I. INTRODUCTION

The nature of knowledge has frustrated philosophers and academics for millennia. In April 2012, the Second Circuit inspired further frustration in the legal community by adopting the principle that an actor’s knowledge of the high probability of a fact’s existence—coupled with steps of deliberate avoidance—will substitute for actual knowledge. The court indicated that the concept, termed “willful blindness,” may be used to determine whether Online Service Providers (“OSPs”) are shielded from copyright infringement liability under the Digital Millennium Copyright Act (the “DMCA”). According to the language of the statute’s Section 512(c) safe harbor, OSPs may lose immunity if they have either actual knowledge of instances of copyright infringement by their users or awareness of “facts or circumstances from which infringing activity is apparent.” This Note asks whether the willful blindness doctrine, shaped as it is by common law criminal and tort principles, fits within the special statutory scheme crafted by the DMCA in a way that is appropriate in the new digital millennium.

Three major considerations guide an examination of case law surrounding willful blindness under the DMCA. First, precedent establishes that any knowledge sufficient to defeat OSP immunity must be specific to the particular infringing content at issue. Second, any definition of knowledge must not be interpreted to impose a duty on OSPs to affirmatively monitor their sites. Finally, the balance of interests struck by the DMCA between content owners and OSPs in limiting liability for copyright infringement must be preserved in any application of willful blindness to the statutory provisions.

To resolve these concerns, this Note argues that willful blindness, to the extent that it is even possible to demonstrate under the specificity requirements of the DMCA, has already been accounted for in the language of the current statutory safe harbors, and that any arguments submitted by plaintiffs with regard to OSPs’ general policies of willful blindness must be considered in light of inducement liability, which falls outside the contemplation of Section 512(c). In sum, this Note challenges the current judicial and academic acceptance of the common law concept of willful blindness as a knowledge standard under the DMCA Section 512(c) safe harbor, and offers a means of reconciling the problem of willful blindness with the purposes of the statute.

Part I charts the evolution of the DMCA as a tool for reconciling the interests of early Internet pioneers and content owners and introduces relevant statutory provisions, such as the Section 512(c) knowledge standards, as they are now understood. Part II explores Viacom v. YouTube in the Second Circuit and Southern District of New York and identifies three complex considerations underlying any practical application of willful blindness to the safe harbor. Part IV introduces three possible uses of willful blindness under the DMCA, including the approaches taken in Aimster and Grokster. Finally, Part V proposes a dual role for the willful blindness doctrine—either as evidence attacking the threshold issue of safe harbor protection or as a trend supporting inducement liability on the part of an OSP.

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1 See Viacom Int’l, Inc. v. YouTube, Inc., 676 F.3d 19, 35 (2d Cir. 2012).
2 See Viacom, 676 F.3d at 35.
3 Section 512(c) of the DMCA provides immunity from secondary liability in certain circumstances for “user-generated content,” e.g., content that is stored on a network at the direction of a user.
5 Viacom, 676 F.3d at 19.
7 In re Aimster Copyright Litig., 334 F.3d 643 (7th Cir. 2003).