



**CPTWG MEETING**

**#127**

**April 25, 2012**

*Litigation/Legislative Update*

**Jim Burger**

[jburger@dowlohnes.com](mailto:jburger@dowlohnes.com)



# Litigation

- *Viacom v. YouTube*
- *ABC v. Aereo & WNET v. Aereo*
- *Twentieth Century Fox Film Corp. v. Lime Wire LLC*
- *Kirtsaeng v. John Wiley & Sons, Inc.*
- *Flava Works, Inc. v. Gunter*
- *Megaupload*

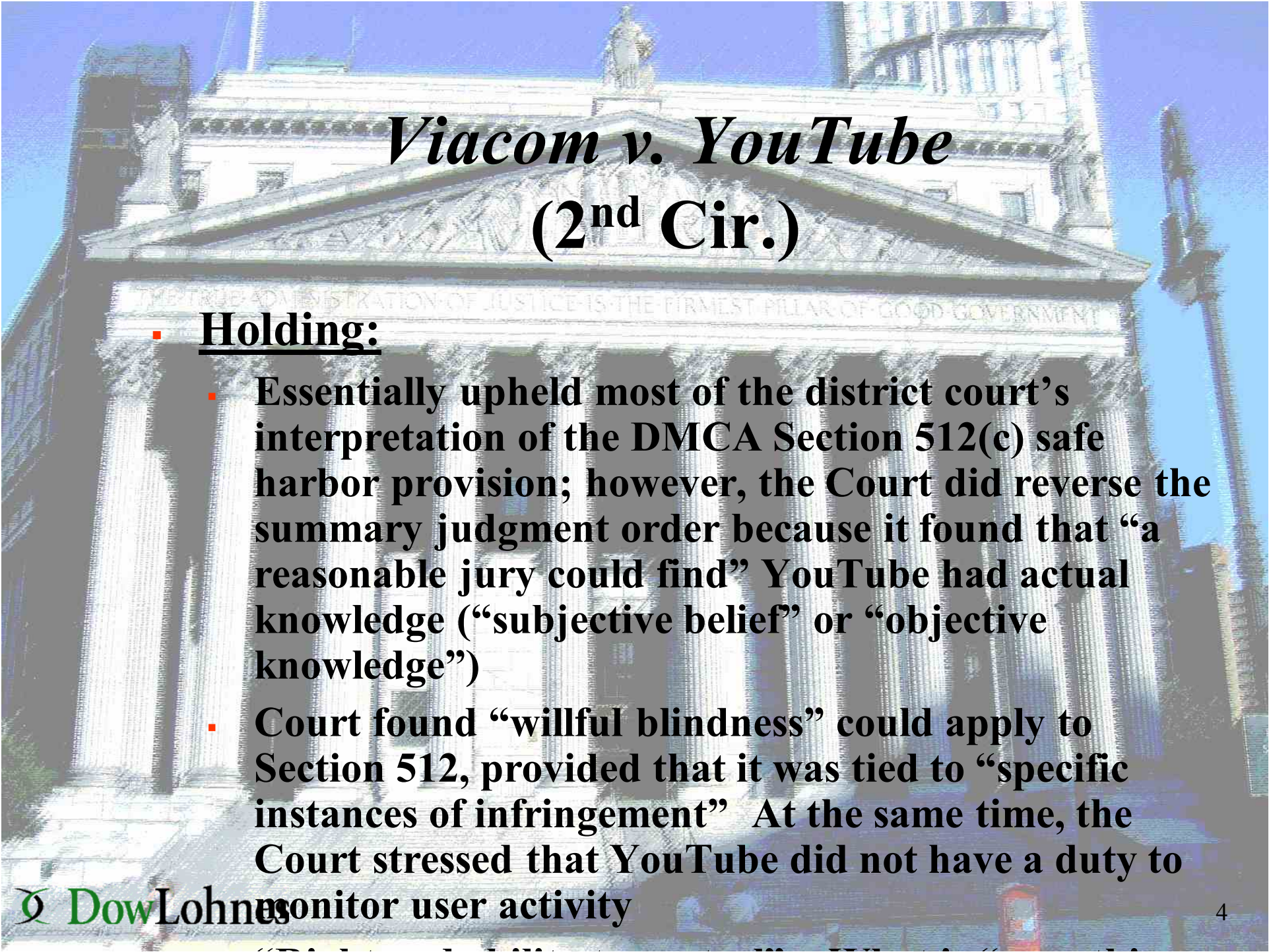




# *Viacom v. YouTube* (2<sup>d</sup> Cir) – Background

- **2007: Viacom sued YouTube, seeking more than \$1 billion in damages**
- **June 2010: SDNY grants Google summary judgment ruling DMCA safe harbor protected Google**
  - **Mere knowledge of prevalence of infringing material not enough to remove service provider from safe harbor**
  - **YouTube did not go beyond providing “storage” at the direction of users**
  - **YouTube did not obtain a financial benefit directly attributable to infringing activity that it had the right and ability to control**
- **December 2010: Viacom filed appeal with Second Circuit**





# *Viacom v. YouTube* (2<sup>nd</sup> Cir.)

## ▪ Holding:

- Essentially upheld most of the district court's interpretation of the DMCA Section 512(c) safe harbor provision; however, the Court did reverse the summary judgment order because it found that "a reasonable jury could find" YouTube had actual knowledge ("subjective belief" or "objective knowledge")
- Court found "willful blindness" could apply to Section 512, provided that it was tied to "specific instances of infringement" At the same time, the Court stressed that YouTube did not have a duty to monitor user activity



# *ABC v. Aereo & WNET v. Aereo* (SDNY)

- Copyright infringement lawsuits filed by the major networks and other NYC broadcasters against Aereo, a Barry Diller-backed over-the-top Web video subscription service
- Aereo's answer and counterclaim in the suit relies heavily on the *Sony* and *Cablevision* decisions
- The decision may rest on more details about what happens to the signal from the antenna to the DVR, as well as how the antenna actually works
- Injunction hearing expected in late May 2012
- Now NimbleTV?





# *Twentieth Century Fox Film Corp. v. Lime Wire LLC (SDNY)*

- Copyright infringement lawsuit filed by studios against the file-sharing service
- LimeWire previously paid \$105 million to settle similar claims by the record labels
- Complaint cites the federal judge's May 2010 summary judgment order in the music case, which determined that LimeWire “intentionally encouraged direct infringement” by LimeWire users and that the LimeWire software was used “overwhelmingly for infringement”





# *Certiorari granted in **Kirtsaeng v. John Wiley & Sons, Inc.***

- Question Presented:

- Whether first sale doctrine only applies to works manufactured in the United States
- Decision could have important implications for the large and growing markets in discount and Internet sales
- eBay was among the outside parties urging SCOTUS to hear the case and decide it in Kirtsaeng's favor



# *Flava Works, Inc. v. Gunter* (N. II)

## Facts:

- Case involves an adult studio plaintiff and a user-submitted video links/video embedding site
- Flava Works complained that Gunter did nothing to stop repeat posters of infringing content

## Ruling:

- In granting the preliminary injunction, Judge John F. Grady wrote, “[Gunter] removes videos from myVidster that are listed in DMCA notices, but goes no further . . . It is true that service providers are not required to police their sites for infringement, but they are required to investigate and respond to notices of infringement – with respect to content and repeat infringers”

Currently pending before the 7<sup>th</sup> Circuit



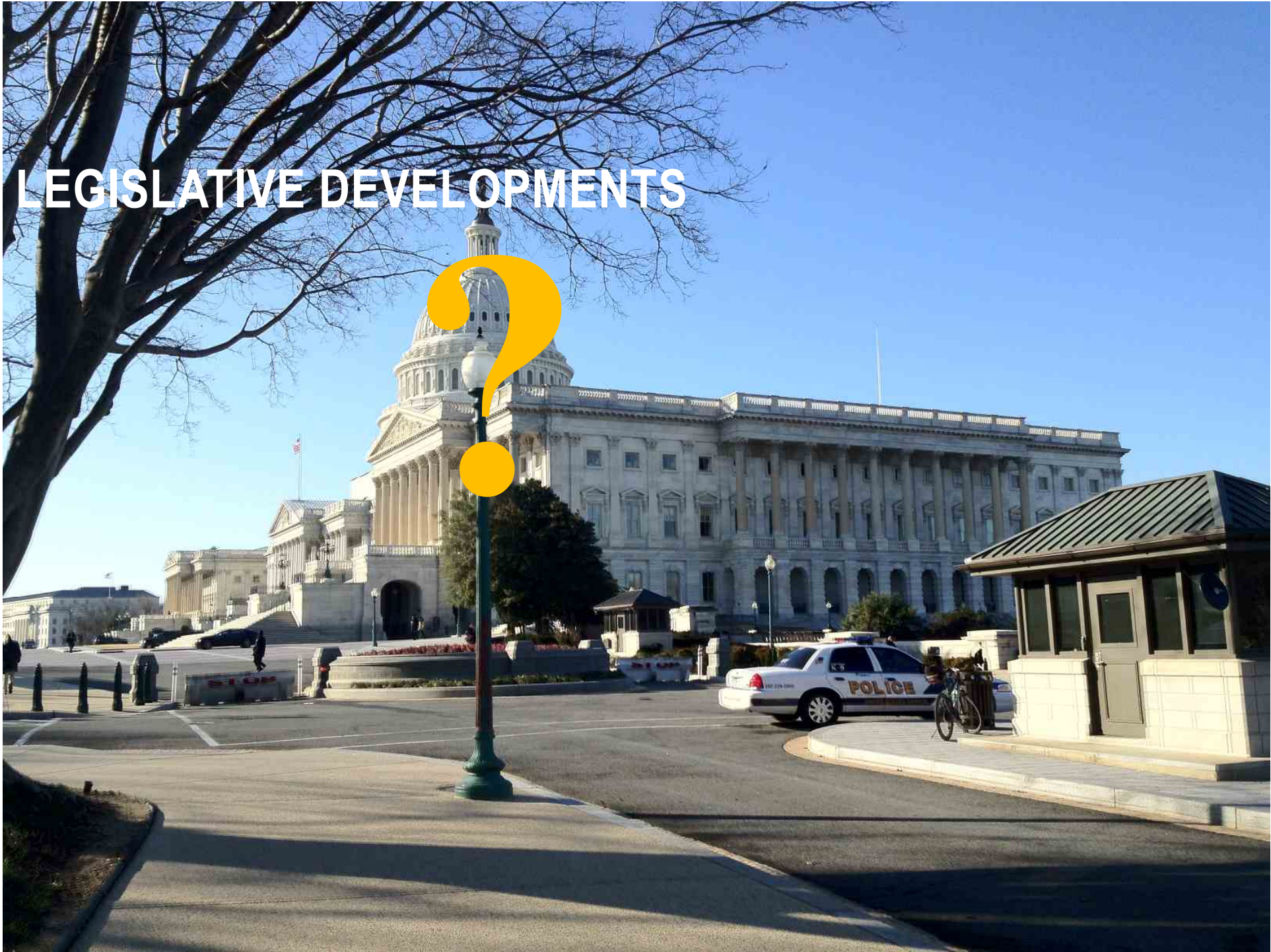
## 3<sup>RD</sup> PARTIES & MEGAUPLOAD



- Goodwin (EFF) – allows users (with password) to access
- Carpathia – pay or re-provision
- DOJ – we're done
- MPAA – don't let Megaupload access
- Defense – preserve and allow access
- 25 Petabytes (a Petabyte =13.3 years of HDTV or 50 LOCs), 1,103 servers, 66 Million users
- Judge – Parties figure work it out or I will decide



# LEGISLATIVE DEVELOPMENTS





# International

## **Australia: A hotbed of copyright activity**

### ***SingTel Optus Pty Ltd v. National Rugby League Investments Pty Ltd (No. 2)***

Australian court ruled that use of the TV Now service, which allows Optus mobile network subscribers to stream recorded television broadcasts to their PCs or mobile phones within a few minutes after the original broadcast, is permitted “time-shifting” under Australia’s Copyright Act

### ***Roadshow Films Pty Ltd v. iiNet***

The High Court of Australia dismissed the content industry’s appeal and held that an Internet service provider, iiNet, was not liable for authorizing the copyright infringements of its users

## **AG of Australia Copyright Inquiry**

The government of Australia released for public comment draft “Terms of Reference” as part of the Australian Law Reform Commission’s review of the country’s Copyright Act to determine “whether the exceptions in the Federal Copyright Act are adequate and appropriate in the digital environment”

The comment period closes April 27, 2012 and the ALRC is to issue a report no later than November 30, 2013





# International

## *GEMA v. YouTube*

German court rules that YouTube must install filters to prevent users uploading music clips whose rights are held by royalty collection group, GEMA

## Significant push for new copyright exceptions in Europe

Dutch government organized conference: "Towards Flexible Copyright," an initiative to introduce a more flexible system of copyright exceptions (like US fair use) taking into account new technology and enabling greater leeway for creative remixes of protected content

Similar developments occurring across the EU

## French Presidential Race and HADOPI

Francois Hollande's presidential campaign announced if elected, he will "replace" HADOPI, France's controversial three-strikes anti-piracy law