

10-3270-cv

10-3342-cv

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,

v.

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

Defendants-Appellees.

(Additional Caption on the Reverse)

*On Appeal from the United States District Court
For the Southern District of New York*

**BRIEF FOR AMICI CURIAE EBAY INC.; FACEBOOK, INC.;
IAC/INTERACTIVECORP; AND YAHOO! INC.
SUPPORTING DEFENDANTS-APPELLEES**

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THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED, on behalf of themselves and all others similarly situated, BOURNE CO., CAL IV ENTERTAINMENT, LLC, CHERRY LANE MUSIC PUBLISHING COMPANY, INC., NATIONAL MUSIC PUBLISHERS' ASSOCIATION, THE RODGERS & HAMMERSTEIN ORGANIZATION, EDWARD B. MARKS MUSIC COMPANY, FREDDY BIENSTOCK MUSIC COMPANY, dba Bienstock Publishing Company, ALLEY MUSIC CORPORATION, X-RAY DOG MUSIC, INC., FEDERATION FRANCAISE DE TENNIS, THE MUSIC FORCE MEDIA GROUP LLC, SINDROME RECORDS, LTD., on behalf of themselves and all others similarly situated, MURBO MUSIC PUBLISHING INC., STAGE THREE MUSIC (US), INC., THE MUSIC FORCE LLC,

Plaintiffs-Appellants,

and

ROBERT TUR, dba Los Angeles News Service,
THE SCOTTISH PREMIER LEAGUE LIMITED,

Plaintiffs,

v.

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

Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, nonparties eBay Inc.; Facebook, Inc.; IAC/InterActiveCorp; and Yahoo! Inc. state that none of them has a parent corporation and that no publicly held corporations own 10% or more of the stock of any of them.

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STATEMENT OF INTERESTS¹

Amici Curiae eBay Inc.; Facebook, Inc.; IAC/InterActiveCorp (“IAC”); and Yahoo! Inc. (collectively “Amici”) are some of the best known online service providers. They file this brief to provide the perspective of online service providers who have developed popular and innovative services in reliance on the safe harbor provisions of the Digital Millennium Copyright Act (“DMCA”).

Founded in 1995 in San Jose, California, eBay Inc. connects millions of buyers and sellers globally on a daily basis through eBay, the world’s largest online marketplace. eBay has 90 million active users, engaged in transactions across 50,000 unique categories with the richest and deepest inventory of products ever assembled. At any given moment, over 200 million listings are available for sale on eBay across a multitude of formats that includes auction-style, fixed price and local listings. Throughout its history, eBay has served individual buyers and sellers along with businesses ranging in size from part time sole proprietorships to some of the most recognized household brand names and everything in between.

Facebook is among the world’s leading providers of online networking

¹ All parties have consented to the filing of this brief. Counsel for the Amici Curiae discloses pursuant to Circuit Rule 29.1(b) and Rule 29(c)(5) of the Federal Rules of Appellate Procedure that (1) no party’s counsel authored the brief in whole or in part; (2) no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person other than the amici curiae contributed money that was intended to fund preparing or submitting the brief.

services and is one of the most visited websites of any kind in the world. Facebook provides service in over 70 languages to over 500 million active users worldwide, over half of whom log on to the Facebook website on any given day. Facebook provides tools for each of its users to create a “Profile” allowing them to connect with other users and to share content. Facebook also enables users to create and join communities via “Pages” and “Groups” dedicated to various topics—such as specific businesses or artists, geography, Internet and technology, organizations, sports and recreation, and more—and to share content related to those topics.

IAC is a leading Internet company that owns over 50 established and start-up brands, including Ask.com, Citysearch, CollegeHumor, Match.com, Pronto, ServiceMagic, and Vimeo. These brands reach many millions of people worldwide and have been recognized as leaders in their segments. Ask.com was one of the first major Internet search engines and has been recognized for its web search technology and focus on providing answers to user queries. Today, Ask.com’s network of websites answers questions from 220 million people worldwide. Citysearch, founded in 1996, provides listings and user reviews for businesses in over 75,000 locations in the United States. Vimeo, launched in 2004, provides a unique community for sharing original video content and was named one of *Time* magazine’s Top 50 Websites for 2009 and 2010.

Yahoo! Inc. is a premier digital media company. It operates one of the most

trafficked Internet destinations in the world and attracts hundreds of millions of users every month through its engaging media, content, and communications offerings. Yahoo! aims to create deeply personal digital experiences using technology, insights based on data, and intuition to bring together personally relevant content and experiences from across the Web. It gives consumers across the globe simple, trusted ways to connect with the people, communities, topics, and trends that matter to them most.

Amici depend upon the DMCA safe harbor. It gives them comfort that, if they conscientiously follow the safe harbor requirements and act upon notices of claimed infringement that copyright holders send them, they will not be subject to the threat of enormous claims by copyright owners.

The safe harbor has played an extremely strong role in encouraging all four of the Amici to develop some of the most important online services in the world. They have transformed the way persons form communities, communicate with each other, do business with each other, and enrich social life and our culture. In recent months we have also seen how they galvanize regional political and social movements that transform the modern world.

Moreover, the American public has come to rely upon these services for a wealth of benefits: connecting with others, creating new markets, learning new ideas, expressing itself, experiencing new pleasures, and promoting and

discovering new artistic movements. While few can predict the twists and turns that technology and business models will take, one fact is certain: a stable, consistent, clear rule of law promotes innovation, investment, and enterprise.

For that reason the Amici have a vital interest in consistent application of the law of DMCA safe harbors. To date, courts across America have been remarkably uniform in their interpretation of that law. The decision below is merely one of a consistent string of decisions both correct and salutary. The Amici urge the Court to affirm the district court's decision below and to preserve the settled expectations and practices of the industries that have built their businesses in reliance on the safe harbor.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court's opinion properly focused on the statute and rightly followed other cases that have pioneered the issues now before this Court. This case has attracted attention largely because of the potentially enormous damages facing YouTube. But the decision below was neither novel nor unique.

The DMCA requires that both copyright holders and online service providers work together for their mutual benefit. Section 512(c)(1)(C) and (c)(3) require copyright holders to bear responsibility for identifying infringements and notifying online service providers so that the providers can disable access to the infringing activity or material. Section 512(c)(1)(c) also requires service providers

expeditiously to remove or disable access to challenged activity or material upon receipt of a valid notice by a copyright holder. Section 512(g) allows the providers to restore material in certain circumstances upon receipt of a valid counter-notice. This provision authorizes the service provider to step aside while the copyright owner and the user litigate (if necessary) the allegations of infringement. Section 512(m) provides that service providers need not monitor their services or affirmatively seek facts indicating infringing activity (except to the extent consistent with accommodating “standard technical measures” as Section 512(i)(2) defines the term).

Some copyright holders wish to shift their responsibilities to service providers. Instead of having to identify content that they believe is infringing and provide notice to the service providers, they want the service providers affirmatively to investigate users and make complicated judgment calls as to whether certain user-submitted content may infringe another’s copyright. The district court’s decision follows an unbroken line of cases rejecting arguments that would disturb the shared responsibilities imposed by Congress in the DMCA.

The importance of the DMCA to online service providers like the Amici cannot be overstated. Without the DMCA’s safe harbor, many online service providers would find themselves exposed to the risk of extreme damages. Copyright plaintiffs have sued online services or technology providers for *billions*

of dollars, and in one active case within this Circuit they have even articulated a theory for *trillions* of dollars in damages. *See Arista Records, LLC v. Lime Group LLC*, 2011 WL 832172 at *3 (S.D.N.Y. March 10, 2011) (rejecting plaintiffs' damages theory). The reason for these numbers is that the Copyright Act authorizes statutory damages, without proof of actual loss to the copyright holder, of up to \$150,000 *per work infringed*, and online service providers may interact with millions of works per day.

Because of the potential for enormous damages, bright lines and consistent legal outcomes are paramount. Responsible companies such as Amici need to rely on consistent interpretation of the law so that they can operate and innovate free from the threat of major litigation. That is why this Court should join others in ensuring that the DMCA safe harbor remains reliable, balanced, and meaningful.

Specifically, the Amici ask this Court to affirm that:

1. actual knowledge that material or activity is infringing and awareness of facts or circumstances from which infringing activity is apparent are high standards that cannot extend to guesswork, casual inferences, mere predictions, or probability assessments; and
2. the right and ability to control infringing activity must involve far more than the mere ability to deny service or remove material.

ARGUMENT

I. The Safe Harbor has Succeeded in Achieving its Legislative Purposes of Promoting Innovative Services and of Encouraging Copyright Holders and Service Providers to Work Together to Combat Copyright Infringement.

The safe harbor provisions of the DMCA have worked well for twelve years.

The Amici and many other services have blossomed in the safe-harbor era; and the entertainment industry has also embraced Internet availability of its works through new online licensed or proprietary services including iTunes, Hulu, Netflix, Rhapsody, Pandora, the new Napster, MTV.com, and VEVO.

Plaintiffs' brief opens by arguing that the central purpose of the DMCA was to protect against massive piracy and that copyright holders would not make works available on the Internet without strong legal protection (6-7)², and Plaintiffs later argue (28) that the district court's decision provides no protection at all against massive piracy.

Plaintiffs' emphasis on anti-piracy corresponds to anti-circumvention provisions of the DMCA, 17 U.S.C. §§ 1201-2. That emphasis is faulty because those provisions have nothing to do with this case. Sections 1201 and 1202 establish civil and criminal liability for those who tamper with copyright protection measures (such as DVD encryption) and provide technologies that circumvent such mechanisms. Neither of those provisions has any bearing on this case.

² Citations throughout are to the Viacom brief.

This case involves construction of a different part of the DMCA, so distinct that it had its own title: the Online Copyright Infringement Liability Limitation Act (“OCILLA”). OCILLA added 17 U.S.C. § 512, the focus here. It created no new violations, no new causes of action for copyright holders, and no basis of criminal prosecution. Its sole purpose—as the name suggests—is to *limit liability* of certain types of service providers by providing safe harbors against monetary damages and broad injunctive relief.

Similarly, Plaintiffs invoke portions of a Senate Report pertaining to other aspects of the DMCA not relevant to this case. (6) By contrast, the legislative statement pertaining specifically to the safe harbors states:

[W]ithout clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet. In the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability.... [B]y limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.

S. Rep. 105-190, at 8 (emphasis added).

The final sentence of that passage has proved true: There can be no argument that many innovative Internet-based services, marketplaces, communities, and platforms, like those of Amici, have arisen or expanded due in substantial part to the safe harbor.

Plaintiffs’ suggestion that the safe harbor encourages websites to place

obstacles in copyright holders' way (30-31) is mistaken. On the contrary, the notice-and-takedown process at the core of Section 512(c) imposes burdens on both copyright holders and online service providers: The copyright holder must identify the content it believes is infringing, and the service provider must expeditiously remove the content following notification. This shared burden creates every incentive for *cooperation on both sides to develop streamlined communications and processes*.

Amici and many others in the industry have taken steps, and are investing significant resources, to reduce the burdens of filing takedown notices. Webpages dedicated to explaining the DMCA process are now common. Many online services accept e-mail notice (as opposed to letters or faxes) and some even have special Webforms for filing DMCA notices. In addition, operators of online services often have staff dedicated to DMCA takedowns and specialized systems to enforce repeat infringer policies.

The safe harbor, with cooperation by both copyright holders and service providers, reduces tensions between industries, provides practical remedies for copyright holders, and enables important new technologies and business models that exploit the opportunities of the Internet.

II. The District Court’s Decision Is Consistent with a Line of Cases upon Which Innovative Companies Rely, and This Court Should Not Depart from That Tradition.

Plaintiffs assert that the DMCA’s safe harbor should not be available where a service provider has generalized knowledge that at least some of its users have posted content that infringes another’s copyright. The district court’s rejection of this argument was not unique or novel. It accords with at least ten other decisions from federal courts of all levels over the past twelve years. Those decisions evidence a combination of acute legal analysis, understanding of copyright law and its purposes, and respect for Congressional intent and craftsmanship in the copyright legislation.

In the first of these cases in 1984, the Supreme Court rejected the argument that “constructive knowledge” would satisfy the knowledge requirement for contributory infringement in a case against Sony for manufacturing and distributing the first video cassette recorder. The Court stated:

If vicarious liability is to be imposed on petitioners in this case, it must rest on the fact that they have sold equipment with constructive knowledge of the fact that their customers may use that equipment to make unauthorized copies of copyrighted material. There is no precedent in the law of copyright for the imposition of vicarious liability on such a theory.

Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 439 (1984).

Instead, the Court held that such constructive knowledge would qualify only if the product was incapable of substantial noninfringing uses. *Id.* at 442. The rest is

history: Few today would argue that the innovation of the VCR harmed copyright holders. Instead, it created an entirely new medium for enjoyment of, and an incentive to expanded distribution of, copyrighted works.

While the discussion in *Sony* pertained to knowledge of customer conduct as an element of contributory infringement, the notion of what qualifies as “knowledge” extends beyond that case. The Court rejected other standards, such as knowledge of customers’ “primary purpose,” “most conspicuous use,” or “major use” of the product, as criteria of knowledge. 464 U.S. at 428 (quoting from the Ninth Circuit’s ruling, which it overturned). That a VCR *could* be used for infringing purposes is obvious to anyone—as is the fact that at least *some* people would almost certainly use it for such purposes. But that is not the point: So long as the device is capable of substantial non-infringing uses, its potential for abuse is irrelevant to the question of knowledge.

In the present case, it is also obvious that a service that allows its users to upload and share content will, in at least some cases, have users who wish to upload and share works that infringe another’s copyright. But the entire point of the DMCA’s safe harbor provision is to limit the website operator’s liability for such user activity.

In *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361, 1374 (N.D. Cal. 1995) — one of the cases that influenced the adoption

of the DMCA — the Northern District of California held that general knowledge was insufficient to impose liability on a contributory infringement theory. The court stated:

The court is more persuaded by the argument that it is beyond the ability of a BBS [online bulletin board service] operator to quickly and fairly determine when a use is not infringement where there is at least a colorable claim of fair use. Where a BBS operator cannot reasonably verify a claim of infringement, either because of a possible fair use defense, the lack of copyright notices on the copies, or the copyright holder's failure to provide the necessary documentation to show that there is a likely infringement, the operator's lack of knowledge will be found reasonable and there will be no liability for contributory infringement for allowing the continued distribution of the works on its system.

Post-DMCA, every court to examine the issue has found that general knowledge of infringement is insufficient, and has required copyright holders to keep up their end of the bargain by providing notice to the website operators as set forth in the DMCA.

The Central District of California in *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1093-94 (C.D. Cal. 2001), rejected an effort to hold eBay liable (based on knowledge) after giving generalized notice that infringing copies were available on the marketplace but without specifying particular auctions; and it rejected an argument that the ability to exclude a user constituted a right and ability to control infringing activity.

The District of Maryland in *Costar Group, Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 704 (D. Md. 2001), rejected arguments that the ability to control or

block access to a site constituted the ability to control infringing activity.

The Western District of Washington in *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1108 (W.D. Wash. 2004), rejected the arguments of a plaintiff that it was not obligated to send notices of infringement to require a takedown.

The Ninth Circuit in *Perfect 10, Inc., v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007), ruled that generalized notices of infringement (i.e., those that did not identify specific content) were insufficient. It further rejected arguments that the service providers are imbued with actual knowledge of infringing activity based on so-called “red flags” that should have (in plaintiff’s view) signaled infringement. Discussing the notice-and-takedown process and the plaintiff’s effort to avoid a requirement of proper notices, the court stated:

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

CCBill, 488 F.3d at 1113.

The Northern District of California in *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1148 (N.D. Cal. 2008), upheld a safe harbor for Veoh, a user-generated video sharing service like YouTube, against arguments that Veoh should have been aware of infringements based upon “red flags” signaling that there was unauthorized infringing content. The court observed that, without

notices from the plaintiff (as here), Veoh lacked actual knowledge of any claimed copyright infringement, and it rejected the argument that generalized knowledge disqualifies a service provider from the safe harbor. *Id.* at 1148-49. The court also pointed out that “Veoh’s ability to control its index does not equate to an ability to identify and terminate *infringing* videos.” *Id.* at 1153 (emphasis in original). As in this case, the *Io* plaintiff itself had difficulty identifying infringements of its own works. *See id.*

The Central District of California in *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1108 (C.D. Cal. 2009), addressed similar issues where the plaintiff had resisted giving proper notices of infringement. The court rejected similar arguments that the knowledge or awareness disqualification or the direct financial benefit and control disqualification displaced the defendant’s safe harbor. *Id.* at 1108-16.

The Southern District of New York (Sweet, J.) in *Wolk v. Kodak Imaging Network, Inc.*, 2011 WL 940056, at *5 (S.D.N.Y. Mar. 17, 2011), recently held that a plaintiff’s non-specific notices of infringement were insufficient to establish knowledge or awareness of infringement that would exclude the safe harbor for defendant Photobucket.

Finally, the Central District of California in *Arista Records, LLC v. Myxer Inc.*, No. CV 08-03935 GAF (JCx) (C.D. Cal. Apr. 1, 2011), held that “general

knowledge” of infringements on a site and allegations of “willful blindness” based on a refusal to employ filtering did not meet the knowledge element of the disqualification and that awareness of popular downloads did not constitute “red flag” awareness of circumstances in which infringing activity was apparent. *Id.*, slip op. at 42-47. The court also suggested that a service provider did not have a right and ability to control infringements when it used automated processes to allow user uploads without selecting or previewing the uploads. *Id.* at 57.

Taken together, these ten cases have established and continued a tradition within which the district court’s decision in this case squarely rests. They have shown a consistent regard for the challenges faced by businesses that serve a mass public and that may enable an extraordinarily wide range of uses. Any mass service or technology provider faces risks that copyright owners will argue for massive damages arising from the conduct of an enormous user base. That is why Congress struck a balance between service providers and copyright holders, so that online services would develop and flourish while copyright holders would still enjoy protection. That is also why it is important that service providers continue to rely upon the consistent jurisprudence the courts have developed.

Amici and other service providers are willing to do their part in the balanced system that Congress devised, as they have been doing for years. They want copyright holders to continue with their part as well, and not to escape

responsibility for their notice obligations.

III. The Notice-and-Takedown Process Is Central to the Section 512(c) Safe Harbor, and This Court Should Not Construe Other Safe Harbor Provisions to Make It Meaningless.

It is important to understand the practical effects of efforts to expand the disqualifications of the safe harbor in Section 512(c). First, copyright holders often decide not to sue users directly but seek to hold service providers responsible for their users' behavior. In effect, they aggregate their claims against the public and focus them on service providers in order to allege enormous damages.

The risks of founding, investing in, and building online businesses would be unacceptable if the application of the safe harbor were uncertain. The threat is especially chilling in the current climate, where copyright holders sue not only companies but also their investors and directors for personal liability arising from activities that would normally gain protection from a corporate veil. *See UMG Recordings, Inc. v. Veoh Networks, Inc.*, 2009 WL 334022 (C.D. Cal. Feb. 2, 2009) (dismissing, without prejudice, secondary liability claims against investors); *UMG Recordings, Inc. v. Bertelsmann AG*, 222 F.R.D. 408 (N.D. Cal. 2004) (refusing to dismiss secondary liability claims against Napster's investors).

Second, Plaintiffs' proposals in this case would allow copyright holders to avoid the responsibility of policing their own copyrights, contrary to the clear framework of the DMCA and disturbing the balanced process that Congress

designed in order to encourage both copyright claimants and service providers to work together to minimize online infringement. The copyright owner is by far the most competent participant in the process to evaluate infringement: It should know whether it has provided the material at issue or whether one of its licensees has done so. It has access to far more reliable information than the service provider.

Third, Plaintiffs' proposals would sideline an important constituency: the public. An important aspect of the notice-and-takedown process is the protection of users of the online services. Under the current process, after a copyright holder sends a notification of claimed infringement and the service provider disables access to the activity or material, the user who uploaded the material may send a counter-notification in order to restore the material to the system if he or she believes the copyright holder to be mistaken. 17 U.S.C. § 512(g). If the copyright holder does not file suit against the user within ten business days, the service provider may restore the material without liability. Thus, service providers may properly step aside from the dispute, and the copyright owner and the uploader may litigate the issues, with the service provider respecting a decision of a court but having protection from damages exposure to both the copyright holder and the user. This gives the user a statutory opportunity to challenge the infringement claim and determine the outcome.

This important goal of the safe harbor reflected a specific legislative concern, and spurred a specific amendment, for the benefit of users:

Although I applauded the efforts of the affected industries to resolve the OSP [online service provider] liability issue, there was one issue which the industry agreement did not address—the protections that need to be given to users of the Internet. The agreement that the OSPs entered into would have protected the interests of the copyright owners, but it provided little or no protection for an Internet user who was wrongfully accused of violating copyright laws.

I think of a little girl, perhaps, who puts on her Internet site the picture of a duck she draws. We shouldn't allow Disney to say, "We own Donald Duck. That looks too much like Donald," and be able to bully a little girl from having a duck on her web site. We needed protection for the small user, not just for the big content promoters.

... If material is wrongfully taken down from the Internet user's home page, my amendment ensures that the end user will be given notice of the action taken and gives them a right to initiate a process that allows them to put their material back on line without the need to hire a lawyer or go to court. This was a critical improvement over the industry's prior compromise agreement.

144 Cong. Rec. S4888 (May 14, 1998) (statement of Sen. Ashcroft).

Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150 (N.D. Cal. 2008), illustrates the wisdom of Senator Ashcroft's amendment. In that case, the process worked in favor of a mother whose video of her toddler dancing to the music of Prince was fair use and who was able to restore the video to YouTube.

If courts expand the safe harbor disqualifications as Plaintiffs seek here, making takedown notices irrelevant, service providers will be forced to remove any content that *might* be infringing without affording users the opportunity to respond to specific takedown notices. As a consequence, users will not have a mechanism for joining the debate. Requiring service providers to disable access to

material based upon surmise or suspicion and not in response to a formal notification, or merely because the service providers have the power to disable it, without providing an important vehicle for vindication of a user's interest, would distort the important balance Congress achieved. It would harm the public, which has important interests and rights in its own creations and in fair use.

The Amici have gained popularity because, while sensitive to copyright owners' concerns, they are committed to engaging their users in community and providing forums for users to express themselves, engage in debate, and influence others. That is why they consider the role of the user in the safe harbor process to be so vital. Amici urge this Court to avoid construing safe harbor disqualifications in a way that moots the core, user-protecting notice-and-takedown provisions.

IV. The Actual Knowledge or Awareness Disqualification Does Not Require Actions Based upon Guesswork, Surmise, Inferences from Partial Information, or Mere Predictions.

Plaintiffs rely upon a provision disqualifying a service provider from the safe harbor where the provider has “actual knowledge that the material or activity is infringing” or has awareness of “facts or circumstances from which infringing activity is apparent.” 17 U.S.C. § 512(c)(1)(A). Knowledge of infringement, on the one hand, and awareness of facts and circumstances from which infringing activity is apparent, on the other hand, are two different things. The plain language of the statute makes that clear. The former is knowledge of a legal conclusion, for

example after a legal decision involving the challenged activity. The latter relates to actual experience of facts that compel a conclusion of infringement, regardless of whether one draws the legal conclusion. As we explain below, both require specificity.

Plaintiffs argue that “awareness” is a lesser included alternative to “actual knowledge” on the ground that such a construction avoids superfluity. (27) But as Plaintiffs construe it, actual knowledge would always be a subset of “awareness,” making the “actual knowledge” element superfluous. Thus Plaintiffs’ argument defeats itself. Only a construction, such as that we offer, that distinguishes between the legal conclusion and the awareness of facts of actual infringement satisfactorily accommodates and explains the statutory language.

It is unworkable to require a service provider to make important judgments on insufficient information, or to make it liable for failure to act in that context. To be aware of facts from which copyright infringement is apparent, a service provider must know the identity of the work; the identity of the uploader; the identity of the author; the identity of the copyright claimant of the work; whether the uploader and copyright holder have a relationship; and, if so, what the scope of that relationship is (such as an agency or license). Even if those facts were known, a service provider must still make a judgment based on further facts pertaining to fair use (perhaps for purposes of parody or criticism) or substantial similarity.

The Amici and other online service providers have experienced numerous examples where the public and even agents for rights holders have been misguided about the lawfulness of uploads. A recording artist posts a video, the RIAA claims it infringes, and the artist asks it to be restored after a takedown. A member of the public complains of an infringement where a filmmaker actually uploaded his own film. A copyright holder uploads apparently bootleg content in the hopes of creating “buzz,” and the public assumes it is unauthorized. Here Viacom itself apparently could not accurately determine what content it did or did not authorize on YouTube; the same was true of the plaintiff in *UMG v. Veoh*, where the plaintiff had to remove files from the list it claimed to be infringing. *See UMG*, 665 F. Supp. 2d at 1104. In this context, things may not be as they seem, and it is indeed very difficult to discern genuine “red flags” of infringing activity. The Amici speak from experience in this regard. Penalizing service providers for imperfect judgments, or requiring them to exclude lawful material or activity in order to avoid risk, is contrary to the point of the safe harbor.

A. The Plaintiffs’ Proposed Standard Conflicts with the Standard of Knowledge in *Sony*, and It Makes the Safe Harbor Tougher for Defendants than the Substantive Liability Standard.

Plaintiffs chafe at the requirement of “actual knowledge of ‘specific and identifiable infringements of individual items’” as a standard to defeat the safe harbor. (3) They argue such a requirement leads to “absurd, disquieting, and

disruptive results.” (3) They claim “that construction 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.” (3) The Amici disagree. The safe harbor, as applied so far, has not destroyed copyright.

Plaintiffs state that “[t]he primary issue ... is whether, in light of YouTube’s undisputed knowledge or awareness of ongoing infringement, this no-action policy properly excludes it from the safe harbor.” (23) Yet the “knowledge or awareness” that Plaintiffs allege constitutes *generalized* knowledge, not *actual* knowledge.

After arguing that circumstantial evidence and inferences may support a finding of knowledge of “actual infringement” (39), Plaintiffs offer nothing to support the inference other than references to percentages of videos that were copyrighted and one memorandum that assumed that files of certain shows were “blatantly illegal.” (39-40) But percentages say nothing about actual knowledge of *specific* infringements. Where copyright holders themselves upload videos to services while disguising their identity in guerilla marketing, service providers are in no position to evaluate, much less to *know*, whether *specific* files were infringing. Indeed, that is why the DMCA gives copyright holders the responsibility to initiate the takedown process rather than imposing a duty on service providers to monitor their services.

The Supreme Court in *Sony* addressed the parallel question of what type of knowledge would lead to a finding of contributory liability. The standard for contributory liability at the time was “one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.” *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971), *quoted by Sony*, 464 U.S. at 487. In *Sony*, the plaintiffs sought to base liability upon *generalized* knowledge by the defendant of infringements by the public on the theory that it was “constructive knowledge.” The Supreme Court correctly rejected “constructive knowledge” of a technology provider based upon statistics relating to customers’ uses as relevant so long as the technology was “merely ... capable of substantial noninfringing uses.” *Sony*, 464 U.S. at 442. The construction of “knowledge” that Plaintiffs urge runs afoul of *Sony*. Indeed, Plaintiffs would have this Court impose a more rigid standard for the DMCA—whose entire purpose is to limit liability of service providers—than under the substantive standard for contributory infringement under *Sony*. This makes no sense.

A safe harbor provides protection for a service provider *even when infringement otherwise exists*: the DMCA safe harbor merely limits remedies and does not preclude a finding of infringement. *Compare* 17 U.S.C. § 512(c) (“A

service provider shall not be liable for monetary relief, or ... for injunctive or other equitable relief”) with 17 U.S.C. § 107 (“the fair use of a copyrighted work ... is not an infringement of copyright”). Because a safe harbor limits remedies in the case of infringement, any construction that makes a safe harbor depend upon facts that already preclude infringement would make it superfluous.

B. The Plaintiffs Employ Circular Reasoning to Distort the Actual Knowledge or Awareness Requirement by Using “Willful Blindness” to Annul the Effect of Section 512(m).

Plaintiffs argue in vain that Section 512(m) of the DMCA, 17 U.S.C. § 512(m), is irrelevant even though that section specifically states that the safe harbor does not depend upon “a service provider monitoring its service or affirmatively seeking facts indicating infringing activity.” (46) They strain to limit that section artificially by ascribing to it a narrow purpose and an interpretation that renders it a nullity.

Plaintiffs rest their argument upon a concept of “willful blindness” as a substitute for knowledge. (34) The “willful blindness” standard they propose is but a form of constructive, generalized knowledge that the Supreme Court in *Sony* rejected. Plaintiffs’ claimed “common law of willful blindness” (38) is both irrelevant and directly contrary to *Sony*.

Moreover, even assuming that willful blindness would serve as a substitute for “actual knowledge,” Plaintiffs engage in the following circular reasoning to

circumvent Section 512(m), which excuses services from monitoring or affirmative efforts to seek facts of infringement:

- (a) YouTube's failure to monitor or affirmatively seek facts indicating infringing activity constitutes willful blindness;
- (b) Such willful blindness constitutes YouTube's actual knowledge of infringements;
- (c) Such knowledge nullifies YouTube's innocence;
- (d) Section 512(m) applies to only innocent parties;
- (e) Therefore YouTube must monitor or affirmatively seek facts indicating infringing activity.

That circular reasoning mocks both the letter and the purpose of Section 512(m). The only reasonable construction is that Section 512(m) prohibits imposing any monitoring or research obligation as a condition of obtaining the safe harbor. For that reason, Plaintiffs' arguments to disqualify YouTube or any other service provider from the safe harbor based on willful blindness, in turn based upon a failure to monitor or investigate, are contrary to the statute. The district court correctly rejected this attempt to render Section 512(m) a nullity.

C. Filtering and "Community Flagging" Are Not Part of an Obligation for Expedious Removal upon Acquisition of Actual Knowledge or Awareness.

Plaintiffs claim that "YouTube had fingerprint filtering technology and even

its own community flagging feature available to it. Its refusals to use those technologies—indeed, to disable or selectively deploy them—could not possibly be construed as actions consistent with an obligation of ‘expeditious[] ... remov[al].’” (33)

Filtering technologies and community flagging are hardly tools for accurate identification of infringing material or activity. Filtering – which occurs during the upload process -- may screen for some but far from all relevant facts that are necessary for an evaluation of possible infringement, such as the identity of the uploader, the license status of the use, the context of the use (which may be fair)³, and so forth. Any attempted filtering solution may well require substantial suppression of relevant, useful, and noninfringing content, and the DMCA does not require a service provider to suppress lawful material or activity.

Moreover, Plaintiffs’ argument that a service provider’s failure to deploy barriers to *inclusion* (filtering) is inconsistent with its obligation of “expeditious *removal*” is faulty. Removal presumes that content was already present, so an obligation to remove cannot entail an obligation to block uploads from occurring in the first place.

³ The Northern District of California, in *Lenz*, 572 F. Supp. 2d at 1155, made it clear that even a DMCA notice must take into account the context of the use of a work in order to evaluate fair use. Copyright holders lament the fact that automated systems cannot account for fair use when they generate notices. Their argument explains why automated systems of a service provider cannot assess fair use.

Finally, the suggestion that *community* flagging is an adequate substitute for *copyright holder* flagging and notification is far-fetched. Plaintiffs furnish no identification of who the “community” is apart from suggesting that it is a service provider’s user base, they fail to suggest why the community would have relevant expertise and knowledge, and they entirely fail to accommodate the fact that ignorant and possibly malicious persons may distract a service provider with entirely unfounded “flags” or comments. There is a straightforward cure for the serious defects in the alternatives that Plaintiffs propose, and that is *copyright holder flagging via notification*, exactly as the DMCA provides.

V. The Disqualification Based upon the Right and Ability to Control Infringement Pertains to Specific Control and Does Not Allow Ordinary Activities to Render the Safe Harbor Irrelevant.

Plaintiffs’ construction of the disqualification based upon the right and ability of a service provider to control infringing activity distorts the clear meaning of the statute.

Numerous cases agree that the right and ability to control *infringements* cannot arise from the mere ability to admit or exclude works from a service: *See, e.g., Io*, 586 F. Supp. 2d at 1132; *Corbis*, 351 F. Supp. 2d at 1110; *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1181 (C.D. Cal 2002); *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1061 (C.D. Cal. 2002), *aff’d in part and rev’d in part on different grounds*, 357 F.3d 1072, 1079 n.10 (9th Cir. 2004); *Costar*, 164 F.

Supp. 2d at 704 n.9; *Hendrickson*, 165 F. Supp. 2d at 1092.

Leaving aside that error, Plaintiffs' arguments on specific language of the safe harbor are misguided. They mistakenly treat a "right and ability to control [infringing] activity" as an ability to deploy filters, which may have a coarse and imperfect relationship to actual infringements and may therefore unduly exclude lawful material and activity.

The district court resisted such an error by observing a link between actual knowledge of infringements and the right and ability to control: The right and ability *accurately* to control infringements depends upon knowledge of the particular infringements and the ability to target those particular infringements without jeopardizing lawful uses. Copyright law does not require, and should not tolerate, the suppression of some lawful, creative works and uses as a by-product of extra protection for other creative works and uses.

This Court should apply the statutory language, consistently with its legislative history, and resist Plaintiffs' invitation to distort the law to enable them to avoid their responsibility in the notice-and-takedown process at the core of the safe harbor.

CONCLUSION

The district court's decision correctly analyzed the law. It respected Congress' purpose in enacting it. It respected the practical realities of the

symbiosis of copyright protection and online innovation that the Amici witness in their daily business and foster in their relationships with copyright holders. Amici curiae eBay, Facebook, IAC/InterActiveCorp, and Yahoo! urge this Court to affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) because it is in 14-point Times New Roman font, and with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 6745 words, excluding the portions excluded under Fed. R. App. P. 32(a)(7)(B)(iii). This count relies on the word-count feature of Microsoft Word.

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STATUTORY APPENDIX

17 U.S.C. § 501(c) Information Residing on Systems or Networks at Direction of Users.

(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(m) Protection of Privacy.

Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on —

(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i); or

(2) a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.