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## The Relationship Between the ISP Safe Harbors and Liability for Inducement

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¶1 The extent to which online service providers can be held liable for copyright infringement committed by users of their services is one of the more complicated and contentious copyright issues of our day. Courts have struggled with how to apply common-law doctrines of secondary liability to online activity. Congress has enacted limitations on the liability of service providers, but conditioned those limitations on a fairly complicated set of conditions. And technology continues to evolve and to raise new questions. This Essay examines one relatively new issue concerning the interaction between Congressional and judicial developments: how do the statutory liability limitations apply to the developing cause of action for inducing copyright infringement? Part I briefly introduces both the statutory regime and inducement liability, and then examines one court's suggestion that the statute's limits simply do not apply to claims for inducement. Part II argues that it is too early in the evolution of the law of inducement to categorically deny the possibility that the statute might limit liability for at least some claims of inducement.

### I. SAFE HARBORS FOR ONLINE SERVICE PROVIDERS AND CLAIMS FOR COPYRIGHT INDUCEMENT

#### *A. Safe Harbors for Online Service Providers*

¶2 When copyright infringement occurs, copyright law, through two doctrines of secondary liability, has long allowed courts to impose liability for that infringement on certain parties who did not themselves actually commit the act of copyright infringement. Contributory infringement imposes liability on "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another."<sup>1</sup> Vicarious liability attaches to one who "has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities."<sup>2</sup>

¶3 Since the mid-1990s, courts and commentators have faced questions about whether and when providers of Internet access and other kinds of online services can be held secondarily liable for

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<sup>1</sup> *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (emphasis added).

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

copyright infringement committed by their users.<sup>3</sup> Congress addressed this question in 1998, as part of the Digital Millennium Copyright Act. Congress did not purport to definitively resolve the scope of service providers' liability. Instead, it added to the copyright statute a new § 512, which limits whatever liability an eligible online service provider<sup>4</sup> might face for claims of infringement based on four kinds of activities: transmitting material through the provider's network, caching material for later retransmission, storing material on the provider's network at a user's direction, and providing information location tools (such as hyperlinks, directories, or indices).<sup>5</sup> For each covered activity, the statute specifies certain conditions that a service provider must meet in order to have its liability limited. Essentially, Congress declared that for the conduct specified in § 512, a service provider that complied with all of the statute's conditions would not be liable for copyright infringement, even if courts eventually determined that, as a general matter, that conduct would ordinarily give rise to secondary liability.

¶4 For example, § 512(c) limits a qualifying service provider's liability for copyright infringement "by reason of" storing material on the provider's system or network at the direction of one of the provider's users, but only if several conditions are met. First, the provider must not actually know that the material is infringing, must not be aware of facts or circumstances from which infringing activity is apparent, and must expeditiously remove material if it obtains such knowledge or awareness.<sup>6</sup> Second, the provider must not receive a financial benefit directly attributable to the infringing activity if it has the right and ability to control that activity.<sup>7</sup> Third, if a copyright owner notifies the provider of infringing material on its network, the provider must expeditiously remove or disable access to that material.<sup>8</sup>

¶5 In essence, § 512 creates four "safe harbors" that shelter a service provider from most liability for copyright infringement for certain online activities, if the safe harbor's conditions are met.<sup>9</sup> As I have argued elsewhere, many of those conditions parallel, but are not identical to, the elements of copyright law's secondary liability doctrines of contributory infringement and vicarious liability, and, as a result, some of § 512's safe harbors protect service providers against both claims of direct infringement and claims of secondary liability.<sup>10</sup>

### B. Grokster and Inducement Liability

¶6 In 2005, the Supreme Court elaborated another aspect of secondary liability for infringing activity online in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*<sup>11</sup> The defendants in that case disseminated software that allowed users to find and exchange files over a peer-to-peer network, and the decision involved copyright owners' claims that the defendants, by disseminating that software, were liable as contributory infringers for the infringements committed by those who used the software. The Court concluded that the defendants could be held liable as contributory infringers not for merely distributing their software, but for *inducing* those to whom they distributed the software to

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<sup>3</sup> See, e.g., *Religious Tech. Ctr. v. Netcom On-Line Comm'n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993); *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503 (N.D. Ohio 1997).

<sup>4</sup> To be eligible, a service provider must accommodate standard technological measures used to identify and protect copyrighted works, 17 U.S.C. § 512(i)(1)(B), and must adopt, reasonably implement, and inform its subscribers and account holders of a policy providing for the termination of repeat infringers, 17 U.S.C. § 512(i)(1)(A).

<sup>5</sup> 17 U.S.C. § 512(a)-(d).

<sup>6</sup> 17 U.S.C. § 512(e)(1)(A)(i)-(iii).

<sup>7</sup> 17 U.S.C. § 512(e)(1)(B).

<sup>8</sup> 17 U.S.C. § 512(e)(1)(C). The statute prescribes the form and content of a copyright owner's notice in some detail, 17 U.S.C. § 512(c)(3), as well as requiring a service provider to designate an agent to receive such notices, 17 U.S.C. § 512(c)(2). It also outlines a procedure by which the provider's user can make a counter-notification that will require the provider to replace any allegedly infringing material unless the copyright owner files an infringement action in court. 17 U.S.C. § 512(g).

<sup>9</sup> The limitation on liability is not complete. A copyright owner can still obtain limited injunctive relief against an eligible service provider who meets the conditions of any one of the safe harbors. 17 U.S.C. § 512(j).

<sup>10</sup> R. Anthony Reese, *The Relationship Between the ISP Safe Harbors and the Ordinary Rules of Copyright Liability*, 32 COLUMBIA J. L. & THE ARTS 427 (2009).

<sup>11</sup> *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

use it to commit copyright infringement: “[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”<sup>12</sup>

*C. Inducement and § 512: The Fung Court’s Approach*

¶7 Many questions and controversies have arisen about the scope and application of § 512’s safe harbors. The *Grokster* decision raises a question that had previously gotten little or no attention: to what extent do the § 512 safe harbors limit a service provider’s liability where a copyright owner claims that the provider induced users of its service to infringe?

¶8 Perhaps the first court opinion to address that question came in the case of *Columbia Pictures Industries, Inc. v. Fung*, decided in late 2009 in the Central District of California.<sup>13</sup> In *Fung*, several large copyright owners sued Gary Fung, alleging that he was operating several websites that enabled users to copy the plaintiffs’ copyrighted works over a BitTorrent peer-to-peer network. The copyright owners successfully moved for summary judgment on the issue of Fung’s liability for inducing visitors to his sites to commit copyright infringement.<sup>14</sup> In granting summary judgment for the copyright owners, the court rejected Fung’s defense that he was shielded from liability by § 512’s safe harbor—specifically, § 512(d)’s safe harbor against claims “for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity.”<sup>15</sup>

¶9 The *Fung* court suggested that if a copyright owner alleges that a service provider has induced users to infringe, then the service provider should simply not be allowed to use the § 512 safe harbors to defend against the claim. The court said that “inducement liability and the Digital Millennium Copyright Act safe harbors are inherently contradictory. Inducement liability is based on active bad faith conduct aimed at promoting infringement; the statutory safe harbors are based on passive good faith conduct aimed at operating a legitimate internet business.”<sup>16</sup> The court concluded, “Defendants are liable for inducement. There is no safe harbor for such conduct.”<sup>17</sup>

¶10 The district court in *Fung* thus suggested that inducement claims are *categorically* excluded from § 512’s safe harbors: if a copyright owner’s claim against a service provider is categorized as a claim of inducement, then the service provider would not be entitled to claim the protection of any of the statute’s safe harbors. A court faced with a proper inducement claim against a service provider therefore would not need to examine whether, on the facts of that particular claim, the service provider’s conduct met the conditions of any of § 512’s limitations on liability. Instead, because the copyright owner’s claim sounds in inducement, and because inducement is “inherently contradictory” to the § 512 safe harbors, the court would simply evaluate the inducement claim on its own merits and impose liability if the plaintiff could prove its claim, regardless of whether the defendant might satisfy the requirements of one of the statutory liability limitations.

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<sup>12</sup> *Id.* at 936-37.

<sup>13</sup> *Columbia Pictures Indus., Inc. v. Fung*, No. CV 06-5578 SVW(JCx), 2009 WL 6355911 (C.D. Cal. Dec. 21, 2009). The Ninth Circuit was scheduled to hear argument in the appeal from the district court’s decision on May 6, 2011.

<sup>14</sup> The court therefore declined to reach the plaintiffs’ claims that Fung was liable for contributory infringement on the basis of materially contributing to infringement by visitors to his websites, or that he was vicariously liable for such infringement. *Id.* at \*15.

<sup>15</sup> 17 U.S.C. § 512(d). The court apparently concluded that the “dot-torrent” files on the defendant’s website, which automatically caused the downloading over the BitTorrent network of corresponding files containing the plaintiffs’ copyrighted works, constituted information location tools covered by § 512(d). 2009 WL 6355911, at \*16. The court also concluded that Fung’s alleged conduct did not fall within the scope of the § 512(a) safe harbor for transitory digital network communications or the § 512(c) safe harbor for the storage of information at the direction of a user. *Id.* at \*16 n.26.

<sup>16</sup> *Fung*, 2009 WL 6355911, at \*18.

<sup>17</sup> *Id.* at \*18.

## II. AGAINST A CATEGORICAL EXCLUSION

¶11 Courts should not adopt a categorical exclusion of inducement claims from the safe harbors for online service providers. The *Fung* court premised its suggested categorical exclusion of inducement claims from § 512's scope on the view that if a copyright owner can prove an inducement claim against a defendant, then the very nature of the inducement claim means that the defendant will have engaged in active bad-faith conduct that Congress did not intend to exempt from liability when it enacted § 512. I am less confident, however, that just because a claim is denominated as one for "inducement," it will necessarily involve the kind of bad-faith, active conduct that the *Fung* court has in mind as inherently incompatible with the safe harbors.

¶12 My principal reason for concern is that we do not yet really know with much precision what will constitute a valid claim of inducement. Inducement has been expressly recognized as a basis for contributory infringement liability at least since the "classic" formulation of the contributory infringement doctrine by the Second Circuit in its 1971 opinion in *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*: "[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer."<sup>18</sup> But until the Supreme Court's decision in *Grokster* in 2005, courts and commentators paid little attention to the inducement basis for contributory infringement liability in copyright law.<sup>19</sup>

¶13 Most of what we know about the contours of inducement liability therefore comes from *Grokster* and its progeny. In *Grokster*, the Court explained that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for resulting acts of infringement by third parties."<sup>20</sup>

¶14 The *Grokster* decision seems to focus on two aspects of a defendant's behavior in determining culpability. First, the Court looks to whether the defendant took "active steps"<sup>21</sup> or "affirmative steps"<sup>22</sup> to "induce,"<sup>23</sup> "promote,"<sup>24</sup> "foster,"<sup>25</sup> "encourage,"<sup>26</sup> "stimulate,"<sup>27</sup> "bring about,"<sup>28</sup> or "cause"<sup>29</sup> copyright infringement. Second, the opinion directs courts to look at the "intent,"<sup>30</sup> "object,"<sup>31</sup> or "purpose"<sup>32</sup> with which the defendant acted (and the Court focused some attention on

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<sup>18</sup> *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (emphasis added). The Ninth Circuit has referred to this as the "classic" statement of the doctrine. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996). See also PAUL GOLDSTEIN, 2 GOLDSTEIN ON COPYRIGHT § 8.1.3, at 8:18.1 (3d ed. 2008) ("Contributory infringement doctrine has from its beginning included inducement along with provision of labor or equipment as a separate, but sometimes overlapping, ground for secondary liability.").

<sup>19</sup> As the Court's opinion in *Grokster* makes clear, inducement as a basis for secondary liability for patent infringement has received much more development, both in the cases and the statute. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 935-36 (2005); 35 U.S.C. § 271(b). But while pre-*Grokster* copyright decisions generally did not focus on inducement as a distinct kind of contributory infringement, some cases do reflect an awareness of inducement as a basis for liability. For example, in *Sega Enters. Ltd. v. MAPHLA*, 857 F. Supp. 679 (N.D. Cal. 1994), the court, in discussing a contributory infringement claim against the operator of a computer bulletin-board service whose users uploaded and downloaded copies of the plaintiff's copyrighted videogames, explained that the defendants' "role in the copying, including provision of facilities, direction, knowledge and encouragement, amounts to contributory copyright infringement." *Id.* at 687 (emphasis added). See also *Casella v. Morris*, 820 F.2d 362 (11th Cir. 1987) (affirming district court's ruling that the defendant had engaged in a "blatant inducement" of a third party's infringement).

<sup>20</sup> 545 U.S. at 936-37.

<sup>21</sup> *Id.* at 924, 931, 938.

<sup>22</sup> *Id.* at 937.

<sup>23</sup> *Id.* at 935.

<sup>24</sup> *Id.* at 926, 931.

<sup>25</sup> *Id.* at 919.

<sup>26</sup> *Id.* at 924.

<sup>27</sup> *Id.* at 937.

<sup>28</sup> *Id.* at 939.

<sup>29</sup> *Id.* at 933.

<sup>30</sup> *Id.* at 926, 931.

<sup>31</sup> *Id.* at 919, 931.

<sup>32</sup> *Id.* at 934, 935.

the question of what constitutes sufficient evidence to establish the defendant's intent, object, or purpose).<sup>33</sup>

¶15 In my view, though, the *Grokster* decision merely set courts, copyright owners, infringement defendants, and commentators down a path that lower courts are just beginning to chart—a path of developing the contours of what constitutes actionable inducement. Part of this development will involve elaborating on the test announced in *Grokster* and the evidence required to establish inducement.<sup>34</sup> Courts will also have to adapt the inducement claim recognized in *Grokster* beyond that case's specific context. “[T]he Court in *Grokster* fashioned the test for inducement around the particular facts before it,” facts involving the distribution of a device (computer software) capable of both infringing and noninfringing use.<sup>35</sup> Presumably, though, just as contributory infringement in general extends beyond providing a device that is used to infringe, actionable inducement may extend to contexts other than “distribut[ing] a device with the object of promoting its use to infringe copyright.”<sup>36</sup> What constitutes inducement in these other contexts remains to be determined through the ongoing adjudication of asserted claims of inducement.

¶16 This development of the details and applications of the inducement cause of action has only just begun in the six years since *Grokster* was decided. As a result, it is probably too early to tell whether, as the *Fung* court concluded, an inducement claim will always involve allegations that, if proven, will demonstrate that the defendant is not merely involved in “passive good faith conduct aimed at operating a legitimate internet business.”<sup>37</sup> Indeed, not all of the early steps in the development of inducement liability offer reassurance that inducement will necessarily be limited to the kind of active, bad-faith conduct that the *Fung* court has in mind as the grounds for its suggested categorical exclusion from the § 512 safe harbors.

¶17 For example, in its 2007 opinion in *Perfect 10, Inc. v. Amazon, Inc.*, the Ninth Circuit wrote that, “under *Grokster*, an actor may be contributorily liable for intentionally encouraging direct infringement if the actor knowingly takes steps that are substantially certain to result in such direct infringement.”<sup>38</sup> Under this reading of *Grokster*, it seems that *any* online service provider who allows users to store content on the provider's network might be held liable for having induced infringement. After all, *some* of the provider's users are almost certain to store infringing material, at least if the provider's service attracts any substantial number of users. So the provider would seem to have knowingly taken steps—offering storage services to users—that are substantially certain to result in at least some direct infringement taking place, thus meeting the Ninth Circuit's *Amazon* test for inducement. And yet it seems clear that merely offering storage space to users, knowing with substantial certainty that some of them will infringe, is not conduct that should automatically be excluded from § 512's safe harbors. After all, § 512(c) expressly limits a service provider's liability for copyright infringement based on storing a user's content on the provider's network, and the statute does not disqualify a provider that knows that providing storage space is “substantially certain” to lead to user infringement.<sup>39</sup>

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<sup>33</sup> *Id.* at 937-40.

<sup>34</sup> For example, the Court made clear that a finding of inducement could not be “merely based on a failure to take affirmative steps to prevent infringement,” though that failure might “give[] added significance” to evidence of unlawful objective, or “underscore[] [a defendant's] intentional facilitation of . . . users' infringement.” *Id.* at 939 & n.12. And as for a showing that “the commercial sense of [a defendant's] enterprise turns on high-volume use, which . . . is infringing,” the Court stated that “[t]his evidence alone would not justify an inference of unlawful intent.” *Id.* at 940. The Court left open the question of how much other evidence of inducement, and what kind of other evidence, would be necessary in order for a court to take into account a failure to act to prevent infringement or a business model that reaps more profit from more infringement.

<sup>35</sup> PAUL GOLDSTEIN, 2 GOLDSTEIN ON COPYRIGHT § 8.1.3, at 8:18.1 (3d ed. 2008).

<sup>36</sup> 545 U.S. at 919.

<sup>37</sup> *Columbia Pictures Indus., Inc. v. Fung*, No. CV 06-5578 SVW(JCx), 2009 WL 6355911, at \*18 (C.D. Cal. Dec. 21, 2009).

<sup>38</sup> *Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146, 1171 (9th Cir. 2007). The court did not determine whether Google was liable for the alleged infringement under this standard, but instead remanded the claim to the district court for further factual development. *Id.*

<sup>39</sup> As discussed below, the service provider is disqualified only if it actually knows of infringing activity, or is aware of facts and circumstances from which infringing activity is apparent.

¶18 The *Fung* decision offers another example. In that case, at least some of the conduct that the court viewed as evidence that the defendant encouraged users to commit copyright infringement seems at least potentially ambiguous. The court noted that the defendant’s websites “present available torrent files (the vast majority of which contain infringing content) in browseable categories,” and that the defendant had “generate[d] lists of the most popular files in categories like ‘Top 20 Movies.’”<sup>40</sup> Again, many online service providers who store or index content seem likely to present that content to users in browseable categories, and to create lists of the most popular content stored or indexed on their site. The fact that a service provider would choose to organize its site’s content in that way does not necessarily seem to be an indication that the service provider is a bad-faith actor who is knowingly encouraging users to commit copyright infringement.

¶19 That is not to say that other substantial evidence did not support the court’s finding in *Fung* that the defendant had encouraged or promoted infringing activity. But the court’s negative view of a service provider organizing content into browseable categories and generating lists of its most popular content should give one pause. Which kinds of service provider conduct will a court considering an inducement claim view as having fostered infringement? Will such conduct always also show that the provider is really the kind of bad actor that the *Fung* court seemed to have in mind as justifying its categorical exclusion of inducement claims from the protection of § 512’s safe harbors?

¶20 Indeed, the *Grokster* Court’s own discussion of the evidence of intent that can prove inducement might give us pause as to whether a defendant who is found to have induced will necessarily have engaged in bad-faith conduct that should fall outside the protection of § 512. In *Grokster*, the Supreme Court explained how the defendants made money off the peer-to-peer networks created by their software: “by selling advertising space, by directing ads to the screens of computers employing their software.”<sup>41</sup> The Court explained that the more the software was used, the more ads the defendants sold and the more money they made. Finally, the Court noted that infringing (as opposed to noninfringing) use of the software was its high-volume use. Therefore, the Court concluded, the more infringement that users engaged in, the more ads the defendants sold, and the more money they made.<sup>42</sup> As a result, the Court viewed the defendants’ business model as a “complement” to direct evidence in the record of unlawful intent to encourage infringement,<sup>43</sup> although the Court was quick to caution that the nature of the defendants’ business model *alone* would not justify inferring the bad intent necessary to find inducement.<sup>44</sup>

¶21 Of course, any service provider who sells advertising space through its service will make more money if the service is used more, thereby providing more page views (or their equivalent) against which advertising can be sold. And it would seem that infringing use can always be said to increase the use of the service and allow for more ad sales—at the very least, the provider would not be able to sell advertising directed to those who are using the service for infringing conduct if they weren’t doing so. The *Grokster* opinion therefore at least raises the possibility that a court evaluating an inducement claim will weigh any service provider’s advertising-based revenue model as an indicator of unlawful intent to encourage or promote infringement. Yet it seems difficult to conclude that every service provider operating on such a business model is not operating a legitimate online business and should not benefit from § 512’s limitations on copyright infringement liability. Even if courts were to view any ad-based revenue model as potential evidence of inducement, nothing in the

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<sup>40</sup> *Fung*, 2009 WL 6355911, at \*11. The “Top 20 Movies” title for a list of content seems ambiguous as to the infringing nature of the content included in that list. If the list contains the 20 most popular movies currently in theatrical release, there may be little question that anyone who created or titled such a list would know that the movies listed are highly likely to be copyrighted. On the other hand, if the list identifies the 20 most popular movies posted on (or searchable on) the website where the list appears, the fact that those 20 movies are popular would not necessarily indicate anything about whether the movies are infringing.

<sup>41</sup> 545 U.S. at 940.

<sup>42</sup> *Id.* at 940.

<sup>43</sup> *Id.* at 939.

<sup>44</sup> *Id.* at 940.

text of § 512 or its legislative history suggests that a service provider should be barred from the safe harbors merely because it makes money from advertising.<sup>45</sup>

¶22 It does not seem that a service provider that offers its services to users knowing that at least some of them will infringe, and who generates revenues by selling space for advertisers to reach its users, must necessarily be acting in bad faith. Yet the development of inducement law to date at least raises the possibility that a court might find a service provider liable for inducement based on those activities. I think this should make us less sanguine than the *Fung* court was that when a copyright owner accuses a service provider of inducement, that claim will necessarily involve such active, bad-faith conduct that a court should not even bother to see whether the § 512 safe harbors might apply to the provider's activity. Instead, the current state of the law creates some risk that in some instances a service provider's conduct that would, and perhaps should, be protected by the safe harbor will be characterized as inducement. Categorically excluding inducement claims from the statutory limitation on liability therefore seems unwarranted at the current time.

¶23 Of course, if courts do not adopt a categorical exclusion of inducement claims, then there is a risk that the statutory safe harbors might put a service provider who *does* take active, affirmative steps to encourage, promote, or foster infringement by users of its service beyond the reach of copyright owners' claims that the provider is contributorily infringing by means of inducement. But I think § 512 already contains provisions that should exclude such providers from its protections, and leave them subject to liability for inducing infringement.<sup>46</sup>

¶24 Most significantly, a service provider who actively encourages users to infringe will likely at least be "aware of facts or circumstances from which infringing activity is apparent."<sup>47</sup> And such awareness will disqualify the provider from the two most important safe harbors.<sup>48</sup> The legislative history frequently refers to this condition as a "red flag" test—if the service provider has seen a red flag that signals that infringing activity is occurring, then the service provider has the requisite, disqualifying awareness. In cases where the provider has actively taken affirmative steps to encourage users to infringe, the provider will have planted the red flag itself and will be disqualified from the safe harbor.<sup>49</sup>

¶25 The *Fung* court itself reached this same conclusion—that the evidence before it easily established that the defendant had reason to know of users' infringing activity, and therefore did not qualify for the safe harbors.<sup>50</sup> The evidence showed that the defendant had asked users to upload "Box Office" movies,<sup>51</sup> had aided users in downloading current or recent movie releases,<sup>52</sup> had implemented systems to rank active users with the terms "pir4te" and "W4rez" in the names of the ranks,<sup>53</sup> had

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<sup>45</sup> Indeed, § 512(c) and § 512(d) expressly spell out the conditions under which making money should disqualify a service provider from the safe harbors: when the provider "receive[s] a financial benefit *directly attributable* to the infringing activity" and also "has the right and ability to control such activity." 17 U.S.C. §§ 512(c)(1)(B), 512(d)(2).

<sup>46</sup> See, e.g., *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 526 (S.D.N.Y. 2010) ("The *Grokster* model does not comport with that of a service provider who furnishes a platform on which its users post and access all sorts of materials as they wish, while the provider is unaware of its content, but identifies an agent to receive complaints of infringement, and removes identified material when he learns it infringes.").

<sup>47</sup> 17 U.S.C. § 512(c)(1)(A)(ii); 17 U.S.C. § 512(d)(1)(B). Indeed, in many instances the inducing service provider will likely have "actual knowledge" that the material stored on its network, or to which it directs users, is infringing, and that actual knowledge will disqualify the provider from the protections of the key safe harbors. 17 U.S.C. § 512(c)(1)(A)(i); 17 U.S.C. § 512(d)(1)(A).

<sup>48</sup> This awareness (or actual knowledge) of infringing activity will not disqualify the service provider from the safe harbor's protection if the provider acts expeditiously to remove or disable the infringing material once it acquires the knowledge or awareness. It seems unlikely, though, that a provider that acquires awareness or knowledge through its own acts of encouraging users to infringe will be able to meet that condition.

<sup>49</sup> In addition, a bad-faith inducing service provider seems unlikely to be able to meet § 512's basic eligibility condition of reasonably implementing a policy of terminating repeat infringers, or to satisfy the requirements for the § 512(c) and (d) safe harbors of removing infringing activity upon receiving a notification of alleged infringement from a copyright owner.

<sup>50</sup> See 17 U.S.C. §§ 512(c)(1)(A), 512(d)(1) (denying liability limitation if provider has actual knowledge that material or activity is infringing or is aware of facts or circumstances from which infringing activity is apparent).

<sup>51</sup> *Columbia Pictures Indus., Inc. v. Fung*, No. CV 06-5578 SVW(JCx), 2009 WL 6355911, at \*4 (C.D. Cal. Dec. 21, 2009).

<sup>52</sup> *Id.* at \*5, \*12-13.

<sup>53</sup> *Id.* at \*12.

provided technical assistance to users in downloading obviously copyrighted works,<sup>54</sup> and had organized files using terms like “screener” and “PPV” that referred to obviously copyrighted works.<sup>55</sup> That evidence (which might also support a determination that the defendant had affirmatively promoted infringing activity) seems to make clear that the defendant did not meet the conditions required to benefit from § 512’s limitations on liability.

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Indeed, the *Fung* court’s ruling that § 512’s safe harbors did not protect the defendant from the copyright owners’ infringement claims does not appear to flow from the court categorically excluding inducement claims from the safe harbors. Instead, the decision was actually based on the court’s conclusion, after applying the statute’s liability-limiting provisions to the facts before it, that the defendant simply did not meet the conditions that a service provider must meet if it wants to enjoy the safe harbor’s protection from infringement claims. As a result, *Fung*’s suggestion that inducement claims are categorically exempt from § 512 is just that—a suggestion. The statement that “inducement liability and the [statute’s] safe harbors are inherently contradictory”<sup>56</sup> is merely dictum—not essential to the actual decision, which rests on the court’s conclusion that the defendant could not show that it met the conditions required to qualify for § 512’s protection. Other courts would be well advised not to take up the suggestion of a categorical exclusion, at least not until a more robust understanding has developed of what constitutes actionable inducement of copyright infringement.

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<sup>54</sup> *Id.* at \*5, \*12-\*13.

<sup>55</sup> *Id.* at \*14. “‘Screener’ refers to an advance copy of a film given to critics for review, while ‘PPV’ refers to ‘pay-per-view.’” *Id.* at n.23.

<sup>56</sup> *Id.* at \*18.