

Searching for an Out: Rojdirecta, MyVidster, and the Knowledge Components of the Information Location Tool Exemption of § 512(d)

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Searching for an Out: Rojadirecta, myVidster, and the Knowledge Components of the Information Location Tool Exemption of § 512(d)

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INTRODUCTION

With technology evolving at a dizzying pace and providing new opportunities to connect with others, the United States government has tried to stay ahead of Internet copyright infringers. Of particular frustration to the government are websites such as Rojadirecta¹ and myVidster.² These sites, among many others, provide Internet users with the ability to stream unauthorized, copyrighted video from third parties directly to their computers. Seeking to take down the domains of these websites, the government withholds the site from any functionality. But many of these pending cases have been dismissed before the courts could decide on the claims' substantive merits. Assuming that these third-party linking websites would have otherwise met the threshold to be found liable for copyright infringement, each might possess a defense against their charges through the Digital Millennium Copyright Act (DMCA), specifically through its "safe harbor" exemptions in § 512.³ While the bulk of legal discussion on safe harbor defenses deals with the first three parts of § 512, the fourth—less invoked part of limitations on liability relating to material online—specifically provides an exemption for "information location tools," provided they meet certain criteria.⁴

This Comment will discuss the potential use of § 512(d) of the DMCA in connection with third-party video streaming websites, particularly the recent government seizures in Rojadirecta and litigation in myVidster. First, the Comment will examine § 512(d) of the DMCA, the various elements that comprise the section, and the legislative intent behind its drafting. Second, the Comment will focus directly on the actual knowledge requirement within § 512(d)(1), and, in the absence of actual knowledge, the similarities in "red flag" knowledge to patent knowledge requirements. Finally, it will address the state of case law regarding websites such as Rojadirecta and myVidster, and analyze whether third-party linking websites such as these can legitimately claim to be information location tools or whether this section provides too much latitude for copyright infringers.

I. THE LAW AND HISTORY OF THE SAFE HARBOR PROVISIONS

A. *Internet Service Provider Definitions and Liability*

Two definitions exist within the Digital Millennium Copyright Act § 512 that define who qualifies as a "service provider" eligible for one of the safe

1. ROJADIRECTA, <http://www.rojadirecta.me/> (last visited Feb. 25, 2014).

2. MYVIDSTER, <http://www.myvidster.com> (last visited Feb. 25, 2014).

3. 17 U.S.C. § 512 (2006).

4. *See id.* § 512(d).

harbor exemptions. The first is limited to § 512(a) and protects transitory digital network communications.⁵ In § 512(k)(1)(A), a service provider is defined as “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material sent or received.”⁶ This definition provides the working framework for the remaining three safe harbor exemptions. More broadly defined, a service provider is “a provider of online services or network services, or the operator of facilities thereof.”⁷ This broader definition encompasses “services such as search engines, websites (including retail sites), hosting services, bulletin board and newsgroup operators.”⁸

Tension also exists between the various liabilities for these service providers. Traditionally, three distinct types of liability can be attached to copyright infringers: direct, contributory, and vicarious. Direct infringement occurs when “[a]nyone . . . violates any of the exclusive rights of the copyright owner.”⁹ The individual who violates those rights is directly liable for the infringement. But for a variety of reasons, litigation of direct infringers is not as common as it is for secondary infringers, the intermediaries.¹⁰ Individuals or service providers who assist in direct infringement can be held contributorily or vicariously liable. Contributory infringement occurs when “[o]ne who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another.”¹¹ Vicarious liability occurs when “the defendant profits directly from the infringement and has a right and ability to supervise the direct infringer.”¹² These distinct forms of common law liability, which will be covered in further detail later in the Comment, “continue to exist as before, unaffected by the DMCA.”¹³

5. *See id.* § 512(a).

6. *Id.* § 512(k)(1)(A).

7. *Id.* § 512(k)(1)(B).

8. 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT Chap. 21, § 21:85 (2013) (footnote omitted). *See, e.g.,* CoStar, Grp., Inc. v. LoopNet, Inc., 373 F.3d 544 (4th Cir. 2004); Io Grp., Inc. v. Veoh Networks, Inc., 586 F. Supp. 2d 1132 (N.D. Cal. 2008); Ellison v. Robertson, 357 F.3d 1072 (9th Cir. 2004).

9. 17 U.S.C. § 501(a) (2006).

10. *See generally* BRUCE E. BOYDEN, INTERNET LAW: THEORY AND PRACTICE 788 (2012) (“While the Internet and other digital technologies have expanded the ability of individuals to copy and distribute, they have not enhanced the ability to bring lawsuits against individuals. . . . Suing hundreds or thousands of individuals for myriad separate direct infringement actions is difficult and expensive.”).

11. *Fonovisa Inc. v. Cherry Auction Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (quoting *Gershwin Publ’g Corp. v. Columbia Artists Mgmt. Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

12. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 n.9 (2005).

13. 6 PATRY, *supra* note 8.

There does, however, exist *some* difference between the copyright infringement liability and common law causes of action.¹⁴ If a service provider does not qualify for one of the safe harbor exemptions, it may instead argue that the copyright holder “has failed to make out a common law cause of action for contributory infringement or vicarious liability.”¹⁵

Additionally, a distinction exists between criminal and civil copyright infringement. While this Comment does not address criminal copyright infringement,¹⁶ it is pleaded in the *Rojadirecta* case referenced in Section III(A). In short, “[a]ny person who willfully infringes a copyright . . . for purposes of commercial advantage”¹⁷ is criminally liable for copyright infringement. Additional provisions in § 506 account for the “reproduction or distribution . . . of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000”¹⁸ and the distribution of work “being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.”¹⁹ But perhaps the most important distinction for the purposes of this Comment is that there is no secondary criminal copyright infringement. Only direct infringers are held criminally liable.

B. Text of the Digital Millennium Copyright Act § 512

The Digital Millennium Copyright Act is divided into several specific limitations on liability relating to material online. Those who satisfy the elements for one of the safe harbor defenses are shielded from an award of monetary damages and often from injunctive relief.²⁰ Each exemption functions independent of each other. Failure to qualify for one exemption will not bar the party from asserting another exemption. § 512(a) addresses “transitory digital network communications.”²¹ It specifically covers service providers that act as conduits for the transmission of copyrighted work without modification.²² The section allows for “a broad grant of immunity to service

14. *See id.*

15. *Id.* (The reverse is not true however. If a service provider satisfies one of the safe harbor exemptions, the copyright owner cannot also make the provider liable for common law infringement).

16. 17 U.S.C. § 506 (2006).

17. *Id.* § 506(a)(1)(A).

18. *Id.* § 506(a)(1)(B).

19. *Id.* § 506(a)(1)(C).

20. *See id.* § 512(j). This immunity helps protect ISPs from fear of incurring undue liability that would strain or halt normal operation of doing business. Additionally, it can hold off mounting costs of litigation.

21. *Id.* § 512(a).

22. *See id.*

providers whose connection with the material is transient.”²³ The Internet service provider (ISP) cannot actively select the recipients²⁴ or the material to be transmitted,²⁵ or it risks losing immunity. The computers pass along the transient information among users, and if these intervening computers must block indirectly infringing material, “[t]he Internet as we know it simply cannot exist.”²⁶ This exemption is relatively straightforward and easy to identify, especially in comparison to both § 512(c) and § 512(d).

§ 512(b) protects against system caching, or the creation of temporary copies of copyrighted work for quick network archival access.²⁷ Quick access to these files allows for ISPs to prevent excessive network congestion and can be vital to the network’s continued performance. Indeed, § 512(b) takes into account just how the Internet functions. To avoid uninterrupted transmission, caching “reduces waiting time, and . . . service provider bandwidth loads” by sending the temporary or cached copy to the destination point instead of retrieving it from the original source again.²⁸

§ 512(c), one of the more litigated sections within § 512, protects ISPs from liability when information residing on systems or networks at the direction of a third-party user is infringing.²⁹ Websites such as YouTube, Facebook, Twitter, and Flickr (among many others) allow users to store these copyrighted materials in such a manner where they are made publicly available, or at least amongst a select group of individuals that the user approves. Pivotal to this third section’s limit on liability is a knowledge section that, for all purposes, functions nearly identical to the knowledge section in § 512(d).

The final limit on liability in § 512 and the primary focus of this Comment is § 512(d), information location tools.³⁰ Information location tools can include directories, hypertext links, pointers, and other vital means of communicating online.³¹ Further, section (d) states that a service provider will not be found liable “for infringement of copyright by reason of the provider referring or

23. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1116 (9th Cir. 2007) (The court continued explaining its definition of “transient” communication: “When an individual clicks on an Internet link, his computer sends a request for the information. The company receiving that request sends that request on to another computer, which sends it on to another. . . . In passing the information along, each intervening computer makes a short-lived copy of the data.”).

24. 17 U.S.C. § 512(a)(3) (2006).

25. *Id.* § 512(a)(1).

26. *Perfect 10, Inc.*, 488 F.3d at 1116 (“Service providers are immune for transmitting all digital online communications, not just those that directly infringe.”).

27. § 512(b).

28. 6 PATRY, *supra* note 8.

29. § 512(c).

30. *Id.* § 512(d).

31. *See id.* § 512(d).

linking users to an online location containing infringing material or infringing activity.”³² In order to obtain the immunity, the ISP must not receive any financial benefit “directly attributable to the infringing activity,” when the ISP has the “right and ability to control” the activity.³³ In all cases where the ISP has been notified of claimed infringement, the ISP must respond “expeditiously to remove, or disable access to” the infringing material.³⁴

But the immunity is also conditioned on satisfaction of three knowledge factors. The ISP must not have “actual knowledge that the material or activity is infringing.”³⁵ Second, in the absence of actual knowledge, the ISP must not “be aware of facts or circumstances from which infringing activity is apparent.”³⁶ Finally, the ISP must, upon “obtaining such knowledge or awareness, act expeditiously to remove, or disable access to, the material.”³⁷ Section II of this Comment, together with a deeper discussion of the legislative and procedural history of § 512(d), will more closely examine how the “actual knowledge” requirement is defined.

C. Legislative History of § 512(d)

The Digital Millennium Copyright Act, and by extension § 512’s safe harbor exemptions, came in response to several external stimuli. The first was the further implementation of World Intellectual Property Organization (WIPO) sponsored copyright agreements, an extension of the United States’ recent adherence to the Berne Convention.³⁸ The second, arguably more pressing, stimulus was the changing nature of the Internet and digital environments, making the reproduction of copyrighted works easier and more efficient than ever.³⁹ Indeed, users of the Internet or other electronic media can now “send and retrieve perfect reproductions of copyrighted material easily and nearly instantaneously, to or from locations around the world.”⁴⁰ While the advances in technology would undoubtedly benefit copyright owners and consumers, it would also “facilitate pirates who aim to destroy the value of American intellectual property.”⁴¹ To address these concerns, WIPO hosted a

32. *Id.* § 512(d).

33. *Id.* § 512(d)(2). This is a particularly difficult provision to interpret, similar to one in § 512(c). It creates confusion because of its conflicting connections with common law liability. It will be handled in more depth in Section II.

34. *Id.* § 512(d)(3).

35. *Id.* § 512(d)(1)(A).

36. *Id.* § 512(d)(1)(B).

37. *Id.* § 512(d)(1)(C).

38. H.R. REP. NO. 105-551, pt. 1, at 9 (1998).

39. *See id.*

40. *Id.*

41. *Id.*

conference in December 1996 to create two treaties adopted by consensus by over 150 countries: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.⁴²

Specific to this Comment, the second part of House Report 105 addresses Internet copyright infringement liability in Title II of the DMCA.⁴³ One of the primary concerns in drafting Title II was to “[preserve] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.”⁴⁴ Of equal concern was the desire to create “greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.”⁴⁵ By striking a balance between the oft competing interests of the copyright owners, ISPs, and third-party consumers, Congress hoped § 512 of the DMCA would have enough teeth to protect copyright owners, without sacrificing either freedom of speech or the predictability of liability for ISPs.

To that end, the adopted § 512(d) covers situations where “information location tools refer or link users to an on-line location containing infringing material or infringing activity.”⁴⁶ Congress also defined in their House Report that the term “infringing activity” would represent “wrongful activity that is occurring at the location to which the users linked or referred by the information location tool.”⁴⁷ But this definition holds true whether the infringement “is technically deemed to have occurred at that location or at the location where the material is received.”⁴⁸ Additionally, Congress included a list of valid information location tools that would satisfy § 512(d):

[A] directory or index of on-line sites or material, such as a search engine that identifies pages by specified criteria; a reference to outside material, such as a list of recommended sites; a pointer that stands for an Internet location or address; and hypertext links, which allows users to access material without entering its address.⁴⁹

The Report goes on to explain that the § 512(d) safe harbor would restrict

42. *Id.* See generally WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203.

43. H.R. REP. NO. 105-551, pt. 2, at 49 (1998).

44. *Id.*

45. *Id.* at 49–50.

46. *Id.* at 56.

47. *Id.*

48. *Id.*

49. *Id.* at 56–57.

the liability of an ISP that “refers or links users to an on-line location containing infringing material or activity” by using information location tools.⁵⁰ While the knowledge component of § 512(d) will be addressed more thoroughly in the next section of the Comment, Congress identified concerns raised by ISPs that they may be “disqualified from the safe harbor based solely on evidence that it had viewed the infringing Internet site.”⁵¹ The fear became that websites with human editors would expose themselves to undue liability unintentionally. If there existed a cooling effect on edited information location tools because of the exposure to liability, online directories that assisted Internet users in identifying and locating information on the Internet would be permanently impacted.⁵² The solution to this concern resides with the actual knowledge component in both § 512(c) and § 512(d).

II. ACTUAL AND RED FLAG KNOWLEDGE

A. Actual Knowledge

Most of the focus on “actual knowledge” in the Digital Millennium Copyright Act’s DMCA § 512 safe harbor provisions stems from § 512(c).⁵³ § 512(c) is fundamentally very similar in evaluating the component of actual knowledge to § 512(d). In fact, sections (c) and (d) vary only superficially when discussing what constitutes actual knowledge. Courts generally presume that “similar statutes should be interpreted similarly,” with the similarity of the language being the determinative factor in evaluating the similar statutes.⁵⁴ Each safe harbor provision is divided into three subsections. The first subsection of each requires that the ISP not possess actual knowledge of the infringing material.⁵⁵ The only change between the two merely differentiates where the infringing work is held. The identical second subsections of both (c) and (d) address whether an ISP, in the absence of actual knowledge, may be otherwise aware of infringing activities.⁵⁶ The final subsections of (c) and (d) are also identical and provide for what an ISP should do once it has obtained

50. *Id.* at 57.

51. *Id.*

52. *See id.*

53. 17 U.S.C. § 512(c) (2006).

54. *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 718 F.3d 1006, 1016 (9th Cir. 2013) (quoting *United States v. Sioux*, 362 F.3d 1241, 1246 (9th Cir. 2004)).

55. Compare § 512(c)(1)(A)(i) (“does not have actual knowledge that the material or an activity using the material on the system or network is infringing”), with § 512(d)(1)(A) (“does not have actual knowledge that the material or activity is infringing”).

56. “[I]n the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent.” § 512(c)(1)(A)(ii); § 512(d)(1)(B).

actual knowledge or awareness of circumstances for infringement.⁵⁷

§ 512 is not the most clearly written of copyright statutes. Courts have tried tackling the actual knowledge components of §§ 512(c)–(d) and interpreting the fine distinctions between them. As previously mentioned, most case law centers on § 512(c), but because of their similarity in structure, courts have applied the same interpretations to the language of both sections. In *A&M Records, Inc. v. Napster, Inc.*, the Ninth Circuit held that “specific infringing material” that the operator failed to remove could constitute infringement.⁵⁸ But “absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement” just for the inherent structure of the computer system.⁵⁹

One of the most recent high profile cases involving the safe harbor provisions is *Viacom Int’l, Inc. v. YouTube, Inc.*⁶⁰ Plaintiffs from Viacom, the English Premier League, and various television and movie studios appealed a summary judgment decision from the United States District Court for the Southern District of New York in favor of YouTube regarding an assortment of direct and contributory copyright infringement claims.⁶¹

Specific to this Comment, the court examined the issue of actual knowledge. The district court found that YouTube had received “insufficient notice of the particular infringements”⁶² and lacked “actual knowledge” or “aware [ness] of facts or circumstances”⁶³ that would prevent an ISP from claiming safe harbor protection under § 512(c)(1)(A). But importantly, the district court held that § 512(c)(1)(A) refers to “knowledge of specific and identifiable infringements.”⁶⁴ The Second Circuit affirmed this holding for several reasons. First, knowledge by itself is not enough to remove the safe harbor protection of § 512(c)–(d), provided the ISP acts to remove or disable the material “expeditiously.”⁶⁵ The court places an emphasis on the fact that the expeditious activity is to “remove or disable ‘the *material*’ at issue.”⁶⁶ The defendants argue this interpretation neglects what is termed the “red flag”

57. “[U]pon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material.” § 512(c)(1)(A)(iii); § 512(d)(1)(C).

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

59. *Id.* at 1021.

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

61. *Id.* at 25–26.

62. *Id.*

63. 17 U.S.C. § 512(c)(1)(A) (2006).

64. *Viacom Int’l, Inc. v. YouTube, Inc.* 718 F. Supp. 2d. 514, 523 (S.D.N.Y. 2010).

65. See 676 F.3d at 30 (2d Cir. 2012); § 512(c)–(d).

66. 676 F.3d at 31.

knowledge of § 512(c)(1)(A)(ii) and § 512(d)(1)(B).⁶⁷

B. Red Flag Knowledge and Its Patent Roots

Red flag knowledge arises out of facts and circumstances.⁶⁸ In the Second Circuit's *Viacom* opinion, the plaintiffs tried to argue that the usage of the phrase "facts or circumstances" was not intended by Congress to limit red flag knowledge to one type of knowledge and thereby "[require] less specificity" than actual knowledge.⁶⁹ But this could not be further from reality. "[N]o court has embraced the contrary proposition . . . that the red flag provision 'requires less specificity' than the actual knowledge provision."⁷⁰

Much of red flag knowledge case law comes from patent law. In 2011, the United States Supreme Court decided *Global-Tech Appliances, Inc. v. SEB S.A.*, a patent case revolving around a "cool-touch" deep fryer, but that also addresses red flag knowledge.⁷¹ In the 1980's, SEB invented and patented a "cool-touch" deep fryer.⁷² But a U.S. competitor of SEB asked a Hong Kong supplier, Pentalpha Enterprises, Ltd., to "supply it with deep fryers meeting certain specifications."⁷³ Pentalpha purchased a SEB fryer in Hong Kong, but, because of its sale in a foreign market, the fryer did not have any U.S. patent markings.⁷⁴ Despite being directly copied from SEB's design, Pentalpha had an attorney complete a "right-to-use study."⁷⁵ Pentalpha went on to supply its infringing design for sale in the United States, prompting the lawsuit.

The Supreme Court held that "deliberate indifference to a known risk" is not an appropriate defense to infringement.⁷⁶ Pentalpha "was indisputably aware that its customers were selling its product in [the United States]."⁷⁷ Pentalpha demonstrated "willful blindness" by making conscious steps "to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts."⁷⁸ Indeed, the facts and circumstances surrounding Pentalpha's development of their fryer were subjective enough to determine red flag knowledge of their infringement.

67. *See id.*; *see also* § 512(c)(1)(A)(ii); § 512(d)(1)(B).

68. *See generally* § 512(c)(1)(A)(ii); § 512(d)(1)(B).

69. 676 F.3d at 32.

70. *Id.* at 32.

71. *See Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011).

72. *See id.* at 2063–64.

73. *Id.* at 2064.

74. *See id.*

75. *Id.* ("Pentalpha refrained from telling the attorney that its design was copied directly from SEB's.").

76. *Id.* at 2068.

77. *Id.* at 2070.

78. *Id.* at 2070–71.

C. Subjective vs. Objective: Actual vs. Red Flag Knowledge

Actual and red flag knowledge cannot and should not be viewed as “specific and generalized knowledge”.⁷⁹ Actual knowledge, as it appears in § 512(c)(1)(A)(i) and § 512(d)(1)(A) is commonly used to “denote subjective belief.”⁸⁰ Actual knowledge provisions, thus, require that the ISP “subjectively” know of specific infringement.⁸¹ Like actual knowledge, red flag knowledge must also be specific to individual instances of infringement. But the red flag knowledge provisions require the ISP to be “subjectively aware of facts that would have made the specific infringement ‘objectively’ obvious to a reasonable person.”⁸²

The Second Circuit in *Viacom* acknowledges a relatively “limited body of case law,” but nevertheless, finds support for its interpretation of the two knowledge provisions.⁸³ In *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, the Ninth Circuit examined § 512(c) with a copyright infringement case against Veoh Networks.⁸⁴ As with the *Viacom* case, the court in *Shelter Capital* held that actual knowledge required the same “specific knowledge of particular infringing activity.”⁸⁵ Similarly, the court relieves the burden of “determining whether materials are actually illegal” on an ISP.⁸⁶ The *Viacom* court also cites *Capitol Records, Inc. v. MP3tunes, LLC*, stating that despite being aware of infringing occurring at some level, there must be some “specific ‘red flag’ knowledge with respect to any particular link.”⁸⁷

III. APPLYING § 512(D) TO THE ROJADIRECTA AND MYVIDSTER CASES

Courts continue to grapple with how best to apply the various exemptions of § 512. While prominent cases such as *Shelter Capital* and *Viacom* have helped shape the case law surrounding the safe harbor exemptions, many more cases that could have implications on ISP immunity are either dismissed prior to a decision on the merits or decided on other grounds. Two such recent cases are the focus of the remainder of this Comment: the civil forfeiture of the

79. *Viacom Int’l, Inc. v. YouTube, Inc.* 676 F.3d 19, 31 (2d Cir. 2012).

80. *Id.* (“[T]he belief held by the defendant need not be reasonable in order for it to defeat . . . actual knowledge.” (quoting *U.S. v. Quinones*, 635 F.3d 590, 602 (2d Cir. 2011)).

81. 676 F.3d at 31.

82. *Id.*

83. *Id.*

84. *UMG Recordings, Inc. v. Shelter Capital Partners L.L.C.*, 667 F.3d 1022 (9th Cir. 2011). Veoh Networks is a video-hosting service not unlike YouTube.

85. *Id.* at 1037.

86. *Id.* at 1038 (quoting *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007)).

87. 676 F.3d at 32 (quoting *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 645 (S.D.N.Y. 2011)).

Rojadirecta domain name and the myVidster litigation. By looking at these two examples, the potential emerges that the knowledge components of § 512(d) may be too easily satisfied and provide too much latitude for infringing ISPs to obtain immunity.

A. *The Rojadirecta Takedown*

Rojadirecta is a website that is solely owned by the limited liability company Puerto 80 Projects, S.L.U. (Puerto 80), based out of Arteixo, Spain.⁸⁸ Puerto 80 is incorporated under the laws of Spain and owns both the rojadirecta.org and rojadirecta.com domain names.⁸⁹ Both websites were registered with GoDaddy.com, Inc., a United States company located in Scottsdale, Arizona.⁹⁰ Puerto 80 also owns the domain name rojadirecta.me.⁹¹ The Rojadirecta site “hosts ‘forums’ in which users can post messages concerning sports, politics, and other topics.”⁹² Rojadirecta proved to be enormously popular. According to the web traffic metric service Alexa.com, as of or about January 27, 2011, Rojadirecta.org was the 2,380th most popular website in the world and the 119th most popular in Spain.⁹³ Using the same service, Rojadirecta.com was the 2,326th most popular website in the world and the 109th most popular website in Spain.⁹⁴ Additionally, between its .com and .org domain names, Rojadirecta increased the number of monthly unique visitors dramatically from February 2010 to November and December 2010.⁹⁵

But more importantly, Rojadirecta is a “linking” website.⁹⁶ The website provides “links to daily live sporting events and Pay-Per-View events, as well as downloadable broadcasts of sporting events or Pay-Per-View events that had been previously aired.”⁹⁷ The main homepage for Rojadirecta consists of

88. See *Petition for Release of Seized Property*, at 1, Puerto 80 Projects, S.L.U. v. United States (2011) (No. 13 Civ. 3983), available at <https://www.eff.org/files/Petition%20for%20Release%20of%20Seized%20Goods%20Final.pdf>.

89. See *id.*

90. See *id.*

91. ROJADIRECTA, *supra* note 1.

92. *Petition for Release of Seized Goods*, *supra* note 88, at 1.

93. Verified Amended Complaint, at 12–13, United States v. Rojadirecta.org, (No. 11 CV. 4139, 2012 WL 2869487 (S.D.N.Y. 2012)) (this metric service functions similar to that of the traditional Nielsen television ratings service, by measuring the amount of visitors relative to other websites on the Internet).

94. *Id.*

95. *Id.* (Compete.com, a web page analytics service, calculated that Rojadirecta.org went from 44,623 to 96,986 monthly unique viewers from February to December 2010 while Rojadirecta.com increased from 67,476 to 99,316 monthly unique viewers from February to November 2010).

96. *Id.* at 8. “Linking websites generally collect and catalog links to files on third-party websites that contain illegal copies of copyrighted content.” *Id.* at 6.

97. *Id.* at 9.

several groupings of links for viewing, including “‘Today On Internet TV’ . . . ‘Download Last Full Matches’ . . . and ‘Last Video Highlights.’”⁹⁸ These groupings include links to a wide range of sporting events including tennis, basketball, baseball, hockey, college athletics, cricket, rugby, and soccer/football.⁹⁹

The United States government, through the Department of Homeland Security’s (DHS) investigative agency known as U.S. Immigration and Customs Enforcement (ICE),¹⁰⁰ began seizing 150 domain names of commercial websites “engaged in the illegal sale and distribution of counterfeit goods and copyrighted works” in November 2011.¹⁰¹ This operation, together with the Department of Justice, FBI, and the ICE-led National Intellectual Property Rights Coordination Center (IPR Center) was known as “Operation In Our Sites.”¹⁰² Among the websites seized by ICE were rojadirecta.org and rojadirecta.com.¹⁰³ On January 31, 2011, the U.S. government seized both domains and shortly after filed for the forfeiture of those same web addresses.¹⁰⁴

Puerto 80 petitioned for the release of the seized domain names, but was able to maintain the use of foreign domain names such as rojadirecta.me.¹⁰⁵ The Electronic Frontier Foundation (EFF), together with the Center for Democracy and Technology and Public Knowledge, filed an amicus brief supporting Puerto 80.¹⁰⁶ But in August 2011, United States District Court Judge Paul Crotty denied Puerto 80’s petition, arguing that the seizure of the domain names did not violate the First Amendment of the Constitution.¹⁰⁷ Judge Crotty disputed the Puerto 80’s allegations that, “in seizing the domain names, the [g]overnment has suppressed the content in the ‘forums’ on its

98. *Id.* at 10.

99. *See generally* ROJADIRECTA, *supra* note 1.

100. *See generally* Overview, ICE, <http://www.ice.gov/about/overview/> (last visited Mar. 2, 2014).

101. U.S. Dep’t of Justice, FEDERAL COURTS ORDER SEIZURE OF 150 WEBSITE DOMAINS INVOLVED IN SELLING COUNTERFEIT GOODS AS PART OF DOJ, ICE HSI AND FBI CYBER MONDAY CRACKDOWN (2011), *available at* <http://www.justice.gov/opa/pr/2011/November/11-ag-1540.html>.

102. *See id.*

103. *See* Verified Amended Complaint, *supra* note 93, at 1.

104. ROJADIRECTA, *The U.S. Government withdraws complaint against the Rojadirecta domains and the Court orders their return*, ROJADIRECTA BLOG, (Aug. 30, 2012), <http://blog.rojadirecta.me/>.

105. *See generally* Petition for Release of Seized Goods, *supra* note 88. *See also* Nate Anderson, *Government admits defeat, gives back seized Rojadirecta domains*, ARS TECHNICA, <http://arstechnica.com/tech-policy/2012/08/government-goes-0-2-admits-defeat-in-rojadirecta-domain-forfeit-case/>.

106. Ernesto, *Domain Seizures Do Not Violate Free Speech, U.S. Court Rules*, TORRENT FREAK, <http://torrentfreak.com/domain-seizures-does-not-violate-free-speech-110805/>.

107. *Id.*

websites. . . . The main purpose of the Rojadirecta websites, however, is to catalog links to the copyrighted athletic events—any argument to the contrary is clearly disingenuous.”¹⁰⁸ Additionally, he held that the burden of the seizures was not too impactful, as the alternative foreign domains were still available, even to those who may not have known of the seizures.¹⁰⁹

Despite the Southern District of New York ruling on the matter, almost nineteen months after the domain names were seized, the United States government withdrew its complaint and the court ordered their return.¹¹⁰ Dated August 29, 2012, the dismissal letter does not offer a rationale as to why the government dropped the forfeiture case.¹¹¹ One proposed rationale for the withdrawal is the government’s inability to prosecute Puerto 80 for criminal infringement.¹¹² The distinction rests with two problems in the case. The first problem is that, in order to obtain the government’s desired forfeiture result, Puerto 80 would have to be found liable for § 506 criminal copyright infringement.¹¹³ § 506 states that “[a]ny person who willfully infringes a copyright . . . for purposes of commercial advantage or private financial gain” will be held criminally liable.¹¹⁴ Importantly, the specific wording of the statute provides criminal liability only for direct infringers. Nowhere in § 506 does secondary liability for copyright infringement apply. The related second problem is that Puerto 80 did not copy anything.¹¹⁵ “[H]yperlinking per se does not constitute direct copyright infringement because there is no copying. . . .”¹¹⁶ Nevertheless, no substantive ruling was made regarding secondary liability for service providers.

108. Order at 4, *United States v. Puerto 80 Projects*, S.L.U., No. 11 Civ. 4139 (S.D.N.Y. Aug. 4, 2011).

109. *See id.* at 3.

110. *The U.S. Government withdraws complaint against the Rojadirecta domains and the Court orders their return*, ROJADIRECTA (BLOG), <http://blog.rojadirecta.me/>.

111. *See* Re: *United States of America v. Rojadirecta.org*, et al. Letter of dismissal. (August 29, 2012).

112. *See generally* Mike Masnick, *Rojadirecta Argues That The Justice Department Is Making Up Laws; Has No Legal Basis To Forfeit Its Domain*, TECHDIRT, (Aug. 8, 2011, 7:42 AM), <https://www.techdirt.com/articles/20110806/00013915420/rojadirecta-argues-that-justice-department-is-making-up-laws-has-no-legal-basis-to-forfeit-its-domain.shtml>.

113. *See* 17 U.S.C. § 506 (2006).

114. *Id.* § 506(a)(1)(A).

115. Mike Masnick, *Rojadirecta Argues That The Justice Department Is Making Up Laws; Has No Legal Basis To Forfeit Its Domain*, TECHDIRT (Aug. 8, 2011, 7:42 AM), <https://www.techdirt.com/articles/20110806/00013915420/rojadirecta-argues-that-justice-department-is-making-up-laws-has-no-legal-basis-to-forfeit-its-domain.shtml>.

116. *Online Policy Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1202 n. 12 (N.D. Cal. 2004).

B. The myVidster Case: Flava Works v. Gunter

Flava Works, Inc., an adult entertainment company based in Miami, Florida,¹¹⁷ “specializes in the production and distribution of videos of black men engaged in homosexual acts.”¹¹⁸ Neither the court nor the defendant contended that the videos produced by Flava Works were illegal or counter to any obscenity law.¹¹⁹ In order to legally access Flava Works’ videos, the user must first pay an upfront fee or “pay wall” and agree “not to copy, transmit, sell, etc. the video.”¹²⁰ Only paid subscribers are, however, able to download the videos for “personal, noncommercial use.”¹²¹

myVidster is a “social video sharing and bookmarking site” that allows users to “collect and share . . . videos [found] on the web.”¹²² It was created, owned, and operated by Marques Rondale Gunter, who also owns the domain name registration.¹²³ Users are also able to browse and “follow video collections from other users using myVidster.”¹²⁴ Once a myVidster member finds a video they wish to share, the user chooses whether to make the videos available to other members.¹²⁵ When a “bookmark” is received, myVidster then “automatically requests the video’s ‘embed code’ from the server that hosts . . . the video.”¹²⁶ This “embed code” is used by the website to make the video “appear to be on myVidster’s site.”¹²⁷ The code takes the form of a “thumbnail” that, when clicked, will connect the viewer’s computer to the server, storing the file and playing the video.¹²⁸ While it may appear the video is on the myVidster website, the viewer is actually watching the video straight from the server storing the file.¹²⁹ The “frame” surrounding the videos contains advertisements that help myVidster pay for its services.¹³⁰ The “bookmarked”

117. Complaint at 3, *Flava Works, Inc. v. Gunter* (2010) (No. 11-3190), available at <http://flavaworks.com/legal/files/10%2010%2012%20Myvidster%20Complaint.pdf>.

118. *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 755 (7th Cir. 2012).

119. *Id.* at 756. The court spends a bit of time discussing obscenity. *Id.* Stating that “[a]cceptance of an obscenity defense would fragment copyright enforcement, protecting registered materials in a certain community while . . . authorizing pirating in another locale.” *Id.* “In pari delicto” is then raised as a potential question, but quickly dismissed. *Id.*

120. *Id.* (quoting Flava Works’ terms of use).

121. *Id.* (quoting Flava Works’ terms of use).

122. *Frequently Asked Questions*, MYVIDSTER, <http://www.myvidster.com/docs/help> (last visited Feb. 27, 2014).

123. See Complaint *supra* note 117, at 4.

124. *Id.* at 19.

125. See 689 F.3d at 756.

126. *Id.*

127. *Id.*

128. *Id.* (the “thumbnail” is a small picture or screen shot of the video for display purposes).

129. See *id.*

130. See *id.*

video is not hosted on myVidster's website.¹³¹

Flava Works filed for and was granted a preliminary injunction for copyright infringement by the district court against myVidster.¹³² Several businesses filed amicus briefs in the Seventh Circuit alongside Flava Works, including the Motion Picture Association of America (MPAA), Google, and Facebook.¹³³ But Judge Posner, however, found the district court erred in granting the injunction. Drawing precedent from *eBay Inc. v. MercExchange, L.L.C.*,¹³⁴ a patents case, Judge Posner held that likelihood of success is not the sole requirement for granting an injunction.¹³⁵ Likelihood of success, however, was the only requirement discussed in the district court's decision, and so Judge Posner restricted his procedural focus there.¹³⁶

The stakes were high for ISPs. myVidster had responded to § 512(i) takedown notices, but “[went] no further.”¹³⁷ The EFF filed an amicus brief claiming that “[c]ourts have emphasized that . . . § 512(i) does *not* create any duty on the part of service providers to police their sites or otherwise make determinations on claims of copyright infringement.”¹³⁸ Judge Posner's ruling on the contributory negligence claims could have dramatically impacted existing case law on “inline links” and even the “server test.”¹³⁹

Judge Posner reversed the district court opinion and found in favor of myVidster on several grounds related to the contributory infringement claims. Though myVidster is “not *just* adding a frame around the video screen that the visitor is watching,” so long as the viewer of the video does not make a copy

131. *See id.*

132. *Id.* at 754. (the finding by the district judge was that a trier of fact would likely find myVidster to be a contributory infringer).

133. Eriq Gardner, *MPAA Lines Up with Porn Studio in Steamy Copyright Dispute*, THE HOLLYWOOD REPORTER (Apr. 9, 2012, 1:41 PM), <http://www.hollywoodreporter.com/thr-esq/mpaa-flava-works-myvidster-google-facebook-309595>. Google and Facebook in particular were alarmed by the district court's treatment of social bookmarking websites as direct infringers. If myVidster's preliminary injunction were to remain, the impact on licensing and Internet business would be severe. *See id.*

134. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

135. *See Flava Works, Inc.*, 689 F.3d at 755 (citing *Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989 (9th Cir. 2011); *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010) (supporting the Court's conclusion that the eBay standard for preliminary injunctions can apply to a copyright case as well)).

136. *See Flava Works, Inc.*, 689 F.3d at 755.

137. Gardner, *supra* note 133; *See also* Complaint, *supra* note 117.

138. Gardner, *supra* note 133.

139. *See generally* *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (recognizing the reality of how the internet worked, the Ninth Circuit struck a balance between communication dissemination and copyright interests by deciding Google never really hosts the images and thus cannot be a direct infringer); *see also* *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (defendant Corley claims “inline linking” is not trafficking or distributing files, but merely information as to where information is located).

of the video, the viewer is “not violating the copyright owner’s exclusive right . . . to reproduce the copyrighted work in copies.”¹⁴⁰ Judge Posner then made the analogy of a viewer of an infringing video to an individual who steals a copyrighted book from a library to read it.¹⁴¹ Both are “bad thing[s] to do . . . but it is not copyright infringement.”¹⁴²

Judge Posner specifically addressed the safe harbor provisions of § 512(d), but then dismissed their applicability rather quickly as “myVidster is not an infringer, at least in the form of copying or distributing copies of copyrighted work.”¹⁴³ The court’s response was that there was no evidence that myVidster encouraged the infringers to upload the videos.¹⁴⁴ If myVidster had invited or induced the infringers to upload what it knew to be copyrighted material, then the website would be liable for contributory infringement.¹⁴⁵ But the court found no evidence to this point. “myVidster knows that some of the videos bookmarked on its site infringe copyright, but that doesn’t make it a facilitator of copying.”¹⁴⁶ Viewers of the infringing material were not paying for the right to do so, and were “therefore not encouraging infringement.”¹⁴⁷ Judge Posner did posit that the DMCA does refer to linking users to locations with infringing material and the possibility that it could expand the definition of contributory copyright infringement.¹⁴⁸ But again, he granted that Congress likely intended to make the safe harbor provisions of § 512 “as capacious as possible” in order to help ISPs avoid undue liability.¹⁴⁹

C. Do They Qualify for the Information Location Tools Exemption?

In order to determine whether either Rojadirecta or myVidster qualify for the § 512(d) safe harbor exemption for information location tools, an ISP must first satisfy whether the infringing service meets its statutory definition. According to § 512(d) and supported by the corresponding second part of House Report NO. 105-551, an information location tool can be:

[A] directory of on-line sites or material, such as a search engine that

140. *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 757 (7th Cir. 2012) (quoting 17 U.S.C. § 106(1)(3)).

141. *Id.* at 758.

142. *Id.*

143. *Id.*

144. *See id.*

145. *See id.*; *See also Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 930 (2005).

146. *Flava Works, Inc.*, 689 F.3d at 759.

147. *Id.*

148. *Id.* at 758.

149. *Id.*

identifies pages by specified criteria; reference to other on-line material, such as a list of recommended sites; a pointer that stands for Internet locations or addresses; and hypertext link, which allows users to access material without entering its address.¹⁵⁰

Each of the websites in question meets the structural characteristics of an information location tool. Rojadirecta is largely two components, both which would qualify as an information location tool. The first is an online forum with message boards for users to register, comment, and share links to live sporting events.¹⁵¹ This directory or index provides user imputed lists of recommended sites. The second is the hotlinks section on the home page.¹⁵² As the name suggests, these are direct hypertext links to upcoming live events. Similarly, myVidster is a website structured with links to view videos.¹⁵³ The site is organized into “collections,” which are user homepages with bookmarked, in-line links to the desired videos. The website also has a search function, allowing the user to search across myVidster, within a given collection or for a particular user or group. Followers are listed on the right-hand side of the page.

But just because an ISP meets the structural requirements necessary to classify as an information location tool does not mean the ISPs can obtain safe harbor protection under § 512(d). myVidster, for instance, would more than likely maintain its § 512(d) safe harbor protection. The website is primarily a “user-community and it is not the website’s sole purpose to link to copyrighted material.”¹⁵⁴ Therefore, it may qualify for § 512(d) statutory immunity, provided of course, that it responds expeditiously to takedown requests sent to the ISP.¹⁵⁵ The website, while obviously recognizing that copyright infringement is possible on its site, has a structure that allows for copyright owners to not only search and find their work, but also to easily report infringement via a link at the bottom of the page.¹⁵⁶ Provided that myVidster either does not have actual knowledge of a specific infringement or fails to act in a timely manner to remove or disable the material, the ISP is likely protected from contributory copyright infringement.

myVidster must overcome two hurdles in order to feel confident in its safe

150. H.R. REP. NO. 105-551, pt. 2, p 56–57 (1998).

151. ROJADIRECTA, *Forum*, <http://forum.rojadirecta.es/forum.php> (last visited Feb. 27, 2014).

152. See ROJADIRECTA, *supra* note 1.

153. See MYVIDSTER, *supra* note 2.

154. Jason J. Lunardi, Note, *Guerilla Video: Potential Copyright Liability for Websites That Index Links to Unauthorized Streaming Content*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 1077, 1124 (2009).

155. *Id.* at 1125.

156. See MYVIDSTER, *Copyright Complaints*, <http://www.myvidster.com/docs/copyright> (last visited Feb. 27, 2014).

harbor protection. The first is the red flag knowledge provision of § 512(d)(1)(B). As was covered earlier, mere knowledge that infringement may be occurring is neither constructive nor specific enough to cause myVidster to become “subjectively aware of facts that would have made the specific infringement ‘objectively’ obvious to a reasonable person.”¹⁵⁷ The second hurdle, while not an emphasis of this Comment, is § 512(d)(2), the “financial benefit directly attributable to the infringing activity.”¹⁵⁸ Advertisements accompany each page where a video is displayed. Without the advertisements, myVidster’s financial structure would be radically different. Is the sale of the advertisements alongside videos, many of which are owned by the collection owner, enough to remove § 512(d) protection? That appears unlikely, especially considering YouTube’s success in overcoming § 512(c) challenges using a similar business model. Paired with any failures to implement takedown notices or red flag knowledge violations, myVidster could incur problems.

Rojadirecta, however, runs into more substantive issues in obtaining § 512(d) protection. Every link provided on their main page and many of the ones in the forums connect users to live copyrighted broadcasts of sporting events. Unlike myVidster, which has a substantial volume of in-line linking to either user’s personal videos or non-copyrighted media, the very intention of Rojadirecta is to provide free access to otherwise unavailable copyrighted broadcasts. If Rojadirecta were to receive and process every takedown it could receive, the site would likely be devoid of content. Indeed, not only would Rojadirecta fail the actual knowledge provision, but it would likely fail the red flag knowledge provisions as well. With enough recurring broadcasts, it would be objectively obvious to a reasonable person that Rojadirecta was aware of circumstances leading to contributory copyright infringement. Rojadirecta would almost certainly fail both the subjective actual knowledge component and the objective red flag knowledge provision.

Working in Rojadirecta’s favor, however, might be the lack of a “financial benefit directly attributable to the infringing activity.”¹⁵⁹ The website is a free forum devoid of advertising. The only corporate connections are links to “like” Rojadirecta on Facebook or to follow on Twitter.¹⁶⁰ In fact, at the bottom of the Rojadirecta home page, there is a Creative Commons icon, which informs the user of what is permissible.¹⁶¹ It requires that all works must be attributed,

157. *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012).

158. 17 U.S.C. § 512(d)(2) (2006).

159. *Id.*

160. *See* ROJADIRECTA, *supra* note 1.

161. *See Attribution-NonCommercial-NoDerivs*, CREATIVE COMMONS, <http://creativecommons.org/licenses/by-nc-nd/3.0/deed.en> (last visited Feb. 27, 2012). Of particular

not used for commercial purposes, and cannot be altered in any way.¹⁶² In short, Rojadirecta might be able to qualify for § 512 immunity, but it would have a much harder path towards qualifying as an information location tool. Rojadirecta represents a gray area in § 512(d) precisely because it fails the knowledge components, but also fails to satisfy other traditionally glaring infringement red flags like financial incentives. Should Rojadirecta have ever reached litigation, and not remained an ICE civil forfeiture case, it may have helped shape the outer of limits of § 512 exemptions.

CONCLUSION

§ 512 of the Digital Millennium Copyright Act intended to provide additional levels of certainty and protection to ISPs, in order to properly balance the rights of copyright owners without either party sacrificing freedom of speech. § 512(d) has the potential to provide too much latitude for websites and ISPs that allow users to provide links for third parties to stream infringing copyrightable material online. While the sites themselves may be shielded from contributory, direct, or vicarious infringement, the fact remains that the ISPs, while not willfully blind to their behavior of their users, should be cautious of the knowledge requirements set forth in § 512(c)-(d), especially those regarding actual knowledge and red flag knowledge, being subjectively aware of infringements objectively obvious to the reasonable person.

Given the current case law surrounding websites such as YouTube, a model resembling myVidster has a higher chance of being protected in court than the more obvious Rojadirecta. § 512(d), due to its actual and red flag knowledge provisions, gives a great deal of flexibility to ISPs in shielding themselves from copyright infringement. Nevertheless, as case law evolves on the matter, websites that, by their very nature, might potentially expose themselves to copyright infringement must stay alert to the ever-changing legal interpretations around them. While ISPs may have latitude using the safe harbor exemptions, copyright owners, particularly broadcast and recording studios with the financial wherewithal to pursue such claims, will surely continue trying to narrow these exemptions to better protect their copyrighted products.

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note, Rojadirecta's website features the "most restrictive of [the] six main licenses," allowing others the ability to download works and sharing them, provided users properly credit the source. This license also restricts the ability to change the downloaded works in any way or use them commercially. *About the Licenses*, CREATIVE COMMONS, <http://creativecommons.org/licenses/> (last visited Feb. 27, 2012).

162. *Id.*

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