

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
AUSTIN OBODAI, *an individual and d/b/a*  
*HEPTAD*,

Plaintiff,

11 Civ. 2503 (PKC)

-against-

MEMORANDUM  
AND ORDER

DEMAND MEDIA, INC., *a Delaware*  
*Corporation*,

Defendant.

-----X  
P. KEVIN CASTEL, District Judge:

Plaintiff Austin Obodai<sup>1</sup> contends that the defendant violated federal copyright laws when a non-party unlawfully published plaintiff's copyrighted work on defendant's humor website, Cracked.com ("Cracked"). Discovery is now closed. Defendant Demand Media, Inc. moves for summary judgment in its favor, arguing that it falls within the safe harbor provision of the Digital Millennium Copyright Act (the "DMCA"), 17 U.S.C. § 512. Plaintiff moves for partial summary judgment, contending that defendant is ineligible for DMCA safe harbor.

For the reasons explained, the defendant has come forward with evidence that entitles it to safe harbor under the DMCA, and the plaintiff has not come forward with opposing evidence that would permit a reasonable juror to find in his favor. The defendant's motion for summary judgment is therefore granted, and the plaintiff's motion is denied.

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<sup>1</sup> Throughout his submissions, the plaintiff refers to himself as "HEPTAD," and identifies himself in the Amended Complaint's caption as "an individual and d/b/a HEPTAD." The Amended Complaint identifies HEPTAD as "an active sole proprietorship" transacting business in New York. (Am. Compl't ¶ 2.)

## DISCUSSION

In reviewing the defendant's motion for summary judgment, the following facts are either undisputed or described in the light most favorable to plaintiff as the non-movant. See, e.g., Costello v. City of Burlington, 632 F.3d 41, 45 (2d Cir. 2011).

Defendant Demand Media owns Cracked. (Def. 56.1 ¶ 1; Pl. 56.1 Resp. ¶ 1; Pl. 56.1 ¶ 2; Def. 56.1 Resp. ¶ 2.) Along with the site's own humorous content, registered users may post items to their personal profiles, and must confirm that they consent to the site's terms and conditions. (Def. 56.1 ¶¶ 2-3, 10; Pl. 56.1 Resp. ¶¶ 2-3, 10; Ng Dec. ¶¶ 2, 5-6.)

The defendant has a policy of terminating Cracked user accounts if it receives one or more complaints that a user has infringed an author's copyright. (Def. 56.1 ¶¶ 5-7; Pl. 56.1 Resp. ¶¶ 5-7; Ng Dec. Ex. C § 16.) Plaintiff does not dispute that defendant "responds expeditiously to notifications of claimed infringement on Cracked.com . . . ." (Def. 56.1 ¶ 12; Pl. 56.1 Resp. ¶ 12.)

Plaintiff asserts that a registered user with the screenname "socialway" published 32 items on his Cracked profile, and that the plaintiff owns the copyrights for these items. (Def. 56.1 ¶ 4; Pl. 56.1 Resp. ¶ 4.) The items have titles like "How to Pick a Credit Card Now," "How to Bank With Good Institutions," and "How to Become Awful at Math," and satirize traditional self-improvement advice. (Am. Compl't Ex. 1.) For purposes of this motion, it is undisputed that plaintiff owns the copyrights for these works, and that they were displayed with advertisements sold or placed by Cracked. (Pl. 56.1 ¶¶ 1-2; Def. 56.1 Resp. ¶¶ 1-2.) Prior to filing the Complaint in this action, plaintiff did not notify the defendant that "socialway" had posted plaintiff's original works on Cracked. (Def. 56.1 ¶ 13; Pl. 56.1 Resp. ¶ 13.)

The defendant has a designated copyright agent that receives and processes accusations of infringement, and publicly posts its agent's contact information under Cracked's Terms and Conditions. (Def. 56.1 ¶¶ 18-19; Pl. 56.1 Resp. ¶¶ 18-19; Ng Dec. Ex. C § 16.) Defendant removed the allegedly infringing works shortly after plaintiff commenced this action. (Def. 56.1 ¶ 15; Pl. 56.1 Resp. ¶ 15.) On April 27, 2011, defendant e-mailed "socialway" stating that Cracked had a policy of deleting the accounts of users who engaged in repeat copyright infringement. (Def. 56.1 ¶ 8; Pl. 56.1 Resp. ¶ 8.)

Defendant contends that administrators do not review or edit a user's profile, but plaintiff contends that the profiles are within Cracked's control, and that Cracked has placed limitations on uploadable content. (Def. 56.1 ¶ 11; Pl. 56.1 Resp. ¶ 11; Pl. 56.1 ¶ 5; Def. 56.1 Resp. ¶ 5.) Plaintiff also contends that Cracked profits from display advertisements, including advertisements displayed on users' profiles. (Pl. 56.1 Resp. ¶¶ 16-17.)

Plaintiff alleges that the defendant is liable for direct copyright infringement, vicarious copyright infringement and contributory copyright infringement. (Am. Compl't ¶¶ 50-55.)

After the motions were fully briefed, the Second Circuit issued its opinion in Viacom International, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012), which clarified numerous provisions of the DMCA. The parties thereafter submitted letter briefs regarding the Viacom decision, which the Court reviewed in connection with these motions.

#### SUMMARY JUDGMENT STANDARD

Summary judgment "shall" be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a), Fed. R. Civ. P. It is the initial burden of a movant on a summary judgment

motion to come forward with evidence on each material element of his claim or defense, sufficient to demonstrate that he or she is entitled to relief as a matter of law. Vt. Teddy Bear Co. v. 1-800 Beargram Co., 373 F.3d 241, 244 (2d Cir. 2004). In raising a triable issue of fact, the non-movant carries only “a limited burden of production,” but nevertheless “must ‘demonstrate more than some metaphysical doubt as to the material facts,’ and come forward with ‘specific facts showing that there is a genuine issue for trial.’” Powell v. Nat’l Bd. of Med. Exam’rs, 364 F.3d 79, 84 (2d Cir. 2004) (quoting Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067, 1072 (2d Cir. 1993)).

A fact is material if it “might affect the outcome of the suit under the governing law,” meaning that “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The Court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor, and may grant summary judgment only when no reasonable trier of fact could find in favor of the nonmoving party. Costello, 632 F.3d at 45; accord Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-88 (1986). In reviewing a motion for summary judgment, the court may scrutinize the record, and grant or deny summary judgment as the record warrants. Rule 56(c)(3). In the absence of any disputed material fact, summary judgment is appropriate. Rule 56(a).

“A party opposing summary judgment does not show the existence of a genuine issue of fact to be tried merely by making assertions that are conclusory or based on speculation.” Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 310 (2d Cir. 2008) (internal citation omitted); see also Anderson, 477 U.S. at 249-50 (summary judgment may be granted if the opposing evidence is “merely colorable” or “not significantly probative.”).

An opposing party's facts “must be material and of a substantial nature, not fanciful, frivolous, gauzy, spurious, irrelevant, gossamer inferences, conjectural, speculative, nor merely suspicions.” Contemporary Mission, Inc. v. U.S. Postal Serv., 648 F.2d 97, 107 n.14 (2d Cir. 1981) (quotation marks omitted).

A pro se party's submissions are to be read liberally, a requirement that is especially strong in the summary judgment context where claims are subject to a final dismissal. See Graham v. Lewinski, 848 F.2d 342, 344 (2d Cir. 1988) (“[S]pecial solicitude should be afforded pro se litigants generally, when confronted with motions for summary judgment.”). However, proceeding pro se does not relieve a litigant from the requirements of summary judgment. A pro se plaintiff's “bald assertion, completely unsupported by evidence,” does not satisfy his burden as the non-movant. See Carey v. Crescenzi, 923 F.2d 18, 21 (2d Cir. 1991).

## DISCUSSION

To qualify for safe harbor under the DMCA, “a party must meet a set of threshold criteria.” Viacom, 676 F.3d at 27. First, a defendant must be a service provider, meaning that it acts as “a provider of online services or network access, or the operator of facilities therefor . . . .” 17 U.S.C. § 512(k)(1)(B). Second, the defendant must establish a “repeat infringer” policy to facilitate termination of infringing accounts, and, third, must not obstruct “standard technical measures” that may be “used by copyright owners to identify or protect copyrighted works . . . .” 17 U.S.C. §§ 512(i).

Once a party establishes that it can satisfy these threshold requirements, “a service provider must satisfy the requirements of a particular safe harbor.” Viacom, 676 F.3d at 27. In this case, as in Viacom, the defendant seeks safe harbor under 17 U.S.C. § 512(c), “which covers infringement claims that arise ‘by reason of the storage at the direction of a user of material that

resides on a system or network controlled or operated by or for the service provider.” Id. at 27 (quoting 17 U.S.C. § 512(c)(1)).

In reviewing the defendant’s motion for summary judgment, the Court first discusses the DMCA’s threshold requirements, and then considers defendant’s contention that it is entitled to safe harbor by reason of the storage provision under section 512(c).

I. DEFENDANT SATISFIES THE THRESHOLD CRITERIA FOR DMCA SAFE HARBOR.

A. Defendant Is a Service Provider.

The DMCA defines a “service provider” as follows:

(1) Service provider. – (A) As used in subsection (a), the term “service provider” means 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 as sent or received.

(B) As used in this section, other than subsection (a), the term “service provider” means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

17 U.S.C. § 512(k)(1). “The DMCA’s definition of ‘service provider’ is intended to encompass a broad set of Internet entities.” Wolk v. Kodak Imaging Network, Inc., \_\_ F. Supp. 2d \_\_, 2012 WL 11270, at \*17 (S.D.N.Y. Jan 3, 2012) (collecting cases); see also Viacom, 676 F.3d at 39 (discussing breadth of “service provider” definition under section 512(k)(1)(B)). A service provider “offers a site that hosts and allows online sharing . . . at the direction of users . . . .” Wolk, 2012 WL 11270, at \*17. Like the defendants in Wolk and Viacom, defendant’s site permits users to share content online. (Def. 56.1 ¶ 2.) While plaintiff notes that the defendant and its website publish content (Pl. 56.1 Resp. ¶ 2), and argues that this weighs against classification as a service provider, Viacom concluded that a service provider under section

512(k)(1)(B) may provide a wide range of services. 676 F.3d at 39-40. This included posting and syndicating videos that could be accessed by third-party viewers. Id.

Because the defendant operates a website that permits users to post and share materials, it falls within the broad definition of a service provider under section 512(k)(1)(B). Plaintiff has not set forth evidence in opposition from which a reasonable juror could conclude otherwise.

B. Defendant Maintains a Repeat-Infringer Policy.

To be eligible for safe harbor, a defendant also must adopt and enforce an anti-infringement policy:

The limitations on liability established by this section shall apply to a service provider only if the service provider –

(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers.

17 U.S.C. § 512(i)(1); see also Wolk, 2012 WL 11270, at \*17 (to satisfy section 512(i), “a service provider must (i) adopt a policy that provides for the termination of service access for repeat copyright infringers; (ii) inform users of the service policy; and (iii) implement the policy in a reasonable manner.”) (collecting cases). “This requirement is a prerequisite for every DMCA safe harbor and is a fundamental safeguard for copyright owners.” Capitol Records, Inc. v. MP3tunes, LLC, 821 F. Supp. 2d 627, 637 (S.D.N.Y. 2011).

It is undisputed that the defendant has adopted and implemented a policy to terminate the accounts of subscribers who are subject to one or more copyright infringement complaints. (Def. 56.1 ¶¶ 5-6; Pl. 56.1 Resp. ¶¶ 5-6.) Section 16 of the Terms and Conditions posted on Cracked, which is headed “Copyright Infringement/DMCA,” states that Cracked may

terminate “any Account or user for repeated infringement of intellectual property rights, including copyrights, and we reserve the right to terminate an Account or user for even one instance of infringement.” (Def. 56.1 ¶ 7; Pl. 56.1 Resp. ¶ 7; Ng Dec. Ex. C § 16.) The same section identifies both an e-mail address and postal address through which to contact defendant’s agent in the event that a copyright owner identifies an infringing use, and sets forth information that should be contained in any complaint. (Ng Dec. Ex. C § 16.) This is sufficient to satisfy the repeat-infringer requirement. See Wolk, 2012 WL 11270, at \*17 (“having adopted, informed users of and reasonably implemented a policy of terminating users who repeatedly infringe copyrights,” the defendant satisfied section 512(i)(1)); Capitol Records, 821 F. Supp. 2d at 637 (requirement met “where service providers terminated the accounts of users who had been warned yet continued to upload material that had been the subject of a takedown notice.”).

To the extent that the plaintiff contests the existence of Cracked’s policies, his arguments are limited to whether the policies applied to “non-storage activities” and rights after a user uploaded materials to Cracked. (Pl. 56.1 Resp. ¶¶ 5-7.) These points are more properly raised in relation to the specific safe harbor provided by section 512(c), which is discussed below.

C. Defendant Accommodates and Does Not Interfere with Standard  
Technical Measures.

A party is eligible for DMCA safe harbor only if it “accommodates and does not interfere with standard technical measures.” 17 U.S.C. § 512(i)(1)(B). “[T]he term ‘standard technical measures’ means technical measures that are used by copyright owners to identify or protect copyrighted works . . . .” 17 U.S.C. § 512(i)(2). The measures must be developed “pursuant to a broad consensus of copyright owners and services providers in an open, fair, voluntary process,” be “available to any person on reasonable and nondiscriminatory terms,” and



not “impose substantial costs” on service providers. 17 U.S.C. § 512(i)(2)(A-C). “Refusing to accommodate or implement a ‘standard technical measure’ exposes a service provider to liability . . . .” Viacom, 676 F.3d at 41. An example of a party’s failure to comply with standard technical measures may include conduct that “advises or encourages” users to conceal a work’s copyrighted status. Wolk, 2012 WL 11270, at \*18 (in dictum).

To the extent that plaintiff contests this issue, he argues that Cracked distributed copyrighted texts and entered into some form of a distribution agreement. While perhaps probative of other relevant considerations, this is not evidence of interference with standard technical measures under the DMCA. Indeed, based on the record, plaintiff himself readily identified the allegedly infringing posts by “socialway.”

Defendant has set forth evidence satisfying the third threshold criterion for DMCA safe harbor, and plaintiff has not come forward with evidence that would permit a reasonable juror to conclude otherwise.

## II. DEFENDANT SATISFIES THE CRITERIA OF SECTION 512(c).

Having met the threshold criteria for DMCA safe harbor, the defendant must next establish that it satisfies a particular safe-harbor provision. Viacom, 676 F.3d at 27. Defendant argues that it falls within the protection section 512(c), which states:

- (1) In general. -- A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider –
  - (A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

17 U.S.C. § 512(c)(1). Section 512(c)(2) requires the designation of an agent to receive infringement claims, and section 512(c)(3) requires that a written notification of infringement contain information sufficient for the service provider to identify the allegedly infringing items.

A. Defendant Did Not Have Knowledge of the Infringing Material, and Expeditiously Removed the Infringing Material When Notified.

1. The Record Does Not Reflect Actual or “Red Flag” Knowledge by the Defendant.

In Viacom, the Second Circuit discussed in detail the knowledge requirement of section 512(c)(1)(A). 676 F.3d at 30-35. Knowledge may exist based on an actual, “subjective belief” of infringement under section 512(c)(1)(A)(i). Id. at 31. Alternatively, a service provider may have “‘red flag’ knowledge” under section 512(c)(1)(A)(ii), which “turns on whether the provider was subjectively aware of facts that would have made the specific infringement ‘objectively’ obvious to a reasonable person.” Id. “The red flag provision, because it incorporates an objective standard, is not swallowed up by the actual knowledge provision under our construction of the § 512(c) safe harbor. Both provisions do independent work, and both apply only to specific instances of infringement.” Id.; see also Capitol Records, 821 F. Supp. 2d

at 643-44 (“These provisions are designed to deny safe harbor protection to internet service providers operating or linking to pirate sites whose illegal purpose is obvious to a reasonable person.”). In certain instances, knowledge may be attributed through a service provider’s “willful blindness” to infringement. Viacom, 676 F.3d at 34-35. As to section 512(c)(1)(A)(iii), “the nature of the removal obligation itself contemplates knowledge or awareness of specific infringing material, because expeditious removal is possible only if the service provider knows with particularity which items to remove.” Id. at 30.

There is no evidence that, prior to the commencement of this case, the defendants had either actual knowledge or “red flag” knowledge that “socialway” published plaintiff’s original work on Cracked. 17 U.S.C. § 512(c)(1)(A)(i-ii). In opposition, plaintiff directs the Court to no evidence supporting an inference that the defendants had a basis to know that the “socialway” postings were copyrighted. By contrast, in Viacom, internal e-mails and reports reflected awareness by YouTube that specific copyrighted works – such as cable television programs and English soccer broadcasts – had been published on YouTube. 676 F.3d at 32-34. Provided that these clips were challenged in the litigation, they raised triable issues as to defendant’s knowledge infringement and the applicability of safe harbor. Id. at 34.

Plaintiff’s arguments in opposition would not permit a reasonable juror to conclude that defendant had knowledge that “socialway” published plaintiff’s copyrighted material. Plaintiff asserts knowledge of infringement based on keyword-targeted advertisements that appeared with the “socialway” posts. (Pl. Opp. Mem. at 5-6.) Even assuming arguendo that the ads were not automatically generated, the existence of such ads does not reflect awareness that the postings had infringed. Similarly, plaintiff argues that Cracked used a software tool called Tynt in order to measure search-engine traffic to specific pages. (Pl. Supp. Mem. at 5-8.)

Such a tool does not support an inference that defendant was aware of infringement, and instead goes only toward defendant's knowledge as to visitors' pageviews. Plaintiff also contends that defendant has previously "received a considerable number of DMCA takedown notices from copyright holders." (Pl. Supp. Mem. at 7.) But Viacom concluded that safe harbor might not apply if the defendant had knowledge that the specific works in dispute were infringing, not knowledge or suspicion of broader infringement. 676 F.3d at 32-34.

Based on the evidence at summary judgment, defendant did not have actual knowledge or "red flag" knowledge of infringing conduct prior to commencement of this action.

2. Under Section 512(c)(1)(A)(iii), Defendant Expediently Removed the Copyrighted Works Upon Plaintiff's Notice of Infringement.

Based on the summary judgment record, defendant's conduct was consistent with the expeditious-removal requirement of section 512(c)(1)(A)(iii). The Complaint was filed on April 5, 2011. (Docket # 1.) On April 26, 2011, the Court directed the plaintiff to serve the defendant within 120 days. (Docket # 6.) A docket notation entered on May 6 indicates that the defendant was served on May 3, 2011.

On April 27, 2011 – after the plaintiff filed his Complaint, but before he served the defendant – the defendant's copyright agent e-mailed "socialway" informing him of the infringement claim and stating that his profile on Cracked would be deleted. (Mitchell Dec. Ex.

B.) The e-mail states in relevant part:

We recently received a written complaint regarding online material associated with your profile page . . . . Specifically, the Complaint alleges that content on your profile page infringes the copyrights of a third person. As a result, the content has been removed from Cracked.com. . . . Please be advised that Cracked has a policy of deleting the accounts of repeat copyright infringers. Please do not post creative works in violation of third party rights.

(Mitchell Dec. Ex. B.)

This evidence establishes that the defendant expeditiously removed the infringing works upon being notified of their publication. As noted, the plaintiff did not alert defendant to the infringing posts prior to commencing this action. (Def. 56.1 ¶ 13; Pl. 56.1 Resp. ¶ 13.) The defendant removed the posts even before it was served with process. Based on the evidence at summary judgment, upon obtaining “knowledge or awareness” of infringement, the defendant “act[ed] expeditiously to remove, or disable access to, the material.” 17 U.S.C. § 512(c)(1)(A)(iii). Plaintiff has not set forth evidence in opposition that would permit a reasonable juror to conclude otherwise.

3. The Defendant Provides “Storage” of User Content, as the Word Is Used in Section 512(c).

Separately, plaintiff argues that as a matter of statutory interpretation, the defendant is ineligible for safe harbor under section 512(c) because it does not provide “storage” of user content. (Pl. Opp. Mem. at 9-12.) Plaintiff argues that “unprotected syndication or distribution and display acts are not tantamount to the protected storage of 512(c) . . . .” (Pl. Opp. Mem. at 9.)

However, Viacom rejected this narrower definition of “storage,” noting that “storage” was “not limited to merely storing material,” and is “meant to cover more than mere electronic storage lockers.” 676 F.3d at 39 (quotation marks omitted). “The relevant case law makes clear that the § 512(c) safe harbor extends to software functions performed for the purpose of facilitating access to user-stored material.” Id. (quotation marks omitted). In Viacom, “storage” extended to playing shareable videos on the internet, and directing users to related videos. Id. at 39-40; cf. Wolk, 2012 WL 11270 (applying section 512(c) to photo-sharing website). Here, Cracked permitted users to post and share content, in the same manner as

Viacom and Wolk, and therefore enabled “storage at the direction of a user” as that phrase is used under section 512(c)(1).

B. The Record Contains No Evidence that Defendant Had the “Right and Ability to Control” User Posts under the DMCA.

To fall within its safe harbor, the DMCA requires that a defendant “does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.” 17 U.S.C. § 512(c)(1)(B) (emphasis added).

“[T]he ‘right and ability to control’ infringing activity under § 512(c)(1)(B) ‘requires something more than the ability to remove or block access to materials posted on a service provider’s website.’” Viacom, 676 F.3d at 38 (quoting Capitol Records, 821 F. Supp. 2d at 645). Viacom noted that only one court had identified a content-control policy that precluded safe harbor protection, in which a service provider enforced strict guidelines as to layout, appearance and content, and refused access to users who ran afoul of site standards. Id. at 38 (citing Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146 (C.D. Cal. 2002)). By way of another example, active inducement to copyright infringement “might also rise to the level of control under § 512(c)(1)(B).” Id. (citing Metro-Goldwyn-Mayer Studios, Inc. v. Groksters, Ltd., 545 U.S. 913 (2005)). “Both of these examples involve a service provider exerting substantial influence on the activities of users, without necessarily – or even frequently – acquiring knowledge of specific infringing activity.” Id.; see also Wolk, 2012 WL 11270, at \*21 (“[S]uch a right and ability to control must take the form of prescreening content, rendering extensive advice to users regarding content and editing user content.”).

No evidence supports a conclusion that the defendant exerted such close control over content posted to Cracked. Plaintiff again cites to the defendant’s use of Tynt to monitor

Cracked traffic, but, as discussed, Tynt reports only on site traffic, and not the content of user postings. (Pl. Supp. Mem. at 10.) Plaintiff notes that Cracked ran ads alongside the infringing content, thereby earning the defendant revenue every time the infringing ads were viewed. (Pl. Supp. Mem. at 10.) However, neither site-traffic monitoring nor third-party advertisements relate to Cracked's content control. In addition, while it is undisputed that defendant posted ads alongside the infringing works, Viacom rejected the proposition that financial benefit alone is sufficient to remove a defendant from safe harbor. 676 F.3d at 37.

Based on the evidence at summary judgment, no reasonable jury could conclude that defendant exercised control over user submissions sufficient to remove it from the safe harbor provision of section 512(c)(1)(B).

C. Upon Notification of Infringement, the Defendant Expeditiously Removed the Postings.

As previously discussed in relation to section 512(c)(1)(A)(iii), following the commencement of this action, the defendant removed the infringing posts and notified "socialway" that the infringing postings had violated Cracked policies. For those same reasons, based on the summary judgment record, the defendant's conduct complied with the requirements of 17 U.S.C. § 512(c)(1)(C).

D. The Defendant Publicly Lists Contact Information for Its Copyright Agent.

Section 512(c)(2) states that a service provider falls within safe harbor "only if [it] has designated an agent to receive notifications of claimed infringement," and requires the service provider to post relevant contact information. As part of Cracked's "Terms and Conditions," the defendant lists the physical and e-mail addresses of its copyright agent, and sets

forth information that a copyright holder should forward if it believes that Cracked contains infringing content. (Ng Dec. Ex. C § 16.) This satisfies section 512(c)(2).

III. OTHER ISSUES RAISED BY THE PLAINTIFF ARE INSUFFICIENT TO DEFEAT DEFENDANT'S SUMMARY JUDGMENT MOTION.

Plaintiff also contends that he is entitled to summary judgment on grounds of vicarious liability. (Pl. Supp. Mem. at 18.) However, Viacom stated that the DMCA "control" prong of 17 U.S.C. § 512(c)(1)(B) "'dictates' a departure from the common law vicarious liability standard," and instead premises liability on a service provider "exerting substantial influence on the activities of users," as discussed above. See 676 F.3d at 37-38. Therefore, for the reasons previously discussed, plaintiff's vicarious liability argument does not defeat defendant's summary judgment motion.

Plaintiff also argues that defendant is liable on grounds of willful blindness, and argues that defendant designated a copyright agent as a means of ensuring its willful blindness to infringement. (Pl. Opp. Mem. at 6-7.) While Viacom recognizes willful blindness as a basis to deny DMCA safe harbor, 676 F.3d at 35, section 512(c)(2) expressly requires the appointment of a copyright agent and publication of its contact information. Defendant's use of a copyright agent is not, in itself, evidence that supports a finding of willful blindness.

Plaintiff notes that in a feature article titled "The 8 Most Bizarre Patron Saints," a Cracked staff writer published a derivative work based on a copyrighted "'candle label' without receiving authorization from the owner." (Pl. Supp. Mem. at 8-9.) Assuming the truth of plaintiff's characterizations, which defendant disputes (Pargin Dec. ¶¶ 4-6), this incident is not material to plaintiff's infringement claims or DMCA safe harbor, because they do not go to this plaintiff's copyrighted works. See Viacom, 676 F.3d at 34 (knowledge of infringement under section 512(c)(1)(A) is relevant when it involves postings that are subject to the litigation).




Finally, the Court reviewed plaintiff's evidentiary objections. (Docket # 40.) To the extent that defendant has set forth legal conclusions as statements of fact, these statements have not been construed as evidence in defendant's favor on this motion. Relatedly, as requested by plaintiff, and for the purposes of this motion only, the Court has taken judicial notice of certain materials that plaintiff submitted on reply. (Docket # 54.)

CONCLUSION

For the foregoing reasons, the defendant has set forth evidence that entitles it to safe harbor protection under the DMCA, and the plaintiff has not come forward with evidence that would permit a reasonable juror rule in his favor. The defendant's motion is GRANTED (Docket # 28) and the plaintiff's motion is DENIED (Docket # 26).

The Clerk is directed to terminate the motions and to enter judgment for the defendant.

SO ORDERED.

  
\_\_\_\_\_  
P. Kevin Castel  
United States District Judge

Dated: New York, New York  
June 12, 2012