some third parties, however, was uncontested.[107]

96. *Id.* at *12, *16.
97. No. 09-cv-2596 H (WMC), Docket No. 71 (S.D. Cal. May 18, 2010) (order denying plaintiff's motion for preliminary injunction).
98. *Id.* at *2–3.
99. *Id.* at *3.
100. *Id.* at *2.
101. *Id.* at *7.
102. *Id.*
103. *Id.* at *9.
104. *Id.* at *12–13.
105. *Id.* at *4–5.
106. *Id.* at *5–6.
107. *Id.* at *7.

The court also held that RapidShare was not subject to contributory infringement.[108] RapidShare argued that it did not have "actual, specific knowledge" of others' direct infringement and that Perfect 10's notice-via-CD was lacking because it did not enable RapidShare to locate and delete the infringing files.[109] The court held that, under the knowledge standard set forth in *Napster*, RapidShare did have sufficient knowledge of the infringement.[110]

However, the court ruled that Perfect 10 failed to meet its burden (on motion for preliminary injunction) to show that RapidShare materially contributes to another's infringing conduct.[111] Unlike Napster, RapidShare provides no search index or other search function, and when given limited information about infringing photos, it uses that information to take down the files it can find and also does some independent searching.[112] However, because it had a program that rewarded users for driving higher usage levels, it was possible that the development of additional facts could establish some degree of material contribution.[113]

Borrowing from *Sony* (as interpreted by *Grokster*), the court also noted that there are a number of substantial lawful uses for the RapidShare service and, in that regard, it is distinguishable from most media file-sharing concepts.[114]

Additionally, RapidShare has a notice of a Conditions of Use that prohibits copyright infringement and also has an Abuse Department that responds to takedown notices.[115] Thus, the court found no liability for "contributory infringement based on [. . .] inducement."[116]

Although the court denied the preliminary injunction, there was a degree of ambivalence in the opinion, suggesting that the case could have ultimately turned out badly for RapidShare. According to the

108. *Id.* at *9.

109. *Id.* at *7. Under the ruling in *Veoh*, this would appear to have been sufficient to satisfy the no-knowledge requirement of the DMCA safe harbor, if RapidShare were eligible for the safe harbor. *See* UMG Recordings, Inc. v. Veoh Networks, Inc., 665 F. Supp. 2d 1099 (C.D. Cal. 2009).

110. *RapidShare,* No. 09-cv-2596 H (WMC) at *8.

111. *Id.* at *9.

112. *Id.* at *8–9.

113. *Id.* at *10.

114. *Id.* at *11.

115. *Id.*

116. *Id*.

docket information available on PACER/ECF, the case appears to have settled in July 2010.[117]

D. LimeWire

Also in May 2010, the Southern District of New York issued a ruling in a case involving *Grokster*-era peer-to-peer file sharing technology.[118] LimeWire, which was launched in 2000, provided a user interface into which users enter search criteria.[119] LimeWire then scanned other users' computers to locate files that match the criteria.[120] Selected files were then copied from the provider-user computer to the acquirer-user computer.[121]

There was no factual dispute that users of LimeWire committed direct infringement.[122] It was estimated that 93 percent of files available on LimeWire are copyrighted and not authorized for distribution.[123] Moreover, an estimated 98.8 percent of requested downloads were of copyright-protected material.[124]

In the May 2010 decision, which provided rulings on cross-motions for summary judgment, there was no analysis of the DMCA safe harbors.

The court denied plaintiff's motion for summary judgment of contributory infringement.[125] The court held that LimeWire was clearly aware of users' infringement and materially contributed to the users' infringing conduct, but denied summary judgment, holding that there was a genuine issue of material fact on whether there was a substantial noninfringing use for LimeWire.[126] For example, it could be used to distribute public domain e-books, historical documents, and music distributed free online by the artists.[127]

117. S.D. Cal. Case No. 09-cv-2596 H (WMC), Docket No. 107 (Minute Entry for Telephonic Settlement Conference, dated July 28, 2010); Docket No. 109 (Order Granting Joint Motion to Dismiss With Prejudice, dated Aug. 13, 2010).

118. Arista Records, LLC v. Lime Group LLC, 715 F. Supp. 2d 481, (S.D.N.Y. 2010).

119. *Id.* at 494.

120. *Id.*

121. *Id.*

122. *Id.* at 506.

123. *Id.* at 507.

124. *Id.*

125. *Id.* at 515.

126. *Id.* at 517.

127. *Id.* at 517–18. The court noted that the *Grokster* majority decision did not resolve the substantial noninfringing use question, and the two concurring opinions went in opposite directions on whether Grokster had a substantial noninfringing use. *Id.*

However, the court granted plaintiff's motion for summary judgment on the claim of inducing infringement.[128] The court found that the mere creation of LimeWire was evidence of purposeful conduct to encourage infringement; that intent to encourage was established by, among other things, Lime Group's awareness of users' infringement; their efforts to attract, enable and assist infringing users; their dependence on infringing uses for their business model; and their failure to mitigate infringing activities.[129]

The court denied Lime Group's motion for summary judgment on the issue of vicarious liability.[130] In particular, the court concluded that a jury could find that LimeWire profits from others' infringement (via increased advertising sales), and that it failed to stop others' infringement (e.g., by filtering content, denying access to infringers, and supervising and regulating users).[131]

Finally, the court declined to extend the "substantial noninfringing use" doctrine to vicarious infringement.[132]

E. YouTube

Finally, in June 2010, the Southern District of New York issued a ruling in *Viacom International, Inc. v. YouTube, Inc.*[133] This dispute involves the unauthorized third-party posting of copyrighted Viacom content (such as clips from Comedy Central's *The Daily Show*) on YouTube.[134]

The court granted summary judgment in favor of YouTube on its section 512(c) safe harbor defense. It focused on the knowledge element, honing in especially on whether a general awareness of ongoing infringement (as opposed to actual knowledge of specific identifiable acts of infringement), was enough to defeat the application of the safe harbor.[135] The court concluded that "mere knowledge of prevalence of such activity in general is not enough" to defeat the safe harbor.[136] It further emphasized that the infringing works were a tiny fraction of the millions of works posted on

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128. *Id.* at 508.
129. *Id.*
130. *Id.* at 518.
131. *Id.*
132. *Id.* at 519.
133. 718 F. Supp. 2d 514, (S.D.N.Y. 2010).
134. *Id.* at 516.
135. *Id.* at 519.
136. *Id.* at 523.

YouTube.[137] The court held that the element of a right and ability to control users required *item-specific* knowledge, not generalized knowledge of ubiquitous infringement.[138] YouTube's notice-and-takedown procedures and its provision for banishing repeat offenders were both sufficient under the DMCA.[139]

Finally, the court ruled that *Grokster* does not apply, because the DMCA gives a safe harbor even in circumstances where the defendant would otherwise be held liable as a contributory infringer.[140]

III. Emerging Themes

When these cases are viewed together, a few consistent themes emerge. Overall, there is a sense that the larger, more established providers, who play fair with content owners tend to fare better than brasher, more rebellious providers. And maybe that is right, we are led to think, because the brasher, more rebellious providers are guiltier than the established ones. Or is there a double standard at play here? Could the brash, rebellious "bad guys" ever win the protection of the safe harbor? It is difficult to make a direct apples-to-apples comparison, because each case is decided on a somewhat different set of issues. Nonetheless, several themes do emerge. The table below summarizes some key factors from the five cases discussed above.

	DMCA Safe Harbor	Estimated Infringing Content	Knowledge	Business Model
Veoh	Yes	5–10%	Specific identified items of infringing content, no duty to investigate leads	Seeks a wide range of content, has not turned a profit
YouTube	Yes	Small Fraction	Specific knowledge required, generalized knowledge is insufficient; when Viacom sent a notice letter with 100,000 items, YouTube promptly removed them.	Infringing content could drive higher traffic and advertising revenue

137. *Id.* at 524.
138. *Id.* at 523.
139. *Id.* at 519, 527–28.
140. *Id.* at 526.

RapidShare	No—but has a substantial compliance program	Much is subject to substantial lawful uses	Specific identified items of infringing content, RapidShare did its best to remove content based on Perfect 10's inadequate notice	Fact question existed about whether reward system, as currently constituted, encourages infringement
LimeWire	No—not addressed	93%	Clearly aware of users' infringement	Profits from traffic to site driven by infringing content
Fung	No—rejected	90-95%	General awareness that infringing content was available	Expressly directed to exploiting infringing content

A comparison of the cases in this fashion suggest a couple of trends. First, the existence of some form of a copyright-compliance program (whether fully DMCA-compliant) is an important factor to avoiding liability.

Second, the percentage of infringing content on the service is important. This means that data collected and statistical analysis methods employed can be highly relevant, more relevant perhaps than the absolute volume of infringing content. For example, is the "small fraction" of infringing content on YouTube a larger or smaller number of infringing items than the 93 percent of infringing content on LimeWire? It is difficult to tell, based on the reported decisions.

Third, although the knowledge standards for secondary liability and the DMCA safe harbor appear to be substantively distinguishable, more specificity of knowledge appears to be required where the provider has a copyright compliance program and the percentage of infringing content is low.

Finally, there seems to be a general acknowledgement throughout the cases that the presence of infringing content does drive more traffic to the provider. This, in turn, can produce higher advertising revenue and other forms of revenue. This factor seems to be part of the liability finding for the brash-and-rebellious "bad guys," but is more readily brushed aside or excused for the other, less brash, defendants.

These are only some preliminary thoughts and observations based on a handful of recent decisions and are intended to spur further discussion and curiosity about these issues. Further analysis could include the following:

- a more systematic study of secondary liability cases over a longer period of time;

- a deeper analysis of the statistical methods used to estimate the percentage of infringing content; and
- an analysis of the percentage (and absolute numbers) of infringing content on a site over its life cycle from early stage start-up to mature industry leader—with one possible hypothesis being that it matters when in that life cycle a provider is sued for secondary liability.

Further analysis in these and related areas can help clarify our understanding of the differences between these cases, and in the secondary liability doctrine as a whole as it, and the underlying technologies for providing online digital content, continue to develop.

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