
COPYRIGHT LAW — WILLFUL BLINDNESS — SECOND CIRCUIT
HOLDS THAT WILLFUL BLINDNESS IS KNOWLEDGE IN DIGITAL
MILLENNIUM COPYRIGHT ACT SAFE HARBOR PROVISION. —
Viacom International, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012).

“Willful blindness”¹ has long served as a substitute for the mens rea of knowledge in criminal law,² and federal courts have also accepted willful blindness as knowledge in copyright,³ trademark,⁴ and patent⁵ cases. An open question, however, was whether willful blindness doctrine applied to the “safe harbor” provisions of the 1998 Digital Millennium Copyright Act⁶ (DMCA). One such safe harbor, 17 U.S.C. § 512(c), absolves “service providers”⁷ (SPs) of copyright liability for storing user content if they satisfy certain conditions.⁸ Recently, in *Viacom International, Inc. v. YouTube, Inc.*,⁹ the Second Circuit addressed the scope of this statutory safe harbor. The panel held that § 512(c)(1)(A) conditions safe harbor protection on an SP’s lack of knowledge or awareness of specific acts of infringement,¹⁰ that willful blindness is sometimes equivalent to such knowledge,¹¹ and that § 512(c)(1)(B) places an SP outside the safe harbor if the SP has “substantial influence” over user activities from which it benefits.¹² The panel could have better tailored willful blindness doctrine to the DMCA context by adding a motive prong, excluding from the safe harbor only those defendants who are motivated to avoid knowledge by a desire to avoid liability. Doing so would have given clearer guidance to lower courts and better realized Congress’s intended distinction between legitimate enterprises and internet pirates.

Federal law grants copyright holders several exclusive rights over their works.¹³ Direct infringement occurs when others exercise these rights without permission, and secondary infringement occurs when a

¹ This concept is also called, inter alia, “conscious avoidance” and “deliberate ignorance.” Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1352 n.1 (1992).

² See, e.g., *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068–69 (2011). See generally Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 196–210 (1990) (describing the doctrine’s origins in 1860s England, its ensuing adoption by U.S. courts, and renewed interest in it starting in the 1960s).

³ See *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003).

⁴ See, e.g., *Louis Vuitton S.A. v. Lee*, 875 F.2d 584, 590 (7th Cir. 1989).

⁵ See *Global-Tech*, 131 S. Ct. at 2069.

⁶ Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 5, 17, 28, and 35 U.S.C.).

⁷ For the relevant definition of “service provider,” see 17 U.S.C. § 512(k)(1)(B) (2006).

⁸ See *id.* § 512(c)(1).

⁹ 676 F.3d 19 (2d Cir. 2012).

¹⁰ See *id.* at 32.

¹¹ See *id.* at 34–35.

¹² *Id.* at 38.

¹³ See 17 U.S.C. § 106.

third party encourages or profits from direct infringement.¹⁴ The § 512(c) safe harbor provision absolves SPs of direct or secondary liability for infringement that occurs “by reason of the storage at the direction of a user of material” on its systems.¹⁵ This immunity is subject to several conditions. First, under § 512(c)(1)(A), if an SP has “actual knowledge” of infringing material or is “aware of facts or circumstances from which infringing activity is apparent,” it must “act[] expeditiously to remove . . . the material.”¹⁶ (The “aware of” prong is the so-called “red flag” provision.¹⁷) Second, under § 512(c)(1)(B), if the SP has “the right and ability to control” the infringing activity, the SP must not “receive a financial benefit directly attributable” to the activity.¹⁸ However, § 512(m)(1) clarifies that safe harbor protection does not depend on an SP’s “monitoring its service or affirmatively seeking facts indicating infringing activity.”¹⁹

YouTube, founded in 2005, operates a website where users upload and watch videos.²⁰ In 2007, media conglomerate Viacom filed suit in the Southern District of New York, claiming direct and secondary infringement of its works by YouTube.²¹ Viacom alleged that YouTube knew that over sixty percent of user videos contained “‘premium’ copyrighted content,” of which only ten percent were uploaded with permission.²² Several internal YouTube emails discussed specific clips: one email urged the rejection of “copyrighted . . . content,” such as CNN space shuttle launch videos, but replies to that email suggested waiting until receipt of a take-down request, and the clips allegedly stayed online.²³ Both sides moved for partial summary judgment on the issue of whether YouTube qualified for the § 512(c) safe harbor.²⁴

The district court granted summary judgment for YouTube.²⁵ Judge Stanton ruled first that § 512(c)(1)(A) requires knowledge or awareness of specific acts of infringement.²⁶ On the basis of legislative history, he rejected Viacom’s argument that general awareness of infringement triggers the “red flag” provision, § 512(c)(1)(A)(ii).²⁷ The opinion further suggested that allowing general awareness to trigger

¹⁴ See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

¹⁵ 17 U.S.C. § 512(c)(1).

¹⁶ *Id.* § 512(c)(1)(A).

¹⁷ *Viacom*, 676 F.3d at 31.

¹⁸ See 17 U.S.C. § 512(c)(1)(B).

¹⁹ *Id.* § 512(m)(1).

²⁰ See *Viacom*, 676 F.3d at 28. In 2006, codefendant Google acquired YouTube. *Id.*

²¹ See *id.*

²² *Id.* at 33.

²³ *Id.* at 34.

²⁴ See *id.* at 29.

²⁵ *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 529 (S.D.N.Y. 2010).

²⁶ See *id.* at 523.

²⁷ See *id.* at 522–23.

the red flag provision would effectively impose a duty on SPs to monitor user activity, violating § 512(m)(1).²⁸ Second, the court ruled that § 512(c)(1)(B) presupposes knowledge of specific acts of infringement, reasoning that an SP cannot control something about which it does not know.²⁹ The opinion did not address the issue of willful blindness.³⁰

The Second Circuit affirmed in part, reversed in part, vacated the order granting summary judgment, and remanded.³¹ Writing for the panel, Judge Cabranes³² affirmed that § 512(c)(1)(A) requires knowledge or awareness of specific acts of infringement.³³ SPs may stay within the safe harbor by taking down infringing content; this provision, Judge Cabranes reasoned, assumes knowledge of specific copyright violations.³⁴ Viacom argued that this reading made the red flag provision superfluous, but the court disagreed, distinguishing “actual knowledge,” which refers to *subjective* awareness of specific infringing acts, from the red flag provision, an *objective* standard asking whether the SP was aware of facts from which a reasonable person would have inferred the existence of specific infringing acts.³⁵ The court held that, while evidence that YouTube knew of the prevalence of infringement was insufficient, the emails discussing specific clips might have created a genuine issue of material fact, and it remanded for consideration of whether the emails discussed any of the “clips-in-suit.”³⁶

The panel then held that willful blindness³⁷ may constitute actual knowledge under § 512(c)(1)(A).³⁸ Noting that willful blindness is a recognized common law principle, the court asked whether the DMCA had abrogated it,³⁹ explaining that a statute abrogates a common law rule only if it “speak[s] directly” to the rule.⁴⁰ Judge Cabranes rejected

²⁸ See *id.* at 524. Judge Stanton also relied on *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007), which held that SPs have no duty to investigate even activity that is highly indicative of infringement, and *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010), which held that knowledge of specific infringements is a necessary element of secondary trademark infringement. See *Viacom*, 718 F. Supp. 2d at 524–25.

²⁹ See *Viacom*, 718 F. Supp. 2d at 527.

³⁰ See *Viacom*, 676 F.3d at 35.

³¹ See *id.* at 41–42.

³² Judge Cabranes was joined by Judge Livingston on the two-judge panel. Judge Miner, originally a member of the panel, passed away before the case was resolved. *Id.* at 25 & n.*.

³³ *Id.* at 30.

³⁴ See *id.* at 30–31.

³⁵ See *id.* at 31.

³⁶ *Id.* at 33–34.

³⁷ The court defined a willfully blind person as someone who “was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.” *Id.* at 35 (quoting *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003)) (internal quotation marks omitted).

³⁸ See *id.* The court noted that this issue was one of first impression. *Id.* at 34.

³⁹ *Id.* at 34–35.

⁴⁰ *Id.* at 35 (alteration in original) (quoting *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009)) (internal quotation mark omitted).

YouTube's argument that the no-monitoring provision, § 512(m)(1), abrogated willful blindness.⁴¹ Saying simply that willful blindness could not be defined as a duty to monitor, the court held that § 512(m)(1) does not speak directly to the doctrine, but merely requires that judges avoid imposing a monitoring requirement when applying willful blindness doctrine.⁴² The panel remanded for factfinding.⁴³

The panel reversed on the meaning of "right and ability to control" in § 512(c)(1)(B), rejecting Judge Stanton's conclusion that it implies knowledge of specific acts.⁴⁴ Judge Cabranes reasoned that this interpretation, favored by YouTube, would make the provision superfluous given the court's reading of § 512(c)(1)(A).⁴⁵ But he also rejected Viacom's suggestion that any ability to block content suffices, regardless of knowledge: the statute's take-down requirement assumes that *all* SPs have this ability.⁴⁶ Instead, the panel held, § 512(c)(1)(B) "requires something more"⁴⁷ than ability to block content but less than knowledge of specific acts, such as "exerting substantial influence on the activities of users."⁴⁸ The court remanded for a determination of whether there was sufficient evidence of this "something more."⁴⁹

Finally, the panel held that most operations YouTube performed on files were done "by reason of the storage at the direction of a user of material"⁵⁰ and were thus eligible for the safe harbor.⁵¹ Automated processes like converting video formats and linking to related content fall within this definition.⁵² The panel was less sure about YouTube's converting, on its own initiative, certain clips into a new format and licensing them to third parties.⁵³ The panel remanded for consideration of whether YouTube had licensed any of the clips-in-suit.⁵⁴

⁴¹ *See id.*

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *Id.* at 36.

⁴⁵ *See id.* Since § 512(c)(1)(A) requires SPs to remove offending material of which they have specific knowledge, a specific knowledge requirement in § 512(c)(1)(B) would leave that provision with no additional effect. *See id.*

⁴⁶ *See id.* at 37.

⁴⁷ *Id.* at 38 (quoting *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 645 (S.D.N.Y. 2011)) (internal quotation mark omitted).

⁴⁸ *Id.* The court thus split from the Ninth Circuit, which had agreed with Judge Stanton. *See UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1041–42 (9th Cir. 2011).

⁴⁹ *See Viacom*, 676 F.3d at 38.

⁵⁰ 17 U.S.C. § 512(c)(1) (2006).

⁵¹ *Viacom*, 676 F.3d at 38–39.

⁵² *See id.* at 39–40.

⁵³ *See id.* at 40. Mobile phone carrier Verizon Wireless was one such third party. *Id.*

⁵⁴ *See id.* The panel also affirmed the lower court's rulings that YouTube's repeat-infringer policy was not statutorily deficient, *see id.* at 40–41, and that the safe harbor provision, if applicable, would shield YouTube from any liability (either direct or secondary), *see id.* at 41.

While the Second Circuit's willful blindness holding was reasonable, the panel could have taken additional steps to clarify and shape the doctrine as applied to the § 512(c) safe harbor. Willful blindness is well accepted by the federal courts, but the two-part definition adopted by the panel is inadequate in the DMCA context: it fails to distinguish between SPs that do not investigate suspected user piracy for legitimate reasons, such as cost or the need to respect user privacy, and those simply seeking plausible deniability. The court could have made its holding clearer and more useful to lower courts by adding a motive prong to the two-part test, requiring that defendants be motivated by a desire to avoid liability in order to be considered willfully blind.

The Second Circuit's conclusion that willful blindness should apply to the safe harbor provision was reasonable given that federal courts have long accepted willful blindness as knowledge when construing federal statutes.⁵⁵ Federal courts, including the Second Circuit, generally adhere to a two-part test: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact."⁵⁶ This doctrine is based on the theory that such defendants are just as culpable as those who actually know the fact.⁵⁷ It typically applies to defendants who seek to exploit the law's scienter requirements either by failing to confirm suspicions that their own conduct is unlawful⁵⁸ or by planning illicit activity in order to avoid individual knowledge.⁵⁹ On its own, however, this definition does not require courts to ask why defendants chose to avoid learning of the illegal activity.

That question matters in the DMCA context, where it makes sense to distinguish between pirate sites and legitimate businesses. Legislative history suggests as much. The DMCA sought to balance combating piracy with encouraging internet growth,⁶⁰ a balance reflected in its safe harbors. Congress seems to have intended to deny safe harbor

⁵⁵ See, e.g., *United States v. Heredia*, 483 F.3d 913, 918–19 (9th Cir. 2007) (en banc) (collecting willful blindness cases dating back to the 1970s); *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003).

⁵⁶ *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 (2011); see also *Viacom*, 676 F.3d at 35 (reciting a similar two-part definition).

⁵⁷ See *Global-Tech*, 131 S. Ct. at 2069.

⁵⁸ Examples include low-level drug traffickers who carry obviously suspicious packages without checking their contents, see, e.g., *Heredia*, 483 F.3d at 917, and inventors who copy a competitor's product but avoid learning whether it is patented, see *Global-Tech*, 131 S. Ct. at 2071–72.

⁵⁹ For example, some drug dealers leave the details of transactions to their underlings. See, e.g., *United States v. Diaz*, 864 F.2d 544, 551 (7th Cir. 1988). Similarly, one file-sharing service has used encryption to claim plausible deniability of user infringement. See *Aimster*, 334 F.3d at 650.

⁶⁰ See S. REP. NO. 105-190, at 8 (1998).

protection to SPs that overlook plainly infringing user content⁶¹ and to online directories of obvious pirate sites.⁶² In the case of directories, Congress did not think that legitimate businesses should have to make “discriminating judgments” about what is infringing⁶³ and likely thought the same of SPs hosting user content, subjecting both to identical red flag provisions.⁶⁴ Congress further included the no-monitoring provision “to protect the privacy of Internet users.”⁶⁵ Such evidence suggests that Congress differentiated legitimate SPs, motivated by interests like maintaining a viable business model and protecting user privacy, from rogue SPs that support outright piracy. Distinguishing these motives avoids trammeling the unpredictable development of the internet.⁶⁶

In light of this distinction, the Second Circuit’s two-part definition of willful blindness risks being both over- and underinclusive. The panel held that § 512(m)(1)’s no-monitoring rule limits the application of willful blindness, but did not say exactly how it does so.⁶⁷ Lower courts could plausibly apply willful blindness only to situations in which no additional “facts indicating infringing activity”⁶⁸ are necessary — that is, where infringement is so obvious that it would be apparent to a reasonable person. If lower courts did so, the doctrine would be largely duplicative of the red flag provision, which adopts just such a reasonable person standard.⁶⁹ Such a limited interpretation would deprive courts of an effective tool against rogue SPs that strongly suspect they harbor pirates but do not investigate in order to manufacture plausible deniability.⁷⁰ By contrast, courts might read

⁶¹ For example, one congressman said that SPs refusing to look into a “bulletin board called ‘PIRATES-R-US,’ or ‘POP MUSIC FOR FREE,’ . . . should not obtain the benefit of [the safe harbor] exemption.” 143 CONG. REC. 15,035 (1997) (statement of Rep. Howard Coble).

⁶² See H.R. REP. NO. 105-551, pt. 2, at 58 (1998).

⁶³ See *id.*

⁶⁴ The provisions, 17 U.S.C. § 512(d)(1)(B) (directories) and 17 U.S.C. § 512(c)(1)(A)(ii) (user content), are identical. If anything, Congress had reason to hold SPs to a less forgiving standard for directories (which they create themselves, see H.R. REP. NO. 105-551, pt. 2, at 58) than for user content (over which they have less direct supervision and knowledge).

⁶⁵ S. REP. NO. 105-190, at 55. The title of § 512(m), “Protection of Privacy,” also reflects this concern. 17 U.S.C. § 512(m) (2006).

⁶⁶ Cf. H.R. REP. NO. 105-551, pt. 2, at 21 (comparing the “digital revolution” to the “agricultural and industrial revolutions” and hoping to foster “electronic commerce”).

⁶⁷ The court noted that § 512(m)(1) forbids imposing a duty to investigate based on “general awareness” and that willful blindness applies to “specific instances of infringement,” see *Viacom*, 676 F.3d at 35, but these remarks did little more than restate its § 512(c)(1)(A) holding.

⁶⁸ 17 U.S.C. § 512(m)(1).

⁶⁹ See *Viacom*, 676 F.3d at 31; Rick Sanders, *Willful Blindness, Substantial Influence and Uncertainty in the Law of DMCA Safe Harbors*, AARON SANDERS PLLC (Apr. 7, 2012), <http://www.Aaronsanderslaw.com/blog/willful-blindness-substantial-influence-and-uncertainty-in-the-law-of-dmca-safe-harbors>.

⁷⁰ For example, the defendant in *In re Aimster Copyright Litigation*, 334 F.3d 643, 650 (7th Cir. 2003), argued that his service’s encryption of user content prevented him from discovering

§ 512(m)(1)'s "affirmatively seeking" language to absolve SPs of a duty to monitor only when they have almost no reason to suspect infringement. If unmodified, willful blindness would extend liability to SPs that are aware of a high probability that specific content is infringing but fail to take a closer look (or cannot do so because they encrypt user files). This extension would ensnare not only SPs who fail to act out of indifference to (or enthusiasm for) piracy, but also those who cannot investigate every case of suspected infringement without taking on unsustainable costs, or who do not want to intrude on user privacy based only on a probability of infringement.⁷¹ Willful blindness doctrine's assumption that all such parties are as culpable as they would be if they had knowledge does not hold here, as extending liability to them would frustrate the need to foster legitimate online commerce.

The Second Circuit could have avoided these problems of over- and underinclusion by adding a motive element to the two-part test. This third prong would require that defendants be motivated by the desire to avoid liability.⁷² The motive prong has had advocates among jurists and commentators,⁷³ and three circuits have incorporated it into their understanding of willful blindness.⁷⁴ Examining SPs' motives would distinguish between sites with legitimate reasons for failing to take a closer look and sites that skirt the law. This result would not only better approximate congressional intent, but would also provide more guidance to lower courts.⁷⁵ The facts of *Viacom* are a perfect example. Had the Second Circuit adopted the motive test, Judge Stanton's task on remand would have been easier. Instead of having to trace the exact limits of § 512(m)(1), he could have focused his initial inquiry on whether internal communications suggested that YouTube failed to look into possible piracy because it wanted to avoid liability or because resource constraints drew its attention elsewhere.

infringement, but the Seventh Circuit held that encryption was his way of consciously avoiding guilty knowledge.

⁷¹ Cf. *United States v. Heredia*, 483 F.3d 913, 928 (9th Cir. 2007) (en banc) (Kleinfeld, J., concurring in the result) (noting that FedEx could face criminal liability under the two-part test for drug shipments that it did not investigate "to save time, or money, or offense to customers").

⁷² See Recent Case, 121 HARV. L. REV. 1245, 1248 (2008).

⁷³ See, e.g., *Heredia*, 483 F.3d at 928–29 (Kleinfeld, J., concurring in the result); *United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1325–26 (9th Cir. 1977) (Kennedy, J., concurring in part and dissenting in part); Charlow, *supra* note 1, at 1429; Recent Case, *supra* note 72, at 1248–50. But see *Heredia*, 483 F.3d at 920 (declining to add the motive prong).

⁷⁴ See *United States v. Puche*, 350 F.3d 1137, 1149 (11th Cir. 2003); *United States v. Willis*, 277 F.3d 1026, 1032 (8th Cir. 2002); *United States v. Delreal-Ordonez*, 213 F.3d 1263, 1268–69 (10th Cir. 2000).

⁷⁵ Cf. Eric Goldman, *Second Circuit Ruling in Viacom v. YouTube Is a Bummer for Google and the UGC Community*, TECH. & MKTG. L. BLOG (Apr. 5, 2012, 1:33 PM), http://blog.ericgoldman.org/archives/2012/04/second_circuit_3.htm (complaining that the Second Circuit's opinion will produce "confusion about what might possibly constitute" willful blindness).

As a common law doctrine, willful blindness has long lent itself to such judicial tailoring. “Connivance,” the doctrine’s nineteenth-century ancestor, applied to defendants who consciously avoided guilty knowledge to encourage another’s illegal act; this approach then spread to other contexts.⁷⁶ In the 1960s and 1970s, federal courts borrowed from the Model Penal Code in shaping willful blindness doctrine.⁷⁷ The Second Circuit’s abrogation analysis presented an opportunity to shape willful blindness further by importing congressional intent into its calculus⁷⁸; instead of limiting itself to the text of § 512(m)(1), the court might have considered the purpose of § 512(m), and the DMCA generally, in tailoring the doctrine to the safe harbor.

There are two primary objections to this approach. First, the subjective nature of the motive inquiry potentially gives rise to problems of proof; however, courts routinely inquire into individuals’ intentions.⁷⁹ Second, judicial minimalism⁸⁰ arguably favors limiting the issue to *whether* (as opposed to *how*) willful blindness applies to the safe harbor. But judicial minimalism is less compelling when the costs of uncertainty created by a narrow decision are high and for issues that do not receive sustained legislative attention.⁸¹ In the case of the DMCA safe harbors, greater clarity is justified: the court left open just how § 512(m)(1) affects willful blindness, creating uncertainty for lower courts and for SPs attempting to gauge their potential liability.⁸²

The panel could have provided such guidance by supplementing its current willful blindness test with a motive element. If the issue returns to the Second Circuit, the court should consider adopting such a provision. Even though such a measure might not influence the future relationship between the litigants in this case,⁸³ it would encourage innovation by legitimate online businesses while discouraging pirates.

⁷⁶ See Charlow, *supra* note 1, at 1400–13.

⁷⁷ See *Leary v. United States*, 395 U.S. 6, 46 & n.93 (1969) (using the Model Penal Code as a “general guide” to the mens rea of knowledge in federal statutes); *Robbins*, *supra* note 2, at 199–203 (describing the application of willful blindness to federal drug statutes).

⁷⁸ Cf. *United States v. Texas*, 507 U.S. 529, 534–36 (1993) (considering congressional intent in determining that a federal statute did not abrogate a common law prejudgment interest rule).

⁷⁹ In the copyright context, for example, courts must ask whether a defendant’s conduct was willful in criminal infringement cases. See, e.g., *United States v. Moran*, 757 F. Supp. 1046, 1051–52 (D. Neb. 1991). Moreover, it is difficult to justify extending liability to insufficiently culpable defendants based on mere practicality. See *Recent Case*, *supra* note 72, at 1251–52.

⁸⁰ Judicial minimalism is the principle that courts ought to decide no more than they must. See Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6–7 (1996).

⁸¹ See *id.* at 30, 32–33.

⁸² *Goldman*, *supra* note 75. Congress intended the safe harbors to provide SPs greater certainty about the scope of their liability. See S. REP. NO. 105-190, at 40 (1998).

⁸³ *Viacom* is not seeking damages for any infringement that occurred after Google began automatically filtering copyrighted content in 2008. See Miguel Helft, *Judge Sides with Google in Viacom’s Video Suit*, N.Y. TIMES, June 24, 2010, at B1.