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SoundCloud, Copyright Infringement, and the "DMCA" Safe Harbor

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Abstract

The amorphous landscape of Internet technology and modern music sharing allows music listeners to instantly access new works from different artists at any location across the globe. Entities like YouTube have developed server space to lend to users who upload digital music and stream the content for public enjoyment. SoundCloud, a service founded in 2007 and based in Berlin, Germany [1], has expanded upon this concept by encouraging its users to create their own works of audio artistry and upload these works to share with others. The facilitation of sharing works through SoundCloud has let it become perhaps the most popular music sharing platforms today.

The most significant problem faced by SoundCloud, along with similar service providers that have followed suit, is that, along with original works that the service was initially intended for, a wealth of copyrighted material is uploaded and shared by and amongst its users. [2] Intensifying the problem, the platform's promotion of sharing the new works has allowed users, and perhaps encouraged them, to freely upload musical creations that are often derivative works of copyrighted materials (i.e. samples, remixes, and edits of copyrighted tracks). The design of the platform complicates the task of

[1] *SoundCloud Review,* APP APPEAL, *http://www.appappeal.com/app/soundcloud*

[2] *See* Jing Xu, *DMCA Safe Harbors and the Future of New Digital Music Sharing Platforms*, 11 Duke L. & Tech. Rev. 145; *see also* Ryan Tranzmission, *Copyright Wars: Tranzmission vs. Interpol vs. SoundCloud,* TRANZMISSION, *http://www.thetranzmission.com/2010/08/copyright-wars-tranzmission-vs-interpol.html* (reporting a SoundCloud request to remove a track the author believed he obtained permission to upload).)

separating songs that have been altered enough to constitute a new work, or transformational use of a copyrighted work, from those that may have been minimally altered—hiding the fact that a particular song is copyrighted. SoundCloud's challenge has become identifying the use of the platform that may give rise to copyright infringement while still allowing the free-flow of presenting and sharing non-infringing music.

To detect uses of its service that constitute infringement, SoundCloud has implemented the use of Audible Magic, a "fingerprinting technology" that can automatically identify copyrighted works as they are uploaded onto a user's page through the service. [3] However, Audible Magic is an inconsistent technology. [4] Most deliberate copies of copyrighted songs are removed consistently, as the audio recognition software accurately identifies songs that have not been altered in any way. [5] Nonetheless, problems arise when the technology attempts to analyze remixes, samples, and edits of copyrighted materials. Some of these altered songs are successfully identified and removed, while other alterations of the same song are not detected by Audible Magic's algorithms and remain available. [6] This has led to situations where

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[3] Eamonn Forde, *SoundCloud Partners with Audible Magic for Rights Identification,* MUSICWEEK (Jan. 5, 2011, 10:05 AM), *http://www.musicweek.com/story.asp?storyCode=1043741&sectioncode=1*.

[4] *See* Scott Smitelli, *Fun with YouTube 's Audio Content ID System,* COMPUTER SCIENCE HOUSE (Apr. 21, 2010), *http://www.csh.rit.edu/~parallax/* (finding that "any pitch or time alterations will also work [to override Audible Magic], provided you apply a 6% or greater change to the parameter you are adjusting").

[5] *See Technology Overview,* AUDIBLE MAGIC, *http://audiblemagic.com/technology.php* (detailing how Audible Magic identifies unless the user is solely purchasing extra server space to store and share snippets of audio files and then matches the sound clip with a database containing more than 11 million copyrighted songs).

[6] *Id.*

users whose works are flagged for infringement have found that other works with seemingly equal levels of infringement remain unflagged. The presence of these works that have slipped through the fingertips of the fingerprinting technology reside in the grey area of copyright law [7] and have been the subject of litigation brought by copyright holders against SoundCloud.

There has been a hotly contested debate in the field of copyright law as to whether SoundCloud's platform, and other similar service providers, by design, gives rise to a prima facie case for copyright infringement. This debate calls for the examination of Digital Millennium Copyright Act [8] ("DMCA") safe harbor provisions, the implications of these provisions, as well as possible fair use defenses as they apply to the innovative functionality of SoundCloud. This begs the question of whether the current growth of the platform can be sustained without having to sacrifice the original creative utility provided to its end-users.

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[7] *See* Tonya M. Evans, *Sampling, Looping, and Mashing . . . Oh My!: How Hip Hop Music Is Scratching More Than the Surface of Copyright Law,* EXPRESSO, 3 (2011) (discussing a circuit split over the fair use status of remixes), *available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=tonya_evans.*

[8] Digital Millennium Copyright Act, 17 U.S.C. §§ 1201-05.

I. SoundCloud's Innovative Platform

SoundCloud's innovative platform integrates a unique feature that creates visual representations of sound, allows playback and the optional ability to download audio files, and encourages users to provide feedback and interact with other users at specific points throughout the visual waveform (a waveform player is one that visualizes sound). [9] SoundCloud offers a free service to the public but also generates revenue through user subscriptions. Revenue is generated by the service by using a tiered subscription model with no advertisements. [10] Because of the subscription model, SoundCloud's revenue stream does not suffer as much from the use of Audible Magic as an ad-based model would. [11] With SoundCloud's subscription model, regardless of infringing material, users will still pay the initial signup fee because utility remains to be derived from legitimate uses of service. [12]

A. Features

SoundCloud's software takes an audio file and, during an upload from a user, generates a visual representation of the audio file's sound. By creating a "waveform" map, other users can identify a specific moment or section of

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9 *Your Sound, in the Player,* SOUNDCLOUD, *http://soundcloud.com/tour/*

10 Eliot Van Buskirk, *SoundCloud Threatens MySpace as Music Destination for Twitter Era,* WIRED (Jul. 6, 2009, 5:20 PM), *http://www.wired.com/epicenter/2009/07/soundcloud-threatens-myspace-as-music-destination-for-twitter-era.*

11 *Id.*

12 *Id.*

the music that is of particular interest to them. [13] This visualization gives users an alternative conceptualization of a track's production, allowing them to note where a particular section begins or ends and how sounds are amassed to produce the final piece. [14] Users can also leave personal comments, suggestions, or feedback that visually represents itself at specific points in the waveform, creating potential back-and-forth communication between users. [15]

The unique ability to display the waveform of any given uploaded track while receiving continuous feedback from other music aficionados makes SoundCloud a particularly appealing platform for new artists who are trying to build a network of fans, fellow musicians, and potential collaborators. [16] It is also a useful service to more established producers and DJs, who are constantly looking for new ways to quickly distribute material to widespread audiences. [17] SoundCloud's interactive features help to manifest a feeling of personal investment in others' artistry, which strengthens the sense of community among users in any particular genre of music. The waveforms are also easily embedded on popular blog sites [18] and directly into Facebook and

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13 *Your Sound, in the Player, supra* note 10.

14 *See, e.g.,* Jon Charnis, *EG AFTER.011* SOUNDCLOUD, *https://soundcloud.com/egpodcast/eg-after011-jon-charnis* (depicting visually where sound buildup occurs and entering breaks to signify a change in the momentum of the song).

15 *Id.*

16 *See* Van Buskirk, *supra* note 11 (noting that artists can quickly share improvements and thoughts on new music).

17 *See id.* (emphasizing SoundCloud's connection to social media services such as Facebook and Twitter).

18 *See id.* (explaining that SoundCloud creates a unique URL for each of an artist's tracks, which allows them to embed the music elsewhere).

Twitter posts. [19] SoundCloud also offers a free mobile application that notifies users of recently uploaded material, recent user interactions, and other information that users may find exciting. [20] With regard to privacy settings, users have a range of autonomy—from opting to allow a file to be downloadable, to opting to keep a file private and shared with only selected users. [21]

True to its mantra, through these interactive features, SoundCloud "puts your sound at the heart of communities, websites and even apps." [22] A user can watch conversations, connections and social experiences happen through the medium of sharing music. [23] It is this call to personal creativity, collaboration, and musical innovation along with no file-size limitations and customizable sharing options, that separates this platform from other similar services. [24] Intrinsically, and ironically, it is because of these unique features, together with the service's emphasis on "your sound," that the uploader often assumes that they own the audio files. The problematic presence of infringing

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19 David Noël, *Updated Facebook Application,* SOUNDCLOUD BLOG (Jan. 15, 2010), *http://blog.soundcloud.com/2010/01/15/facebook/*.

20 Mike Ziarko, *SoundCloud Social Music Community Lets You Visually Comment On Music,* SOCIAL TIMES (Dec. 15, 2010, 3:45 PM), *http://www.socialtimes.com/2010/12/soundcloud-social-music-community-lets-you-visually-comment-on-music/*.

21 *SoundCloud Review, supra* note 1.

22 SOUNDCLOUD, *http://soundcloud.com/* (last visited Dec. 05, 2016).

23 *Id.*

24 Van Buskirk, *supra* note 11 ("In a few short months SoundCloud has begun to give [social media platforms] a run for the hearts and minds of recording artists eager to interact more nimbly with fans than is possible on [these giant social networks].").

material remains pervasive because of the essence of this ubiquitous misnomer. [25]

B. Monetization Model

SoundCloud has more than 175 million unique monthly listeners (as of January 2016). [26] The expansion of the platform into mobile applications for iPhone and Android users has caused exponential increase in the service's user base. [27] Through this growth, SoundCloud found opportunities to identify high value and low value users. The differentiation allowed SoundCloud to monetize its increasing user base by providing a variety of accounts, incorporating both free and paid service options. [28] The free service provides the basic waveform tools, but caps the number of uploadable minutes. [29] Accounts are then available to access additional features that are available at different service tiers available at increasing prices depending on the tier. [30] Users can access more hours for uploads, more efficient distribution channels, and greater recognition for their uploads, depending on the price of the

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[25] Tranzmission, *supra* note 3 (detailing a request to remove a track thought to be uploaded with permission).

[26] *See* SOUNDCLOUD, *http://soundcloud.com/*; *see also* Alex Moazed, *Why SoundCloud Will Be Worth More Than Spotify*, TECHCRUNCH (Jan. 24, 2016), *https://techcrunch.com/2016/01/24/why-soundcloud-will-be-worth-more-than-spotify/* (comparing SoundCloud to YouTube while likening Spotify's service to Netflix)

[27] *SoundCloud Reaches Three Million User Mark,* NME (Feb. 11, 2011, 1:43 PM), http://www.nme.com/news/various-artists/54934, *supra* note 29.

[28] *See SoundCloud Premium,* SOUNDCLOUD, *http://soundcloud.com/premium/*

[29] *Id.*

[30] *Id.*

service. [31] Each account has limitations that can only be lifted by purchasing a better plan. [32] There is no third party advertising at any account level, but the appeal of the premium accounts is the unlimited uploading, adjustable privacy settings and unlimited contacts. [33]

C. Audible Magic Identification Technology

Since 2011, SoundCloud has used Audible Magic's content identification technology [34] to identify the upload of copyrighted material in a database containing millions of songs. [35] Due to SoundCloud's revenue model, which is tied to offering heightened services in return for compensation as opposed to the quantity of views per a user's page, Audible Magic's prevention of infringing material does not hurt SoundCloud's profitability as it would a site such as YouTube. [36] Users that are inclined to use SoundCloud's server space to distribute infringing material would be unlikely to pay monthly for premium service. [37] Users that consistently and knowingly uploaded infringing material would reasonably choose to use a free account. Such users have no need to pay for extra features when free accounts already allow for the private link

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31 *Id.*
32 *Help/Premium & Billing,* SOUNDCLOUD, *http://soundcloud.com/help/premium-accounts*
33 Van Buskirk, *supra* note 11.
34 Forde, *supra* note 4.
35 *Technology Overview, supra* note 6.
36 *See* Michael Rappa, *Business Models on the Web,* DIGITAL ENTERPRISE (2010), *http://digitalenterprise.org/models/models.html* (advertising models work best when the volume of viewer traffic is large and subscription fees are incurred irrespective of actual usage rate).
37 *Id.*

sharing and download options. By the same token, premium users, such as well known DJs or producers, are blocked from uploading music deemed by the identification technology to be infringing, however that unutilized upload time could still be used to upload non-infringing material. These professionals are the type of users that SoundCloud had originally intended to attract. However, in a way, the attraction of premium users may be coming to an end. [38]

Audible Magic has proven itself problematic, despite the progressive nature of this technology. Tests have shown that basic audial manipulation of a copyrighted track (i.e. remixed or samples with no intention to avoid Audible Magic's detection) will fool the algorithm. [39] Although SoundCloud encourages users to borrow and modify content, Audible Magic fails to catch many uploads that infringe on copyrights. [40] The issue for SoundCloud is that its target market is comprised of DJs, producers, and remixers, all of whom frequently borrow and sample from copyrighted material. [41] These users experience notoriety through the sharing of such remixed music on SoundCloud, leading

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[38] *See* Miles Raymer, *SoundCloud Raining on Its Own Parade,* CHICAGO READER (Mar. 3, 2011), *http://www.chicagoreader.com/chicago/sharp-darts-soundcloud-copyright/Content?oid=3351152* (noting that "DJs were the early adopters that helped [SoundCloud] reach critical mass," but they are feeling betrayed by recent practices that "appear to defer to rights holders").

[39] *See* Smitelli, *supra* note 5 (finding that the algorithm only recognizes a sound clip if it is a certain length, while changes in pitch, tempo, or background white noise may successfully cloak the clip).

[40] *See* Larisa Mann, *Walling Off Another Garden: Is Soundcloud Turning on Its Supporters?,* RIPLEY (Dec. 25, 2010), *http://djripley.blogspot.com/2010/12/walling-off-another-garden-is.html* (positing that much of the content on SoundCloud would be considered infringing material).

[41] *Id.*

to an erroneous belief that no legal repercussions exist due to uploading potentially infringing content. Therefore, a significant number of infringing files are successfully uploaded to SoundCloud's servers [42] but are not removed without the copyright holder's express search and notice action. [43]

[42] *See* Evans, *supra* note 8, at 3 (discussing the circuit split over whether remixes of copyrighted songs are still illegal).

[43] Mann, *supra* note 44 *(*Copyright holders may file a takedown notice for an upload that they believe to be infringing. The service provider is required to remove the accused upload even if the copyright holder presents no evidence that it is actually infringing. The uploader may then file a counter-notice that would force the copyright holder to provide proof.)

II. DMCA § 512(c) Safe Harbor Provision

To avoid liability, SoundCloud should comprise a strategy pursuant to the *Viacom v. YouTube* decision. [44] The prevalent presence of arguably illegal work on SoundCloud's servers may incite major record labels or other rights holders to sue. [45] With an understanding of the court's decision in *YouTube*, SoundCloud, along with other similar service providers, can better understand the implications of the DMCA § 512(c) safe harbor, while foreseeing how to best position themselves for protection. [46]

A. The *YouTube* Decision's Interpretation of DMCA Safe Harbors

1. *Relevant* § 512 *provisions*

Section 512(c)(1) of the DMCA provides that a service provider will not be liable for storing copyright-infringing material if the service provider: (a) "does not have actual knowledge that the material or activity using the material on the system is infringing"; (b) "in the absence of such knowledge, is not aware of facts or circumstances from which infringing activity is apparent"; or (c) "upon obtaining such knowledge or awareness, acts

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[44] *Viacom Int'l Inc. v. YouTube Inc.,* 940 F.Supp.2d 110 (S.D.N.Y. 2013).

[45] *Viacom Int'l Inc. v. YouTube Inc.,* 718 F.Supp.2d 514 (S.D.N.Y. 2010) (noting that copyright holder was suing YouTube over "tens of thousands of videos [that] were taken unlawfully" (quoting Brief for Viacom, at 1)).

[46] *See generally* Cassius Sims, *A Hypothetical Non-Infringing Network: An Examination of the Efficacy of Safe Harbor in Section 512(c) of the DMCA,* 2009 Duke L. & Tech. Rev. 9 (2009) (detailing the various elements of DMCA Section 512(c) and the standards by which service providers might qualify for protection).

expeditiously to remove, or disable access to the material." [47] Additionally, the service provider cannot have received "a financial benefit directly attributable to the infringing material" if the service provider "has the right and ability to control such activity." [48] Finally, § 512(c)(1)(C) requires the service provider, when notified of a claimed infringement by the copyright holder, to quickly "remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity." [49]

Section 512(c)(2) and (3) set forth the necessary steps to satisfy the notification requirement, and include the service provider's designation of an agent to receive notices, as well as which information the notice needs to provide. [50] Section 512(m) expressly provides that the § 512(c) safe harbor is not predicated on "(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent … with the provisions of subsection (i)" or "(2) a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law." [51] Instead, § 512(i) requires a qualifying service provider to implement a system that "provides for the termination in appropriate circumstances of subscribers and account holders … who are

47 Digital Millennium Copyright Act, 17 U.S.C §§ 512(c)(1)
48 *Id.*
49 *Id.*
50 *YouTube*, 718 F.Supp.2d 514, 517-18.
51 *Id.* at 518.

repeat infringers." [52] Additionally, service providers must also "accommodate[e] and … not interfere with standard technical measures." [53]

In *Youtube*, the court identified a critical question with regard to YouTube's qualification for the DMCA safe harbor. [54] This question was whether the "actual knowledge" and "facts or circumstances from which infringing activity is apparent" language in § 512(c)(1)(A)(i)-(ii) required a general awareness by YouTube of infringements, or, rather, required the higher standard of "actual or constructive knowledge of specific and identifiable infringements of individual items." [55] The court held that the high standard of actual or constructive knowledge was required. [56]

2. *Legislative History*

Concerning the DMCA, the Senate and House Reports demonstrated Congress' dual concerns of providing an effective deterrence method to clear and repeated cases of infringement while simultaneously ensuring that these methods were not overly burdensome for service providers. [57] One of the concerns that led to the creation of the safe harbor was to protect important

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52 Digital Millennium Copyright Act, 17 U.S.C. § 512(i)(1).
53 *Id.*
54 *YouTube*, 718 F.Supp.2d at 519.
55 *Id.*
56 *Id.* at 520.
57 *See id.* at 522-23 (discussing § 512(d)—which deals with information location tools—elaborating on specificity requirements as well as "red flag" cases of infringement involving "pirate" sites that lead service providers to a greater likelihood of awareness of infringement in the absence of actual knowledge. Also discussing the purpose of the safe harbor to "promote the development" of service providers like Yahoo! as long as they follow the notice and takedown requirements).

service providers from having to implement practices that would be impractical to execute on a large scale. [58] In *YouTube*, the court initially examined the text of the Senate Committee on the Judiciary Report, and stated that the overarching purpose of the DMCA was to "ensure that the efficiency of the Internet will continue to improve and that the variety and quality of the services on the Internet will continue to expand." [59] Further, the court examined the Senate Judiciary Committee Report and the House Committee on Commerce Report to clarify § 512(c)(1)(A)(i)'s "actual knowledge" language. [60] The court defined actual knowledge as "actual or constructive knowledge of specific and identifiable infringements." [61] Finally, the court examined the Reports regarding how to approach the § 512(c)(1)(A)(ii) "red flag" test, which provides direction on how to know that an "infringing activity is apparent." [62]

On the passage of the DMCA, the House and Senate Reports describe § 512(c)(1)(A)(ii) as a "red flag" test which requires "both a subjective and an objective element." [63] The test's subjective element involves a determination of the "awareness of the service provider of the facts or circumstances in

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58 *See* id. at 523 (discussing § 512(d) and its proscription that "awareness of infringement . . . should typically be imputed to a directory provider only with respect to pirate sites or in similarly obvious and conspicuous circumstances").

59 *Id.* at 519.

60 *Id.* at 519-23.

61 The court ruled that "actual knowledge" means "actual or constructive knowledge of specific and identifiable infringements."

62 *Id.*

63 *Id.* at 520.

question." [64] The objective element is then used to determine "whether those facts or circumstances constitute a "red flag"—in other words, whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances." [65]

The *YouTube* court also examined the Reports' comparison between the § 512(d) provision's "need for specificity" when dealing with information location tools like Yahoo! and the § 512(c) provisions. [66] The Reports state that under the "actual knowledge" and "not aware of facts or circumstances from which infringing activity is apparent" language, a service provider has no obligation to seek out copyright infringement. [67] However, a service provider would not qualify to benefit from the safe harbor if it "had turned a blind eye to 'red flags' of obvious infringement." [68] The court elaborated that absent such red flags or actual knowledge, a directory provider cannot be reasonably expected to know whether content is infringing from a "brief cataloguing visit." [69] This test was made to strike the right balance for online editors and cataloguers, as it is unreasonable to require them to "make discriminating judgments about potential copyright infringement" unless the case is "obviously pirate." [70]

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64 *Id.*
65 *Id.* at 520-21.
66 *Id.* at 522.
67 *Id.*
68 *See id.* (explaining an example of a clear red flag where a directory provider came across a "pirate" site that allowed downloading of copyrighted material).
69 *Id.*
70 *Id.* at 523.

Therefore, a high level of certainty of repeated infringement is required before the name of the party or site can be qualified as a "red flag".[71] In considering policy, the court reasoned that information location tools are essential to the operation of the Internet. [72] Therefore, requiring a higher standard for human judgment and discretion, when the legal question is already complicated as it is, would have a chilling effect on whether directory providers are willing to continuously catalogue potentially infringing material. [73] This conclusion suggests that the court seemed to be guided by the utilitarian concept of potential societal loss outweighing the copyright holders' actual loss.

YouTube applied a similar utilitarian reasoning to service providers as well. [74] With regard to efficiency, the court reasoned that rights holders themselves were in the best position to identify infringing material and determent whether they wanted to stop an infringing action. [75] After analyzing further commentary on other § 512 provisions, the court concluded that the intentions of the DMCA were not to force service providers like YouTube to affirmatively seek "facts indicating infringing activity" in order to qualify for safe harbor protection. [76]

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71 *Id.*
72 *Id.*
73 *Id.*
74 *Id.*
75 *See id.* at 524 (reasoning that the amount of infringing material on a service provider's servers may be insignificant and the copyright owner or licensor is in the best position to determine if they actually want to fight a case of infringement).
76 *Id.*

The House and Senate Reports also provided clarification regarding how to apply § 512(c)(1)(B), the provision that bars service providers from receiving a financial benefit directly attributable to the infringing activity. The court stated that in a determination as to whether the financial benefit criterion is satisfied, "courts should take a common-sense, fact-based approach, not a formalistic one." [77] Generally, this means that a service provider conducting a legitimate business would not be considered to receive a "financial benefit directly attributable to the infringing activity" where the infringer makes the same kind of payment as non-infringing users of the provider's service. [78] For example, "receiving a one-time set-up fee and flat periodic payments for service from a person engaging in infringing activities would not constitute receiving a 'financial benefit directly attributable to the infringing activity.'" [79] This analysis is a particularly relevant consideration when trying to understand whether SoundCloud's particular monetization model is relevant under § 512(c)(1)(B). [80]

3. *Case Law*

In *YouTube*, the court emphasized that the outcome of the case turned on how specific the § 512(c)(1)(A) "actual knowledge" requirement was, and what kind of "awareness" of infringement was expected from service

77 *Id.* at 521.
78 *Id.*
79 *Id.*
80 *See infra,* Part II.B.2.

providers. [81] The court ultimately held that "general knowledge" that infringement is "ubiquitous" does not impose a duty on the service provider to monitor or search its services for infringement. [82] The court reached this conclusion after examining previous cases that, while not binding precedent on the court, used a line of reasoning that applied to providers that were comparable in size and function to YouTube. [83]

The court drew justification for its interpretation from *Tiffany Inc. v. eBay* [84], which involved a claim of contributory liability for trademark infringement. [85] In *eBay*, the court held that Tiffany needed to show that eBay knew of "specific instances of actual infringement," and had more than a "generalized notice" that some portion of the Tiffany goods sold on its website "might be counterfeit." [86] In drawing parallels between *YouTube* and *eBay*, the court decided that, through the DMCA, Congress intended the copyright holder to bear the burden of identifying specific instances of infringement. [87] Therefore, without a showing that YouTube knew of specific infringing material

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81 Amanda Bronstad, *'Viacom v. YouTube' Appeal May Decide Future of Web,* LTN L. TECH. NEWS (Dec 14, 2010), *http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1202476144090&slreturn=1&hbxlogin=1.*

82 *Youtube*, 718 F.Supp.2d at 525.

83 *See id.* at 524 (explaining that if the identification of cases of infringement required an investigation of "facts and circumstances," then those cases did not constitute "red flags," and explaining that a "blatant" showing of infringement was necessary to prove that Amazon had actual knowledge of infringement by its users).

84 *Tiffany Inc. v. eBay*, 600 F.3d 93 (2d Cir 2010).

85 *Youtube*, 718 F.Supp.2d at 525.

86 *Id.* (quoting *Tiffany*, 600 F.3d 93 at 106-07).

87 *See id.* (explaining that although *Tiffany* did not involve the DMCA, the DMCA applies the same principle: without a "red flag" or notice from the owner of specific instances of infringement, the service provider is not obligated to identify the infringement).

that was not quickly removed, Viacom could not win its case by invoking § 512(c)(1)(A). [88]

With respect to the § 512(c)(1)(B) "financial benefit" requirement, Viacom argued that YouTube received ad revenue which was directly attributable to the infringing content at issue. [89] The court examined § 512(c)(1)(B)'s "right and ability to control" language and reasoned that knowledge proceeds control. [90] The court reasoned that 512(c)(1)(B) requires "the provider must know of the particular case before he can control it." [91] Because it is the burden of the copyright holder to notify YouTube of specific cases of infringement, YouTube virtually never "controls" infringing material without having first received notice from the owner. [92] Having received notice and promptly removing the infringing material, the court found that YouTube had by all accounts acted in good faith and in compliance with the DMCA guidelines for quick removal, and could therefore not be held liable for infringement. [93]

In August 2011, the appeal was argued before the United States Court of Appeals for the Second Circuit, and a decision was issued on April 5, 2012.

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88 *See id.* ("[I]f a service provider knows . . . of specific instances of infringement, the provider must promptly remove the infringing material. If not, the burden is on the owner to identify the infringement. General knowledge that infringement is 'ubiquitous' does not impose a duty on the service provider to monitor or search its service for infringements.").

89 *Id.* at 527.

90 *Id.*

91 *Id.*

92 *See id.* ("[T]he provider must know of the particular case [of infringement] before he can control it.").

93 *See id.* at 524 (explaining that after receiving notice of over 100,000 infringing videos from Viacom, YouTube "had removed virtually all of them" by the next business day).

[94] The court of appeals determined that the district court correctly held that § 512(c)(1)(A) requires knowledge or awareness of facts or circumstances that indicate specific and identifiable instances of infringement. [95] However, the district court's order granting summary judgment to YouTube was vacated because the court found that a reasonable jury could conclude that YouTube had knowledge or awareness under § 512(c)(1)(A) at least with respect to a handful of specific clips. [96] The court also held that the willful blindness doctrine may apply, in appropriate circumstances, to demonstrate knowledge or awareness of specific instances of infringement. [97]

Further, the appellate court found that the district court erred by requiring "item-specific" knowledge of infringing activity under § 512(c)(1)(B), and the judgment was reversed insofar as it rested on that erroneous construction of the statute. [98] The appellate court affirmed the district court's holding that three of the challenged YouTube software functions, replication, playback, and the related videos feature, occur "by reason of the storage at the direction of a user" within the meaning of § 512(c)(1); however it remanded the cause for further fact-finding regarding

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94 *Viacom Int'l Inc. v. YouTube Inc.*, 676 F.3d 19 (2d Cir. 2012)

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.* at 24

a fourth software function, involving the syndication of YouTube videos to third parties. [99]

The court of appeals set forth the following issues to be examined on remand: (1) Whether YouTube had knowledge or awareness of any specific infringements; (2) Whether YouTube willfully blinded itself to specific infringements; (3) Whether YouTube had the "right and ability to control" infringing activity within the meaning of § 512(c)(1)(B); (4) Whether any clips-in-suit were syndicated to a third party and, if so, whether such syndication occurred "by reason of the storage at the direction of the user" within the meaning of § 512(c)(1), so that YouTube may claim the protection of the § 512(c) safe harbor. [100]

On April 18, 2013, the district court issued another order granting summary judgment in favor of YouTube. [101] Following the remand from the Second Circuit court of appeals, the district judge ruled on all four issues in his decision. [102] The court ruled in favor of YouTube on all four issues finding that YouTube had no actual knowledge of any specific instance of infringement of Viacom's works, and therefore could not have "willfully blinded itself" to the infringement. [103] The court also found that YouTube did not have the "right and ability to control" infringing activity because "there [was] no evidence that

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99 *Id.*

100 *Id.*

101 *Viacom Int'l Inc. v. YouTube Inc.*, 940 F.Supp.2d 110

102 *Id.*

103 *Id.*

YouTube induced its users to submit infringing videos, provided users with detailed instruction about what content to upload or edited their content, prescreened submissions for quality, steered users to infringing videos, or otherwise interacted with infringing users to a point where it might be said to have participated in their activity." [104] This ruling came despite statements made by YouTube employees that "[we should grow] as aggressively as we can through whatever tactics, however evil … [the site is] out of control with copyrighted material … [if we remove] the obviously copyright infringing stuff … site traffic [would] drop to maybe 205 … steal it!" [105] Notably, YouTube successfully argued that these quotations were taken out of context.

Subsequent to the district court's holding, an appeal had begun, but prior to the parties' second appearance before the Second Circuit Court of Appeals, a settlement was announced, and it was reported that no money was exchanged.[106]

B. Application of § 512(c) to SoundCloud

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104 Docket Alarm, Inc. (April 18, 2013), ("Granting Defendant YouTube's Renewed Motion for Summary Judgment; Entering Judgment that Defendants are Protected by the Safe-Harbor Provisions of the Digital Millennium Copyright Act, 17 U.S.C. § 512(c) from all of Plaintiffs Copyright Infringement Claims"), *https://www.docketalarm.com/cases/New_York_Southern_District_Court/1--07-cv-02103/Viacom_International_Inc._et_al_v._Youtube_Inc._et_al/452/*

105 Docket Alarm, Inc. (Black Entertainment Television, LLC, Comedy Partners, Country Music Television, Inc., Paramount Pictures Corporation, Viacom International, Inc. (March 29, 2013), "Memorandum of Law in Opposition to Motion for Summary Judgment"), https://www.docketalarm.com/cases/New_York_Southern_District_Court/1--07-cv-02103/Viacom_International_Inc._et_al_v._Youtube_Inc._et_al/446/

106 Jonathan Stempel, "*Google, Viacom settle landmark YouTube lawsuit*", (March 18, 2014), REUTERS, *http://www.reuters.com/article/us-google-viacom-lawsuit-idUSBREA2H11220140318*

Using the *YouTube* court's guidelines for applying § 512(c) to service providers, SoundCloud and other similar platforms should fall under the DMCA safe harbor. In turn, the DMCA safe harbor limits their potential liability for infringing material uploaded to their servers. As a company, SoundCloud should consider relevant arguments that were made against YouTube to appropriately protect itself. [107]

1. § 512(c)(1)(A)

The *YouTube* court's interpretation of "actual knowledge" requires SoundCloud to have knowledge of "specific and identifiable infringements of particular items" beyond the "mere knowledge of prevalence of such activity in general." [108] Here, SoundCloud does not directly monitor uploads. Rather, it utilizes the Audible Magic technology to preemptively stop infringement. In a potential suit, an argument on behalf of rights holders that SoundCloud has "actual knowledge" is likely to be unsuccessful. Assuming *arguendo*, if the title of an uploaded song somehow indicated that the song could potentially infringe a copyright, [109] it would not constitute actual knowledge under the court's ruling. For example, an artist of a remix might secure a license from

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[107] *Cf.* Mike Masnick, *YouTube 's Reply In Viacom Case Demolishes Each of Viacom's Key Arguments,* TECHDIRT (Apr. 1, 2011, 7:48 AM), *http://www.techdirt.com/articles/20110401/02080513719/youtubes-reply-viacom-case-demolishes-each-viacoms-key-arguments.shtml* (describing YouTube's response to Viacom's appeal).

[108] *Youtube*, 718 F.Supp.2d at 523.

[109] Such potential infringement might, for instance, be identified as a remix of a top pop song appearing on SoundCloud's "Hot" list. *See, e.g., Explore Tracks,* SOUNDCLOUD, *http://soundcloud.com/tracks* (last visited Dec. 4, 2016).

the original musician but a SoundCloud employee would not have knowledge of such license without further inquiry.

To satisfy the actual knowledge standard, a plaintiff would have to show that SoundCloud knew the song is infringing. If the song passes the Audible Magic filter, showing actual knowledge requires SoundCloud to proactively contact the presumed rights holder. Arguably, such a requirement extends to the type of "investigative duties" that the Ninth Circuit in *Perfect 10 v. Google* [110] attempted to discourage. [111] Therefore, the actual knowledge requirement would be difficult to prove.

Section 512(c)(1)(A)(ii) sets forth a more challenging hurdle for SoundCloud to overcome. This subsection sets forth the inquiry of whether SoundCloud, "is not aware of facts or circumstances from which infringing activity is apparent," and the "red flag" test used to verify it. [112] The controlling question will be whether any red flags objectively exist on SoundCloud's servers. In other words, "whether infringing activities would have been apparent to a reasonable person" in the "same or similar circumstances" as one of SoundCloud's employees. [113] This analysis involves both an objective and subjective component. Even if infringing material can objectively be identified as a red flag, the subjective element still exists, requiring a determination of how aware SoundCloud is of these red flags.

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110 *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007).
111 *See Youtube*, 718 F.Supp.2d at 524 (quoting Perfect 10, 488 F.3d at 1114).
112 Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(1)(A)(ii).
113 *Youtube*, 718 F.Supp.2d at 520-21.

Awareness is easier to prove if the infringing material is highly visible or if the artists themselves are highly visible—for example, the content available on the SoundCloud "Explore Tracks" page. [114] If an obviously infringing track bypassed the Audible Magic filter, and became popular enough to reach such a heightened level of exposure, then SoundCloud would be required to remove that content under § 512(c)(a)(A)(iii).

The DMCA's legislative history indicates that it is "not possible to identify a uniform time limit for expeditious action," due to "factual circumstances" and "technical parameters" that vary on a case by case basis. [115] When SoundCloud receives specific knowledge of infringing material, it is usually through a copyright holder's notice, at which point SoundCloud acts quickly to send out takedown notices immediately, in accordance with § 512(c)(A)(iii). [116] Considering that the statute is flexible enough to apply case-specific determinations when deciding the appropriate time limit, the promptness of SoundCloud's response is likely to satisfy the "expeditious action" requirement expounded in *YouTube*. Echoing YouTube's procedural safeguards against infringement should allow SoundCloud to defeat a § 512(c)(1)(A)(iii) challenge.

2. § 512(c)(1)(B)

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114 *See Explore Tracks, supra* note 98 (listing the "Hot" and "Latest" tracks).
115 *Youtube*, 718 F.Supp.2d at 521.
116 *See* Mann, *supra* note 44 (discussing how producers often complain about having remixes taken down due to copyright complaints).

SoundCloud's business model can be used to eliminate the financial benefit that the company receives from the presence of infringing materials on its servers. The way that the DMCA's legislative history treats service providers that require a "one-time set-up fee and flat periodic payments" favorably supports the conclusion that SoundCloud meets the § 512(c)(1)(B) requirement. [117] SoundCloud benefits from the application of the *YouTube* court's ruling that "control" is not possible without specific knowledge and that the DMCA does not place the burden on the provider to proactively seek specific knowledge of infringing uploads.

Contrarily, a copyright holder may argue that, by allowing its users to upload and download songs in greater quantities according to the increase in payment by a user, SoundCloud has created a distinguishable feature that incentivizes paying for premium accounts, therefore violating § 512(c)(1)(B). However, this argument is necessarily premised on the proposition that SoundCloud's limit on uploading and downloading for free accounts is a purposeful institution. SoundCloud would have to be both aware of infringing material uploaded to its servers, and want users to purchase higher level accounts in order to upload with fewer restrictions. SoundCloud should not be too concerned with § 512(c)(1)(B) as this is a difficult argument to support with probative evidence.

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[117] *See Youtube*, 718 F.Supp.2d at 521.

3. §512(c)(1)(C)

Like YouTube, SoundCloud needs to proactively identify and eliminate blatant and repeated infringement, which is already satisfied through the implementation of Audible Magic. SoundCloud can address more egregious cases of potential infringement that bypass the technology by following § 512(c)(1)(C)'s provisions for timely notice and takedown. [118] An examination of SoundCloud's terms of use demonstrates strict adherence to the DMCA's guidelines. The "reasonably implemented" requirement set forth under § 512(i)(1)(A) should be satisfied, as SoundCloud's notice and takedown procedures have been implement with the interests of rights holders as a paramount concern. [119]

Conclusion

The potentially infringing material that exists on SoundCloud's servers remains the primary concern for the company. Without the assistance of copyright holders, the legality of potentially infringing material is difficult for SoundCloud, and other similar service providers, to unilaterally determine. According to the holding in *YouTube*, SoundCloud should be assured that their policies fully protect them against liability under the DMCA § 512(c) safe harbor. In the interim, the implementation of Audible Magic should be an

118 *Id.* at 522.
119 Raymer, *supra* note 42.

effective precautionary mechanism. [120] In the long term, the problem that SoundCloud faces is the reconciliation of their preventative measures with the original creative purpose of their innovative platform. [121]

[120] Mike Masnick, *Permission Culture And The Automated Diminishment Of Fair Use,* TECHDIRT (Dec. 27, 2010, 2:32 PM), ***http://www.techdirt.com/articles/20101227/09520712421/permission-culture-automated-diminishment-fair-use.shtml.***

[121] *See* Phil Morse, *Why You Shouldn't Post Your Mixes On SoundCloud,* DIGITAL DJ TIPS (Mar. 11, 2011), ***http://www.digitaldjtips.com/2011/03/why-you-shouldnt-post-your-mixes-on-soundcloud/*** ("[M]ost of the material on SoundCloud of interest to DJs comprises DJ mixes or reworks, remakes and remixes that can't be found through official channels.").