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**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

VIACOM INTERNATIONAL, INC., COMEDY PARTNERS, COUNTRY MUSIC
TELEVISION, INC., PARAMOUNT PICTURES CORPORATION,
BLACK ENTERTAINMENT TELEVISION, LLC,

Plaintiffs-Appellants,

—against—

(caption continued on reverse)

**CORRECTED BRIEF OF AMICUS CURIAE
WASHINGTON LEGAL FOUNDATION
IN SUPPORT OF APPELLANTS**

DANIEL J. POPEO
CORY L. ANDREWS
WASHINGTON LEGAL FOUNDATION
2009 MASSACHUSETTS AVE., NW
WASHINGTON, D.C. 20036
(202) 588-0302

ANDREW M. RIDDLES*
CROWELL & MORING LLP
590 MADISON AVE., 20TH FLOOR
NEW YORK, NEW YORK 10022
(212) 223-4000
* COUNSEL OF RECORD FOR AMICUS CURIAE

MICHAEL J. SONGER
CROWELL & MORING LLP
1001 PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20004
(202) 624-2500

December 20, 2010

YOUTUBE, INC., YOUTUBE, LLC, GOOGLE, INC.,

Defendants-Appellees.

THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED, BOURNE CO.,
CAL IV ENTERTAINMENT, LLC, CHERRY LANE MUSIC PUBLISHING CO.,
INC., NATIONAL MUSIC PUBLISHERS' ASSOC., THE RODGERS AND
HAMMERSTEIN ORGANIZATION, EDWARD B. MARKS MUSIC CO., FREDDY
BIENSTOCK MUSIC CO., ALLEY MUSIC CORP., X-RAY DOG MUSIC, INC.,
FEDERATION FRANCAISE DE TENNIS, THE MUSIC FORCE MEDIA GROUP
LLC, SINDROME RECORDS, LTD., MURBO MUSIC PUBLISHING, INC., STAGE
THREE MUSIC (US), INC., AND THE MUSIC FORCE, LLC,

Plaintiffs-Appellants,

—against—

YOUTUBE, INC., YOUTUBE, LLC, GOOGLE, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus curiae* certifies that the Washington Legal Foundation (“WLF”) is a not-for-profit public interest law and policy center; it has no parent corporation, and no publicly held company owns 10% or more of WLF’s stock.

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STATEMENT OF INTEREST

The Washington Legal Foundation (WLF) is a non-profit, public interest law and policy center with supporters in all 50 states.¹ WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. In particular, WLF has regularly appeared as an *amicus* before this and numerous other federal and state courts in favor of protecting the rights of property owners, including owners of intellectual property. *See, e.g., MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *UMG Recordings, Inc. v. Veoh Networks, Inc.*, No. 09-56777 (9th Cir. 2010, dec. pending); *Author's Guild v. Google, Inc.*, No. 05 CV 8136 (DC), 2009 U.S. Dist. LEXIS 116175 (S.D.N.Y. Dec. 1, 2009).

In addition, WLF's Legal Studies Division routinely publishes articles and sponsors briefings on a variety of legal issues, including those that are implicated in this case. *See, e.g., Sony v. Tenenbaum: There Are Limits to Fair Use Defense In Copyright Infringement Cases* (WLF Legal Opinion Letter, Oct. 9, 2009);

¹ Pursuant to Federal Rule of Appellate Procedure 29(c), WLF states that no attorney or other representative of any party to this litigation participated in the authorship of this brief in whole or in part, and no person, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Some attorneys in the law firm may represent entities which have an interest in other matters which may be affected by the outcome of this litigation. All parties to this dispute have consented to the filing of this brief.

Liberty And Property: Human Rights And The Protection Of Intellectual Property (WLF Working Paper, Jan. 2009); *Copyrights in Cyberspace: Are Intellectual Property Rights Obsolete in the Digital Economy?* (WLF Media Briefing, March 28, 2001); *Congress Modifies Copyright Protections for the Digital Age* (WLF Legal Backgrounder, Feb. 19, 1999).

I. INTRODUCTION

The district court's decision on summary judgment in this case quotes in great detail the legislative history of the Digital Millennium Copyright Act ("DMCA") to support its decision that YouTube's activities fall within the "safe harbor" offered under 17 U.S.C. § 512(c). Given the district court's reliance on the DMCA's legislative history, WLF submits this brief in support of Appellant's position in this case to highlight certain aspects of Congress's intent and purpose in enacting the DMCA that were ignored by the district court below, and that warrant reversal of the decision.

From its inception, the DMCA was designed to create a delicate balance between service providers and content owners. Congress drew careful lines detailing the circumstances under which immunity from copyright infringement exists for certain distinct activities. The legislative history demonstrates that Congress: (1) sought to encourage cooperation between service providers and content owners; (2) offered immunity for innocent service providers engaged in passive acts; and (3) created four separate "safe harbors" for specific activities, each for its own purpose. This history must be considered when reviewing infringing activity, such as on the YouTube website which is the subject of this litigation.

II. TO COMBAT ONLINE INFRINGEMENT, CONGRESS CREATED A BALANCED SYSTEM WEIGHING IMMUNITIES AND LIABILITY

The Internet has changed drastically since the DMCA was enacted in 1998. At that time “service providers” were generally thought of as the “doorways” to the Internet – the means by which individual users accessed the Internet to exchange electronic mail, view websites, and download files. Common service providers in the 1990’s were America Online, CompuServe, and individual educational and work institutions.

User content was typically located on that user’s individual web page, which was “hosted” on the service provider’s computer systems. In this manner, a user’s individual web page was made available to other Internet users around the world. These individual web pages often contained copyrighted material belonging to others – at that time mainly photographs and music recordings.

Content owners, to protect their intellectual property, brought lawsuits against both the website owner (often an individual) for placing the content on the web page and the service provider for “hosting” the web page. Service providers were thus faced with exposure to copyright liability solely by virtue of their desire to provide to individuals the “doorway” to the Internet.

The problem confronted by Congress in the 1990’s with respect to the Internet and intellectual property rights was how to strike the balance between

protecting a content owner's rights, on one hand, and encouraging service providers to continue to offer Internet access on the other. Congress thus sought, through the DMCA, to address this problem. As stated in the floor debates:

One of the things we do here is to say: "If you are on-line service provider, if you are responsible for the production of all of this out to the public, you will not be held automatically responsible if someone misuses the electronic airway you provide to steal other people's property.

There is a balance here. We want to protect property, but we do not want to deter people from making this [the Internet] widely available. We have a problem here of making sure that intellectual property is protected, but we do not want freedom of expression impinged upon.

144 CONG. REC. H7092 (daily ed. August 4, 1998)(floor statement of Rep. Barney Frank). The DMCA was enacted with that balance in mind: encouraging access to the Internet while at the same time protecting intellectual property.

Thus, the DMCA offers immunity to service providers from copyright liability for four distinct provider operations: (1) Transitory Digital Network Communications, the provider's transmitting, routing, or providing connections for material through a system or network; (2) System Caching, the provider's intermediate and temporary storage of material on a system or network; (3) Information Residing On Systems or Networks at Direction of Users, the provider's storage at the direction of a user of material that resides on a system or network; and (4) Information Location Tools, the provider's referring or linking

users to another online location.² 17 U.S.C. §§ 512(a)-(d). That immunity comes at a real price, however. For the kinds of activities in question here (storing material on computers), immunity is granted only so long as the owner does not know or is otherwise unaware of the copyrighted material on its computers. The law imposes a further requirement that the service provider remove the material once knowledge or awareness is obtained. *See generally* 17 U.S.C. § 512(c).

Websites such as YouTube – a single website that welcomes, stores, hosts, and profits from individual content posted by millions of different users – did not exist at the time the DMCA was enacted. Instead, websites at that time generally offered information, or content collected individually by the website’s owner. And the service providers’ primary role was to provide the “doorway” to the Internet. Thus, this Court is now faced with the dilemma of determining the limits of copyright immunity under the DMCA for activities not contemplated at the time of its passage.

The critical issue mistakenly resolved by the district court was whether YouTube had knowledge or awareness of the copyrighted material on its computers. Relying on the DMCA’s legislative history, the district court found

² Another example where Congress sought to strike a balance between immunity and liability is 47 U.S.C. §230, which offers immunity from liability arising out of statements published on the Internet.

that a service provider must have “knowledge of specific and identifiable infringements of particular individual items” for liability to attach (*i.e.*, for DMCA immunity to be revoked). *Viacom Int’l Inc. et al. v. YouTube, Inc. et al.*, 2010 U.S. Dist. LEXIS 62829 (S.D.N.Y. June 23, 2010)(slip. op. at 15).³ WLF believes that this determination ignores the important balance sought by Congress in enacting a scheme that carves out immunity for copyright infringement in narrow, limited circumstances.

III. THE DMCA WAS DESIGNED TO ENCOURAGE COOPERATION BETWEEN SERVICE PROVIDERS AND CONTENT OWNERS

In addition to striking a balance between copyright protection and Internet access, Congress expected service providers and content owners to cooperate when combating online infringements. *See* H.R. REP. 105-551 (II), 105th Cong. 2d Sess., at 49 (1998) (recognizing that the purpose of section 512 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 network environment.”). This expected cooperation has been reiterated and reinforced by the courts. *See, e.g., Rossi v. Motion Picture Ass’n of Am., Inc.*, 391 F.3d 1000,

³ Because the parties are still in the process of redacting sealed portions of the record, WLF does not have access to the Joint Appendix by which to provide a citation to the record on appeal. Throughout this brief, the pinpoint cites to the district court’s decision will be designated by the appropriate page in the slip opinion (as “slip. op. at ____”).

1003 (9th Cir. 2004) (“Title II of the DMCA contains a number of measures designed to enlist the cooperation of Internet and other online service providers to combat ongoing copyright infringement.”); *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (finding that the DMCA “endeavors to facilitate cooperation among internet service providers and copyright owners”).

The cooperation expected by Congress is explained in section 512(c): upon either knowledge, awareness, or notification of infringing material, a service provider receives immunity if it acts expeditiously to remove or disable access to the material. Importantly, these three events – knowledge, awareness, or notification – are discrete and separate. A service provider receives no immunity if it does not remove or disable access to material when it has actual knowledge of the infringement; if it is “aware of facts or circumstances from which infringing activity is apparent”; or if it has received notification of the infringement in the manner set forth in the statute. 17 U.S.C. § 512(c)(1). *See also Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1117 (9th Cir. 2007).⁴

Even though Congress established three distinct methods by which a service provider may acquire knowledge of infringing works stored on its site (actual

⁴ Section 512(c)(1)(B) sets forth the immunity requirements related to vicarious infringement. WLF takes no position on this particular section of the DMCA and its applicability to the parties in this case.

knowledge, awareness, or specific notification), and even though Congress intended for service providers and content owners to cooperate in resolving copyright disputes, the district court's order below places the onus of combating online copyright infringement entirely on the content owners. In support of this shift away from cooperation, the district court quotes from *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007):

The DMCA notification procedures place the burden of policing copyright infringement – identifying the potentially infringing material and adequately document infringement – squarely on the owners of the copyright. We decline to shift a substantial burden from the copyright owner to the provider....

Viacom Int'l Inc. et al. v. YouTube, Inc. et al., slip op. at 16 (quoting *Perfect 10, Inc. v. CCBill LLC*, 448 F.3d at 1113).

But this passage from the *Perfect 10 v. CCBill* case, aside from being inconsistent with the DMCA's legislative history, does not pertain to every instance under which a service provider may acquire knowledge of infringing activity. Rather, this particular passage from the *Perfect 10 v. CCBill* case describes only the "notification" knowledge, *i.e.*, instances where the content owner provides knowledge to the service provider via the DMCA's formal notification process under section 512(c)(1)(C). While it may be true that the DMCA *notification* procedures "place the burden of policing copyright infringement" on the content owner, that is obviously not true for the other two

methods by which a content owner may acquire knowledge: actual knowledge (under section 512(c)(1)(A)(i)) and awareness of facts and circumstances (under section 512(c)(1)(A)(ii)).

The *Perfect 10 v. CCBill* court was careful to limit its comments to the notification procedures, and did not purport to relieve service providers of the ability to acquire knowledge generally. Neither the DMCA nor *Perfect 10* places the burden of policing and detecting copyright infringements on the content owner in all instances. Rather, a service provider obtains no safe harbor if it has actual knowledge of infringing material, or is aware of facts and circumstances from which infringing activity is apparent. 17 U.S.C. § 512(c)(1)(A).

In sum, the district court's decision improperly eliminates the cooperation expected between content owners and service providers addressed in the DMCA and purports to place the burden of addressing infringement solely on the content owner. As other courts have recognized, "it is...against the spirit of the DMCA if the entire responsibility lies with the copyright owner to forever police websites in search of possible infringers." *Hendrickson v. Amazon.com, Inc.*, 298 F.Supp. 2d 914, 917 (C.D. Cal. 2003).

IV. THE DMCA WAS DESIGNED TO IMMUNIZE INNOCENT SERVICE PROVIDER CONDUCT, NOT ELIMINATE LIABILITY ENTIRELY

The requirement for a service provider to expeditiously remove or disable access to infringing material to obtain the safe harbor also illustrates that the DMCA was designed to immunize *innocent* service provider conduct, not to eliminate liability entirely. Depending on the service provider's conduct and knowledge, liability still may exist. *See, e.g.*, H.R. REP. 105-551 (II), *supra* at 50 (noting that the safe harbors “do not affect the question of ultimate liability under the various doctrines of direct, vicarious, and contributory liability”).

Under the DMCA, the crucial distinction between liability and immunity hinges on whether the service provider is “innocent.” One indicia of innocence on the part of the service provider is a lack of knowledge as articulated in the statute (actual knowledge, awareness of facts or circumstances, or notification by the content owner). *See ALS Scan, Inc. v. RemarQ Cmty, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001)(“[I]mmunity, however, is not presumptive, but granted only to ‘innocent’ service providers who can prove they do not have actual or constructive knowledge of the infringement.”). Another indicia of innocence is whether the conduct is passive, *i.e.*, whether the service provider's acts are merely automatic, in response to those technological features necessary to provide access to the Internet. *See* H.R. REP. 105-551 (II), *supra* at 49 (indicating that under the DMCA liability

should not occur for “passive, automatic acts engaged in and through a technological process initiated by another”). Courts have recognized that a service provider may lose its statutory immunity if its conduct becomes “active” with respect to the infringing work. *See Arista Records LLC v. Usenet.com, Inc.*, 633 F.Supp. 2d 124, 149 (S.D.N.Y. 2009)(finding that actions “transform[ed] Defendants from passive providers of space in which infringing activities happened to occur to active participants in the process of copyright infringement”)(quoting *Playboy Enter., Inc. v. Russ Hardenburgh, Inc.*, 982 F.Supp. 503, 513 (N.D. Ohio 1997)). A third indicia of innocence is whether the service provider is engaged in some type of legitimate business service, as opposed to a service predicated on infringing works. *Columbia Pictures Indus., Inc. v. Fung*, CV 06-5578, 2009 WL 6355911 at *18 (C.D. Cal. Dec. 21, 2009)(“[T]he statutory safe harbors are passive good faith conduct aimed at operating a legitimate business interest”).

Thus, the determination as to whether a service provider’s conduct is “innocent” under the DMCA draws upon many factors, not simply, as set forth by the district court below, by a determination as to whether *specific* knowledge of a *specific*, single copyrighted work exists.

V. THE DMCA'S SAFE HARBORS ARE UNIQUE AND TIED TO SPECIFIC SERVICE PROVIDER ACTIVITIES

Finally, Congress carefully created a limited number of exemptions from copyright liability, with specific prerequisites for each. The DMCA provides immunity for only four discrete functions: (1) transmitting, routing, or providing connections for material through a system or network; (2) storing temporarily material on a system or network; (3) storing at the direction of a user of material that resides on a system or network; and (4) referring or linking users to another online location. 17 U.S.C. §§ 512(a)-(d). If a service provider engages in more than one of these functions, each function must qualify *separately* for immunity. S. REP. NO. 105-190, 105th Cong. 2d Sess., at 55 (1998) (“Section 512’s limitations on liability are based on functions, and each limitation is intended to describe a separate and distinct function.”); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d at 1117.

Each of the four immunities offered under the DMCA has different requirements – they are not interchangeable. For example, sections 512(a) and (b), the immunities for routing and temporary storage, do not utilize the “knowledge” scheme recognized in sections 512(c) and (d). Moreover, what constitutes “knowledge” under sections 512(c) and (d) differs, because the functions underlying these immunities – storing material at a user’s request and using an information retrieval tool – are drastically different.

The district court, in its determination that a service provider must have “knowledge of specific and identifiable infringements of particular individual items,” relied on several different passages from the DMCA’s legislative history – including portions of the legislative history for section 512(d). But this was improper, since section 512(d) is not at issue in this case, and the nature of the immunity offered under section 512(d) differs greatly from the immunity offered under section 512(c). Thus, the district court should not have relied on the legislative history for section 512(d) in determining whether “red flags” occur such that a service provider could become aware of circumstances related to infringement.

In particular, the district court relied on the following passage related to section 512(d):

The knowledge or awareness standard should not be applied in a manner which could create a disincentive to the development of directories which involve human intervention. Absent actual knowledge, awareness of infringement as provided in subsection (d) should typically be imputed to a directory provider only with respect to pirate sites or in similarly obvious and conspicuous circumstances, and not simply because the provider viewed and infringing site during the course of assembling the directory.

Viacom Int’l Inc. et al. v. YouTube, Inc. et al., slip op. at 15 (quoting H.R. REP. 105-551 (II), *supra* at 58). But this case is about section 512(c), *not* 512(d), and it is inappropriate to import Congress’s explanations for what constitutes a “red flag”

under section 512(d) into the immunity determination under section 512(c). The two sections serve two very different functions.

Section 512(d) applies immunity to “Information Location Tools” – tools by which the provider “refer[s] or link[s] users to an online location containing infringing material or infringing activity.” 17 U.S.C. § 512(d). This is a narrow activity, in which the service provider, by definition, “touches” a site *only* by a brief view “during the course of assembling a directory.” H.R. REP. 105-551 (II), *supra* at 58. Given this limited function undertaken by the service provider, determining whether it becomes “aware of facts and circumstances” of infringement is a similarly narrow inquiry. In Congress’s view, imputed knowledge should occur for such a referring or linking function only where the circumstances are “obvious and conspicuous.” *Id.* In other words, Congress determined that it would be improper to hold a service provider who only narrowly views a site for a specific purpose (*e.g.*, building a directory) to a “red flag” standard unless other indicia of infringement exists. *Id.*⁵

In contrast, section 512(c) describes a very different function – the service provider actually storing, at the direction of a user, infringing content on its

⁵ In addition, Congress’s narrow application of “red flag” awareness under section 512(d) derives from a specific desire to “promote the development of information location tools generally.” H.R. REP. 105-551 (II), *supra* at 58.

computer systems. In this situation the service provider does more than “touch” a site to create a directory – it actually stores, displays, and copies the material so that it can be readily available until such time as the user (or service provider) decides it should be deleted. In these circumstances Congress established a broader explanation of what constitutes a “red flag” than in section 512(d):

The “red flag” test has both a subjective and an objective element. In determining whether the service provider was aware of a “red flag,” the subjective awareness of the service provider of facts or circumstances in question must be determined. However, in deciding whether those facts and circumstances constitute a “red flag” – in other words, whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances – an objective standard should be used.

H.R. REP. 105-551 (II), *supra* at 53-54. These two different views of what constitutes “red flag” awareness are understandable given the service provider’s function in each respective case. Thus, it was improper for the district court to rely on the legislative history for section 512(d) to explain the proper standard for “red flag” awareness under section 512(c). The two immunities describe different functions by the service provider, with varying levels of activity that generate awareness of the infringing activity.

VI. CONCLUSION

Congress’s intent and purpose when enacting the DMCA was to encourage a cooperative relationship among service providers and content owners when

combating online copyright infringement. It sought to strike a balance between allowing service providers to engage in their functions, such as transmitting and storing material, while at the same time providing assurances to content owners that immunity will not be conferred in less than innocent circumstances.

The cornerstone of Congress's scheme is knowledge. Under section 512(c), a service provider qualifies for a safe harbor if, among other requirements, it does not have actual knowledge, or is not aware of facts and circumstances of infringing activity. As explained in the legislative history, "[u]nder this standard, a service provider would have no obligation to seek out copyright infringement, but it would not qualify for the safe harbor if it had turned a blind eye to 'red flags' of obvious infringement." H.R. REP. 105-551 (II), *supra* at 57. Other courts have supported this conclusion. *See In re Aimster Copyright Lit.*, 334 F.3d 643, 650 (7th Cir. 2003) (finding that a service provider should not receive immunity when it engages in "willful blindness" to acts of infringement).

This is particularly true in situations where *repeated* infringements occur. Under the DMCA, an innocent service provider is given a tremendous benefit – full immunity from what would otherwise be infringing conduct. The DMCA's stated desire for balancing service provider and content owner rights, and creating a cooperative system between these two parties, requires more protection against copyright infringement than a particularized knowledge of a particular

infringement. In situations where a service provider has repeated knowledge of repeated offenders, a different standard should apply. This Court should apply the view held by the Seventh Circuit in *In re Aimster, supra* at 655: “The common element of [the DMCA’s] safe harbors is that the service provider must do what it can reasonably be asked to do to prevent the use of its services by ‘repeat infringers.’”

Respectfully submitted,

/s Andrew M. Riddles

DANIEL J. POPEO
CORY L. ANDREWS
WASHINGTON LEGAL FOUNDATION
2009 MASSACHUSETTS AVE., NW
WASHINGTON, D.C. 20036
(202) 588-0302

ANDREW M. RIDDLES
CROWELL & MORING LLP
590 MADISON AVE., 20TH FLOOR
NEW YORK, NEW YORK 10022
(212) 223-4000
*COUNSEL OF RECORD FOR THE
WASHINGTON LEGAL FOUNDATION*

December 20, 2010

MICHAEL J. SONGER
CROWELL & MORING LLP
1001 PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 2004
(202) 624-2500

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 3,801 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I relied on Microsoft Office Word 2007, the word processor used to create this brief, to obtain this count.

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Dated: December 20, 2010

Crowell & Moring LLP

By: /s Andrew M. Riddles
Andrew M. Riddles

Counsel of Record for *Amicus Curiae*
Washington Legal Foundation

CERTIFICATE OF SERVICE AND CM/ECF FILING

I hereby certify that I caused the foregoing Brief of *Amicus Curiae* Washington Legal Foundation in support of Appellants to be served on counsel for Plaintiffs-Appellants and Defendants-Appellees via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1:

Paul W. Smith
William H. Hohengarten
Scott B. Wilkins
Jenner & Block LLP
1099 New York Avenue, N.W.
Washington, D.C. 20001
(202) 639-6000

Susan J. Kohlmann
Jenner & Block LLP
919 Third Avenue
New York, New York 10022
(212) 891-1690

Charles S. Sims
Proskauer Rose LLP
1585 Broadway
New York, New York 10036
(212) 969-3000

Stuart J. Baskin
John Guelli
Shearman & Sterling LLP
599 Lexington Avenue
New York, New York 10023
(212) 489-4000

Theodore B. Olson
Matthew D. McGill
Gibson Dunn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8668

John C. Browne
**Bernstein Litowitz Berger &
Grossmann LLP**
1285 Avenue of the Americas
New York, New York 10019
(212) 540-1400

David H. Kramer
Bart E. Volkmer
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, California 94304
(650) 493-9300

Andrew H. Schapiro
A. John P. Mancini
Brian M. Willen
Mayer Brown LLP
1675 Broadway
New York, New York 10019
(212) 506-2500

I further certify that one original and 5 hard copies of the foregoing Brief of amicus Curiae Washington Legal Foundation were sent to the Clerk's Office by Federal Express (Tracking No.: 432548285216) and dispatched on this day for delivery on Tuesday, December 21, 2010, to:

Clerk of the Court
United States Court of Appeals, Second Circuit
United States Courthouse
500 Pearl Street, 3rd Floor
New York, New York 10007
(212) 857-8576

December 20, 2010

/s Andrew M. Riddles

Andrew M. Riddles