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by Andrew M. White and Joshua M. Keesan

Copyright Capabilities

Courts continue to be challenged to reconcile the Copyright Act to new technologies

As consumers shift to experiencing television, movies, and other entertainment through Internet-based delivery systems, broadcasters, studios, and other traditional content providers struggle to preserve their intellectual property rights (and income streams) under legal frameworks that were devised in an earlier, less technological environment. The proliferation of new content distribution technologies has also led to an array of new methods to misappropriate works without obtaining permission from the owners of the intellectual property in those works. When old laws are interpreted with respect to technology that was unfore-

seen when the laws were enacted, how can content producers, distributors, and lawyers understand what is permissible?

Recent litigation continues to demonstrate judicial efforts to reconcile longstanding legal principles with changing technologies. Two areas of acute interest in this conflict between copyright protection and technological innovation are 1) Internet services that allow users to upload and share video clips without permission from copyright owners, and 2) an Internet service that allows its customers to view broadcast television programs over the Internet, even though the program owners did not grant the service provider permission to copy or transmit the programs. The first con-

flict was addressed under a particular safe harbor provision of the Digital Millennium Copyright Act (DMCA) in *Viacom v. YouTube*. The second conflict is found in *American Broadcasting Companies, Inc. v. Aereo, Inc.* The implications of these cases for content owners, potential infringers, and service providers are significant.

In 1998, recognizing that existing copyright law was in need of an update for the

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digital age, Congress passed the DMCA.¹ The act includes Title II, the Online Copyright Infringement Liability Limitation Act,² the purpose of which is “to detect and deal with copyright infringements that take place in the digital networked environment.” Rather than rewrite copyright law in its entirety, Congress created safe harbors to exclude liability for certain common activities of service providers.³ The four safe harbors under Section 512 of the act are for 1) transitory communications, 2) system caching, 3) storage of information on systems or networks at the direction of users, and 4) information location tools.⁴ Notably, these safe harbors apply only “if the provider is found to be liable *under existing principles of law*.”⁵

The third safe harbor deals with information uploaded by users onto systems or networks and is only available if the service provider 1) does not have actual knowledge that the material or an activity using the material on the system or network is infringing, 2) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent, or 3) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material.⁶

Although securing adequate rights and avoiding intellectual property disputes can be a tricky business even under more traditional content delivery models, things get trickier in the case of the many Internet services (such as YouTube, Vimeo, and others) that allow users to upload and share content of their own. In these situations, the safe harbor is important in defending against infringement claims. Although video sharing sites have proven to be remarkably popular, user-uploaded content raises a number of copyright concerns for rights holders.

Viacom v. YouTube

The challenges of interpreting the requirements of the safe harbor found in Section 512(c) came to a head in *Viacom International, Inc. v. YouTube, Inc.*⁷ The case, which was merged with a case brought by various film studios, music publishers, and sports leagues, sought substantial damages for the alleged public performance, display, and reproduction of approximately 79,000 clips appearing on YouTube between 2005 and 2008.⁸

In 2010, the U.S. District Court for the Southern District of New York granted summary judgment to YouTube and its parent company Google, finding that YouTube was entitled to safe harbor protection. In reaching this determination, the critical question for the district court was whether the safe harbor’s phrases “actual knowledge that the material or an activity using the material...is

infringing” and “facts or circumstances from which infringing activity is apparent” should be construed to mean a general awareness that infringements are widespread and common, or instead to mean actual or constructive knowledge of “specific and identifiable infringements of individual items.”⁹ The district court concluded that the latter approach was proper.¹⁰

Part of the rationale for this decision was that, unlike most statutory schemes, the DMCA places the burden of policing copyright infringement on the copyright owners rather than on the defendant.¹¹ Thus, the DMCA safe harbors do not condition protection on whether the service provider actively monitors its service or affirmatively seeks facts indicating infringing activity. What matters is what the service provider does after learning about infringing material.¹² The district court concluded that, based on the record on summary judgment, it was unconvinced that when YouTube was given takedown notices by Viacom and others, it quickly removed the potentially infringing material. As a result, YouTube was thus protected from liability.¹³

The plaintiffs appealed immediately, arguing that if affirmed, the district court’s interpretation of Section 512(c) “would radically transform the functioning of the copyright system and severely impair, if not completely destroy, the value of many copyrighted creations.”¹⁴ Rather than looking to specific instances of actual knowledge of infringement, the plaintiffs argued that under the DMCA, Internet service providers “that not only are aware of pervasive copyright infringement, but actively participate in and profit from it, enjoy no immunity from the copyright laws and may be held to account for their theft of artists’ creations.”¹⁵

The Second Circuit’s Opinion

In April 2012, the Second Circuit issued its unanimous opinion.¹⁶ On the central issue of the requirements of DMCA safe harbor found in Section 512(c)(1)(A), the Second Circuit noted that the act offers two scenarios—one subjective and one objective. The court held that the reference in Section 512(c)(1)(A)(i) to a service provider’s “actual knowledge that the material or an activity using the material on the system or network is infringing,” implicates the defendant’s subjective belief—in other words, liability turns on “whether the provider actually or ‘subjectively’ knew of specific infringement.”¹⁷ On the other hand, under Section 512(c)(1)(A)(ii), which provides a safe harbor for a provider that “in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent,” liability turns on “whether the provider was subjectively

aware of facts that would have made the specific infringement ‘objectively’ obvious to a reasonable person.”¹⁸ Thus, the Second Circuit affirmed the lower court’s ruling that “actual knowledge or awareness of facts or circumstances that indicate specific and identifiable instances of infringement will disqualify a service provider from the safe harbor.”¹⁹

Despite this affirmation of the district court’s interpretation of the law, the Second Circuit concluded that in light of the facts presented, summary judgment was premature. For example, the court acknowledged various internal e-mail messages among YouTube principals that appeared to acknowledge the presence of illegal and infringing content on the site.²⁰ Based on those messages, a reasonable juror could conclude that YouTube “had actual knowledge of specific infringing activity, or was at least aware of facts or circumstances from which specific infringing activity was apparent.”²¹

The plaintiffs also argued that, regardless of Section 512(c)’s requirements, the evidence showed that YouTube was “willfully blind” to specific infringing activity, a concept from common law.²² The Second Circuit held that because the DMCA does not abrogate the doctrine of willful blindness, it could be applied, in appropriate circumstances, to establish a defendant’s knowledge or awareness of specific instances of copyright infringement.²³ The court remanded to allow the district court to consider whether YouTube made a “deliberate effort to avoid guilty knowledge” as a matter of common law.²⁴

Following remand, YouTube submitted to the district court a list of 63,060 video clips that were at issue in the litigation and that it claimed were never subject to any takedown notices and challenged the plaintiffs to provide evidence of notice sufficient to meet the standards of Section 512(c).²⁵ Over the objections of the plaintiffs, the district court concluded that it remained their burden to show that YouTube was aware of the specific infringements at issue and that the plaintiffs lacked sufficient evidence to allow a clip-by-clip assessment.²⁶

On the issue of willful blindness, the district court similarly concluded that the evidence proffered by the plaintiffs demonstrated, at best, that YouTube was aware that infringing activity was taking place with respect to particular works but not that YouTube knew the specific locations of the infringements.²⁷ The court concluded that the plaintiffs had not presented evidence of willful blindness as to the specific clips at issue.²⁸ On these and other remaining issues, the district court granted summary judgment in YouTube’s favor, dismissing the case and

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2. True False
3. True False
4. True False
5. A B C D E
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7. True False
8. True False
9. True False
10. True False
11. True False
12. True False
13. True False
14. True False
15. True False
16. True False
17. True False
18. True False
19. True False
20. A B C D

1. DMCA stands for:
A. Digital Media Communications Act.
B. Digital Millennium Communications Act.
C. Digital Millennium Copyright Act.
D. Digital Media Copyright Act.
demonstrate that it was unaware of the specific infringements at issue.
True.
False.
2. Congress passed the DMCA in 1998.
True.
False.
3. The U.S. Supreme Court addressed safe harbor protection for Internet service providers (ISPs) in *Viacom International, Inc. v. YouTube, Inc.*
True.
False.
4. Title III of the DMCA is the Online Copyright Infringement Liability Limitation Act (OCILLA).
True.
False.
5. Which of the following is not one of OCILLA's safe harbors?
A. Transitory communications.
B. System caching.
C. Storage of information on systems or networks at the direction of users.
D. Content chosen by the ISP.
E. Information location tools.
6. In *Viacom v. YouTube*, the U.S. District Court for the Southern District of New York granted summary judgment to Viacom.
True.
False.
7. *Viacom v. YouTube* places the burden of policing copyright infringement on the copyright owners rather than on ISPs.
True.
False.
8. *Viacom v. YouTube* holds that an ISP's safe harbor protection depends on whether the ISP actively monitors its service for infringing activity.
True.
False.
9. In *Viacom v. YouTube*, the Second Circuit affirmed that actual knowledge of a specific infringement disqualifies an ISP from safe harbor protection.
True.
False.
10. *Viacom v. YouTube* holds that an ISP may lose safe harbor protection if it deliberately avoids knowledge of infringing activity on its service.
True.
False.
11. On remand in *Viacom v. YouTube*, the district court concluded that it was YouTube's burden to
12. On remand in *Viacom v. YouTube*, the district court denied YouTube's motion for summary judgment.
True.
False.
13. The parties to *Viacom v. YouTube* announced a settlement in 2014.
True.
False.
14. The central issue in *American Broadcasting Companies, Inc. v. Aereo, Inc. (ABC v. Aereo)* is whether retransmission of television programming via Web sites constitutes the creation and broadcast of unauthorized derivative works.
True.
False.
15. In *ABC v. Aereo*, the U.S. Supreme Court granted ABC's petition for certiorari.
True.
False.
16. Aereo provides a service that allows subscribers to watch broadcast television programs over the Internet on a pay-per-view basis.
True.
False.
17. One of the exclusive rights which the Copyright Act grants to the copyright owner is the right to perform the copyrighted work publicly.
True.
False.
18. In *ABC v. Aereo*, the Second Circuit Court of Appeals ruled that the potential audience for each Aereo transmission is any user who could have accessed the program.
True.
False.
19. In *ABC v. Aereo*, Judge Denny Chin called Aereo's system a "contrivance, over-engineered in an attempt to avoid...the Copyright Act."
True.
False.
20. Who called for substantial copyright reform in March 2013?
A. David Nimmer.
B. The Register of Copyrights.
C. The Motion Picture Association of America.
D. Chief Justice John Roberts of the U.S. Supreme Court.

entering judgment.²⁹ The appeal from that judgment was pending³⁰ when the parties announced a confidential settlement in March of this year.³¹

The Ripple Effect

The Second Circuit's interpretation of the Section 512(c) safe harbor in *Viacom* affected other cases across the country. For example, the decision revived a case from 2011, *Capitol Records, Inc. v. MP3tunes, LLC*, in which a group of record companies and music producers sued MP3tunes, a now-defunct stor-

pirated works, and in the absence of recent U.S. Supreme Court precedent on this issue, *Viacom* offers the most definitive current statement of the nuances of the safe harbor defense of Section 512(c).

Aereo and Internet Broadcasting

Another case may prove to be as widely watched and followed as *Viacom* is *American Broadcasting Companies, Inc. v. Aereo, Inc.* In *Aereo*, the U.S. Supreme Court is poised to wade into the legality of Web sites that retransmit television programming that is

(the transmit clause), which defines public performance as:

[T]o transmit or otherwise communicate a performance or display of the work to [a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered] or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place

In March 2013, Maria A. Pallante, the Register of Copyrights, called for substantial copyright reform, including to the DMCA and the Copyright Act, in testimony before the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet. She called for Congress to draft "the next great copyright act" to address such pressing issues as "reviewing the efficacy of the DMCA" and "updating the framework for cable and satellite transmissions."

age service for MP3 files.³² In October 2011, the U.S. District Court for the Southern District of New York granted a motion for summary judgment on a claim for contributory infringement against MP3tunes and its founder as to songs identified in takedown notices but not subsequently removed.³³ Following *Viacom*, both parties moved for reconsideration.³⁴ The plaintiffs sought to overturn the summary judgment for the defendants that was based on their partially successful Section 512(c) safe harbor defense, arguing that the district court needed to engage in fact-finding for willful blindness.³⁵ The district court vacated that portion of its 2011 order in light of the Second Circuit's opinion.³⁶ The court also withdrew its prior grant of summary judgment to the defendants with respect to their lack of red-flag knowledge as relevant to the safe harbor, concluding instead that, based on *Viacom*'s analysis, material issues of fact warranted trial.³⁷

Since the Second Circuit issued its opinion in *Viacom*, the case has served as critical precedent in DMCA safe harbor cases across the country, and its impact may grow over time.³⁸ As content creators continue to combat the proliferation of sites that traffic in

broadcast over the air when the retransmission has not been authorized by the owner of the broadcast programming.³⁹ The central issue in *Aereo* will be whether unauthorized retransmission constitutes a "public performance" under the Copyright Act.⁴⁰ The Supreme Court granted ABC's petition for certiorari in January.⁴¹

Aereo provides a service that allows subscribers to watch broadcast television programs over the Internet in exchange for a monthly fee.⁴² The company uses thousands of dime-sized antennas in its central facility to receive transmission. According to Aereo, each individual antenna is separately assigned to a subscriber and feeds the broadcast to a server that the user accesses.⁴³ In 2012, the U.S. District Court for the Southern District of New York denied the motion of ABC and other broadcast networks for a preliminary injunction, finding that the plaintiffs were unlikely to prevail on the merits of their claims for copyright infringement.⁴⁴ In April 2013, the Second Circuit affirmed in a 2-1 decision.⁴⁵

One of the exclusive rights that the Copyright Act grants to the copyright owner is the right "to perform the copyrighted work publicly."⁴⁶ *Aereo* turns on a particular clause

or in separate places and at the same time or at different times.⁴⁷

The complaining broadcasters argue that Aereo's transmissions of television programs while the programs are airing on broadcast television falls within the transmit clause, and as such are public performances.⁴⁸ Following its earlier decision in *Cartoon Network LP v. CSC Holdings, Inc.* (also known as the *Cablevision* case),⁴⁹ the Second Circuit, in a split decision, found that when an Aereo customer watches or records a program, the Aereo system creates a unique copy of that program on a hard drive assigned only to that particular user.⁵⁰ The Second Circuit concluded that when the Aereo customer later watches the program, he or she is watching a transmission generated from that unique copy. Based on that conclusion, the court ruled that the potential audience for each Aereo transmission is only the single user who requested that the program be recorded, and as such, the transmissions are not public performances.⁵¹

In a vigorous dissent, Judge Denny Chin took a dim view of what he perceives as Aereo's creation of a series of complicated technological contrivances to get around the Copyright Act. He wrote: "[Aereo's] system



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is a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law.⁵² Even though each subscriber has an individual antenna and a unique copy, Judge Chin reasoned, these are nonetheless public performances.⁵³ In other words, because Aereo is transmitting television signals to paying strangers, all of its transmissions are to the public, even if intervening devices or processes limit the potential audience of each separate transmission to a single member of the public.⁵⁴

Just as the contours of the DMCA safe harbors continue to bedevil parties and courts struggling to determine if such safe harbors apply to new (and sometimes innovative) services, *Aereo* makes clear that even the classic exclusive rights (such as the public performance right) in the Copyright Act may require clarification or revision in order to be brought up-to-date with the latest technological practices. In March 2013, Maria A. Pallante, the Register of Copyrights, called for substantial copyright reform, including to the DMCA and the Copyright Act, in testimony before the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet.⁵⁵ In her testimony, she called for Congress to draft "the next great copyright act," which could address such pressing issues as "reviewing the efficacy of the DMCA" and "updating the framework for cable and satellite transmissions."⁵⁶

Although the Supreme Court's forthcoming decision in *Aereo* could bring clarity to the interpretation of the Copyright Act's public performance right in a more modern day context, more technological change and more uncertainty is inevitable, and it is only a matter of time before new technologies and new online practices bring an entirely new slew of unanticipated legal challenges. ■

¹ See, e.g., *Ellison v. Robertson*, 357 F. 3d 1072, 1076 (9th Cir. 2004).

² 17 U.S.C. §512.

³ *Ellison*, 357 F. 3d at 1076. Service providers are "provider[s] of online services or network access, or the operator[s] of facilities therefor." 17 U.S.C. §512(k)(1)(B).

⁴ 17 U.S.C. §§512(a)-(d).

⁵ *Ellison*, 357 F. 3d at 1077 (emphasis in original).

⁶ 17 U.S.C. §512(c)(1)(A).

⁷ *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D. N.Y. 2010); 17 U.S.C. §512.

⁸ See *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F. 3d 19, 25-26 (2d Cir. 2012).

⁹ *Viacom Int'l*, 718 F. Supp. 2d at 519.

¹⁰ *Id.* at 523.

¹¹ *Id.* (citing *Perfect 10, Inc. v. CCBill LLC*, 488 F. 3d 1102, 1113 (9th Cir. 2007)).

¹² *Viacom Int'l*, 718 F. Supp. 2d at 524-25.

¹³ *Id.* at 526.

¹⁴ Opening Brief for Plaintiffs-Appellants at 3, *Viacom Int'l Inc. v. YouTube, Inc.*, No. 10-3270, Docket No.

63 (2d Cir. Dec. 7, 2010).

¹⁵ *Id.* at 3-4.

¹⁶ *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F. 3d 19, 25-26 (2d Cir. 2012).

¹⁷ *Id.* at 31.

¹⁸ *Id.*

¹⁹ *Id.* at 32.

²⁰ *Id.* at 34.

²¹ *Id.*

²² *Id.* at 34-35.

²³ *Id.* at 35.

²⁴ *Id.* The Second Circuit also remanded as to other ancillary issues in the case. *Id.* at 36-42.

²⁵ *Viacom Int'l Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 113 (2013).

²⁶ *Id.* at 115.

²⁷ *Id.* at 117.

²⁸ *Id.*

²⁹ *Id.* at 123.

³⁰ Plaintiffs' Notice of Appeal, *Viacom Int'l Inc. v. YouTube, Inc.*, No. 7-2013, Docket No. 454 (S.D. N.Y. Apr. 30, 2013).

³¹ Todd Spangler, *Google and Viacom Settle Copyright-Infringement Lawsuit over YouTube*, VARIETY, Mar. 18, 2014, available at <http://variety.com/2014/biz/news/google-and-viacom-settle-copyright-infringement-lawsuit-over-youtube-1201137538>.

³² *Capitol Records, Inc. v. MP3tunes, LLC* (Capitol II), No. 7-9931, 2013 WL 1987225 (S.D. N.Y. May 14, 2013).

³³ *Capitol Records, Inc. v. MP3tunes, LLC* (Capitol I), 821 F. Supp. 2d 627, 650-51 (S.D. N.Y. 2011).

³⁴ *Capitol II*, 2013 WL 1987225, at *1.

³⁵ *Id.* at *2.

³⁶ *Id.* at *3.

³⁷ *Id.* at *4.

³⁸ See, e.g., *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F. 3d 1006, 1011 (9th Cir. 2013) (relying on *Viacom* in concluding that Veoh, which enables users to share videos, was entitled to safe harbor defense under §512(c)); *Disney Enters., Inc. v. Hotfile Corp.*, No. 11-20427, 2013 WL 6336286, at *1 (S.D. Fla. Sept. 20, 2013) (relying on *Viacom* in concluding that Hotfile, a repository for numerous pirated copyrighted works, was not entitled to any safe harbor protection under §512(c)); *Columbia Pictures Indus., Inc. v. Fung*, 710 F. 3d 1020, 1023-24 (9th Cir. 2013) (holding that defendant, who operated various sites that allowed third parties to download infringing copies of copyrighted works, was not entitled to DMCA protection).

³⁹ *ABC, Inc. v. Aereo, Inc.*, No. 13-461 (U.S. Jan. 10, 2014).

⁴⁰ Petition for Writ of Certiorari, *Aereo*, No. 13-461, Docket No. 1 (U.S. Oct. 11, 2013).

⁴¹ *Aereo*, No. 13-461.

⁴² *WNET, Thirteen v. Aereo, Inc.*, 712 F. 3d 676, 680 (2d Cir. 2013).

⁴³ *Id.* at 682-83.

⁴⁴ *ABC, Inc. v. Aereo*, 874 F. Supp. 2d 373, 405 (S.D. N.Y. 2012).

⁴⁵ *WNET, Thirteen*, 712 F. 3d at 696.

⁴⁶ 17 U.S.C. §106(4).

⁴⁷ 17 U.S.C. §101(2).

⁴⁸ *WNET, Thirteen*, 712 F. 3d at 686.

⁴⁹ *Cartoon Network v. CSC Holdings*, 536 F. 3d 121 (2d Cir. 2008).

⁵⁰ *WNET, Thirteen*, 712 F. 3d at 690.

⁵¹ *Id.*

⁵² *Id.* at 697.

⁵³ *Id.*

⁵⁴ *Id.* at 699.

⁵⁵ Statement of Maria A. Pallante, Register of Copyrights, Mar. 20, 2013, available at <http://www.copyright.gov/regstat/2013/regstat03202013.html>.

⁵⁶ *Id.*

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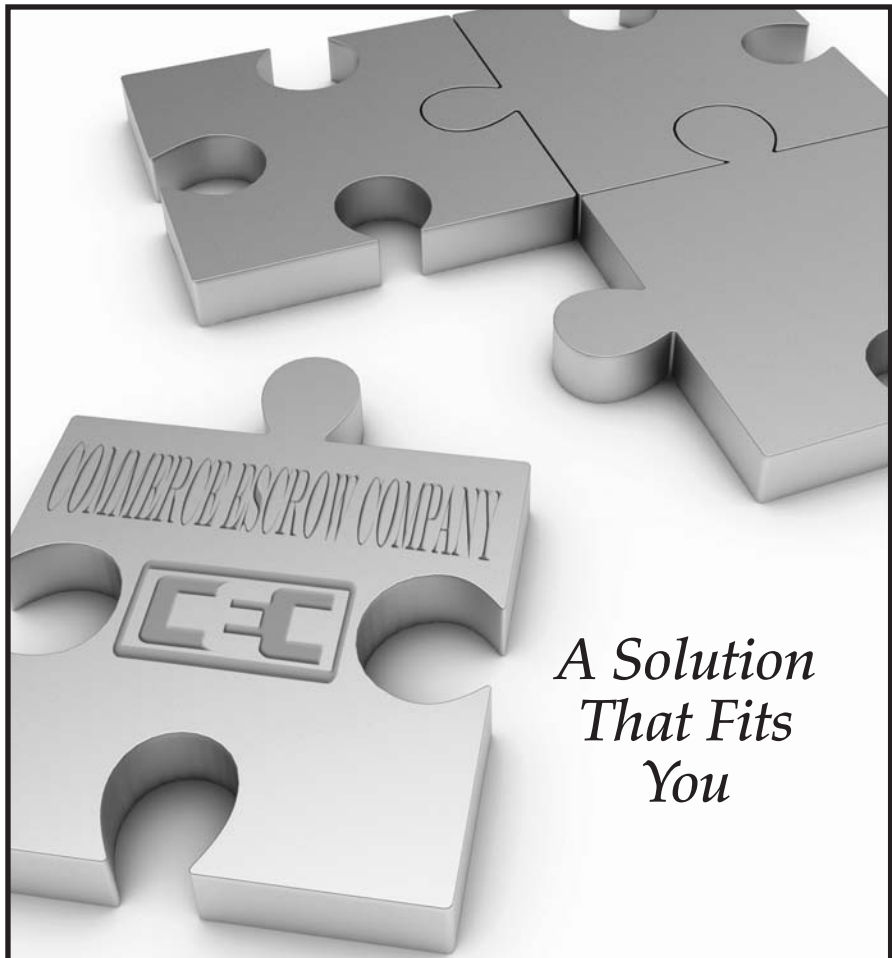
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