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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.

(For Continuation of Caption See Inside Cover)

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

BRIEF FOR HUMAN RIGHTS WATCH, FREEDOM HOUSE, REPORTERS WITHOUT BORDERS AND ACCESS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

SEAN H. DONAHUE
DONAHUE & GOLDBERG, LLP
2000 L Street, NW, Suite 808
Washington, DC 20036
(202) 277-7085

DAVID T. GOLDBERG
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Floor
New York, New York 10013
(212) 334-8813

Counsel for Amici Curiae

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, SIN-DROME 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,

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

Plaintiffs,

– v. –

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

Defendants-Appellees.

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Amici Human Rights Watch, Freedom House, Reporters Without Borders, and Access respectfully submit this brief in support of affirmance of the district court's judgment in favor of Appellees Google and YouTube.

INTEREST OF *AMICI*[1]

Human Rights Watch is one of the world's leading independent organizations dedicated to defending and protecting human rights. Founded as the Fund for Free Expression, the organization has a long-standing commitment to defending free speech, the right to information, and the work and security of human rights defenders everywhere. For 30 years, Human Rights Watch has conducted rigorous, objective investigations of possible human rights violations around the world, and has engaged in strategic, targeted advocacy, and has worked to build a secure legal foundation for human rights throughout the world.

Freedom House is an independent watchdog organization that monitors freedom, supports democratic change, and advocates for democracy and human rights around the world. *See* www.freedomhouse.org. Since its founding in 1941, with Eleanor Roosevelt and Wendell Willkie serving as honorary co-chairpersons, Freedom House has been a vigorous proponent of democratic values and a

[1]All parties have consented to the filing of this brief. It was authored by undersigned counsel, and no party, party's counsel, or other person contributed money intended to fund preparing or submitting it. *Amici* Access, Freedom House, and Reporters Without Borders have received contributions from Appellee Google supporting their general international human rights work.

steadfast opponent of dictatorships of the far left and the far right.

Reporters Without Borders ("RWB") is an international media rights advocacy group based in Paris, with offices throughout Europe and in Washington, D.C. *See* http.en.rsf.org. RWB defends journalists who are being imprisoned or persecuted, and exposes mistreatment and torture of journalists. RWB fights censorship and laws that undermine press freedom; provides financial aid to journalists and media outlets in crisis and to families of imprisoned journalists, and works to promote journalists' safety, particularly in war zones.

Access is a nonprofit, transnational organization premised on the belief that political participation and the realization of human rights in the 21st Century is increasingly dependent on access to the internet and other forms of technology. *See* www.accessnow.org. Founded in the aftermath of the 2009 Iranian elections, Access provides support to human rights and pro-democracy activists in semi-closed countries.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the meaning of the "safe harbor" provision of the Digital Millennium Copyright Act ("DCMA"), 17 U.S.C. § 512, which enables internet platforms that comply with statutory take-down and other procedures to operate without threat of copyright damage liability for infringing materials uploaded without their knowledge by users. As Appellees explain, in enacting this

provision, Congress made a pivotal determination that the openness and continued development of the internet depended on placing the burden of policing infringement on copyright owners, enabling service providers to provide more open platforms.

Plaintiffs-Appellants, in an effort to hold YouTube liable for users' alleged copyright infringements (and reap very large statutory penalties), urge constructions of the DMCA safe harbor that are considerably narrower than the text warrants or than other courts have embraced. If accepted, their arguments would seriously erode the protection the statute was meant to provide. That possibility greatly concerns *amici*, as advocates for civil liberties and human rights.

Social media platforms, including YouTube, have become vital tools in global struggles for human rights, free expression, and political liberty. The self-expression and association such services foster are themselves fundamental human rights — and social media have greatly enhanced individual citizens' ability to document and publicize governmental abuses in their own countries, associate with fellow citizens with shared concerns, and engage others across the world. Services like Facebook, Twitter, and YouTube have contributed importantly both to discrete reforms and to broad social movements, and have helped shine light upon problems previously concealed from scrutiny. Because these platforms allow participation without regard to location, they have helped support new dialogues

and forms of engagement across national boundaries — a critical benefit in the quintessentially transnational field of human rights advocacy.

Rules like those urged by Appellants, which would hold online service providers massively liable for infringing material placed online by users, would jeopardize these important benefits. The core idea behind the DMCA regime — that service providers should not normally be liable for the legal misdeeds of users — is a foundational principle of the growth of the internet and social media, and is essential to their continued vitality and evolution.

For the United States — whose policies, laws, and practices are highly influential around the world, and which has been a highly vocal proponent of internet freedom — to erode these keystone principles in the way Appellants advocate would compromise the utility of these platforms in promoting freedom, openness, and accountability worldwide.[2] Indeed, opening the door to service provider liability under U.S. copyright law based on generalized awareness that infringing content was being uploaded would be contrary to the judgment Congress codified more than a decade ago — and would represent an ominous precedent, especially in parts of the world where repressive and corrupt regimes remain in power and (rightly) perceive the open internet as a threat.

[2] *See* Hon. Hillary Rodham Clinton, Speech, Internet Rights and Wrongs: Choices and Challenges in a Networked World (Feb. 15, 2011), *available at* www.state.gov/secretary/rm/2011/02/156619.htm ("On the spectrum of internet freedom, we place ourselves on the side of openness.").

ARGUMENT

I. SOCIAL MEDIA PLATFORMS HAVE BECOME IMPORTANT TOOLS FOR PROMOTION OF HUMAN RIGHTS

A. Social Media as Instruments of Human Rights Advocacy. Social media platforms — including globally recognized services such as Facebook, Flickr, Twitter, and YouTube, as well as numerous others less well known — have become important tools for people struggling for democracy and human rights.[3] These services allow ordinary individuals to communicate text, sound, images, and video instantaneously and inexpensively, not only to friends, neighbors, and associates, but to millions of unknown others around the world. Because these platforms can connect anyone with a cell phone to a global audience, they dramatically expand the number of people able to bear witness to human rights abuses.[4] And because they can be accessed from almost anywhere, and often with

[3] *See also* Aileen Thomson, *Southeast Asia and Oceania*, HUM. RTS. BRIEF 51 (Spring 2010) ("Social media sites like Facebook are playing a growing role in human rights activism by helping to organize grassroots action and educate a global audience about human rights abuses."); Sam Dupont, Blog, Social Media in Egypt: A Second Public Sphere, NDN Blog (Feb. 10, 2011), *at* http://ndn.org/blog/2011/02/social-media-egypt-second-public-sphere (discussing roles of social media as a "tool for organizing," as a "news source," and as a "public sphere" to build a community of like-minded activists) [hereinafter Dupont, Public Sphere]. YouTube's implications for human rights advocacy have been recognized since its early days. *See, e.g.*, Andrew K. Woods, *The YouTube Defense: Human Rights Go Viral*, SLATE, Mar. 28, 2007, *at* www.slate.com/id/2162780/.

[4] *See* Moises Naim, *YouTube Journalism*, L.A TIMES, Dec. 20, 2006 ("Although international news operations employ thousands of professional

a degree of anonymity, social media can allow people to associate even when in-person meetings are made difficult or impossible by governmental decree or cultural norm.[5] The flexibility of social media allows activists to adjust to rapidly changing events, to organize and reorganize relatively quickly.[6]

In countries like Burma, Tibet, and countless other places made remote by political repression and geography, reporting of events and advocacy for human rights has long been stymied by the sheer difficulty of communicating with the outside world. The advent of social media platforms and cell phones has enabled information to flow even from remote and tightly-controlled societies, permitting expatriates, journalists and NGOs to follow events unfolding within them.[7] And

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journalists, they will never be as omnipresent as millions of people carrying cellphones that can record video."), *at* http://articles.latimes.com/2006/dec/20/opinion/oe-naim20.

[5] *See* Michael Slackman, *Bullets Stall Youthful Push for Arab Spring*, N.Y. TIMES, Mar. 17, 2011, *available at* www.nytimes.com/2011/03/18/world/middleeast/18youth.html (discussing Hiber, a social media and blogging organization, noting that Jordanian women "cannot go to the park unaccompanied and meet friends, but they can join a chat room or send instant messages") [hereinafter Slackman, *Arab Spring*]; Stephanie Holmes, *Burma's Cyber-Dissidents*, BBC NEWS, Sept. 26, 2007, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/7012984.stm (Burmese dissidents who previously shared information "hand-to-hand" were "using the internet - proxy websites, Google and YouTube and all these things") [hereinafter Holmes, *Burma*].

[6] *See* Slackman, *Arab Spring*, *supra* note 5 (quoting Moroccan activist and Facebook user's statement that "Our spontaneity is our strength").

[7] *See, e.g.*, Holmes, *Burma*, *supra* note 5 (noting that, in contrast to 1988 protests in Burma, "[t]hanks in part to bloggers, this time the outside world is

these social media allow for the creation of civic spaces in which interested citizens can discuss shared grievances and policy proposals and lay the groundwork for public appeals — an especially important feature in societies where governments have restricted more traditional forms of assembly and collective engagement.[8]

The fact that anyone with cell phone or computer access can upload a video clip or text message means that abuses of power and denials of human rights — whether single acts of police cruelty or systemic exploitation of children — risk being recorded and quickly publicized. In the past, a witness to misconduct by security forces would have to locate a journalist, convince her of the truth and importance of the witnessed events, and hope her employer had the fortitude to publish material reflecting poorly on government authorities. Now the same person could upload evidence directly to the internet. Social media can deny traditional forms of censorship much of their bite.[9]

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acutely aware of what is happening on the streets of Rangoon, Mandalay and Pakokku and is hungry for more information").

[8] *See* Dupont, Public Sphere, *supra* note 3; Charles Hirschkind, The Road to Tahrir, The Imminent Frame, Feb. 9, 2011, *at* http://blogs.ssrc.org/tif/2011/02/09/the-road-to-tahrir/.

[9] Note, The Pakistani Lawyers' Movement and the Popular Currency of Judicial Power, 123 Harv. L. Rev. 1705, 1717 (2010) (quoting Pakistani legal scholar's observation that protest movement, unlikely earlier ones thwarted by martial law, achieved momentum because information about unlawful arrests could be shared via cellphones and new media based outside of the country).

Many of the traditional missions of local and transnational civil liberties and human rights organizations — such as identifying and persuasively documenting abuses; reporting on them to the media and governmental bodies; raising awareness of their existence and extent; and seeking citizen support — are facilitated by the advent of social media platforms. Rights advocates have long recognized that effective responses to abuses and accountability must begin with making such acts *public*. "[E]lectric light [is] the most efficient policeman," LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 92 (1932), and social media have vastly expanded the light that can be shed on abuses, wherever committed.

The vast power of platforms like YouTube and Twitter's Twitvid to disseminate *video* holds particular promise. Advocates have long recognized the special power of that medium to raise awareness and stir opposition to human rights violations. The international organization WITNESS was established in 1992 by musician Peter Gabriel to harness the impact and credibility of such evidence by making video cameras broadly available to human rights activists. With inexpensive phones and video cameras now in the hands of billions of people, platforms like YouTube can make anyone's uploaded video available to everyone.[10]

[10] WITNESS now maintains its own online library of human rights testimonials and other videos and has a partnership with YouTube. *See* www.witness.org; www.youtube.com/watch?v=Ovv6CMZHIic (Witness's Executive Director,

The availability of these powerful new communications platforms does not, of course, guarantee the opening of a new era of respect for human rights — indeed, social media open up new opportunities for abuses of privacy, for monitoring and punishment of dissidents, and for governmental deception. Yet social media platforms undoubtedly offer significant promise as tools in global struggles for human rights and official accountability.

B. Social Media and Popular Advocacy for Human Rights and Government Accountability

Recent events around the world — in places as disparate as Burma, Guatemala, China, Iran, and countries throughout North Africa and the Middle East — have provided compelling and widely noted examples of social media's power to facilitate citizen activism, expose official abuses, and focus world attention on struggles for universal values such as freedom of association and the rule of law. Although their importance is hardly limited to these few prominent examples, social media platforms have played a key role in recent struggles for political and civil rights — including in social protest movements that succeeded in dislodging entrenched authoritarian governments, and those which (whether successful or not) reshaped national politics and expectations for reform.

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explaining organization's use of video to document and deter human rights abuses).

In June 2009, thousands of Iranians took to the streets to protest the disputed election claimed by President Mahmoud Ahmadinejad. During the protests, images and messages transmitted by cellphones were a vital means both of organizing — and of informing the world about the extent of the protests and the government's efforts to shut them down. Despite the Iranian government's assiduous efforts at censorship, millions of people around the world followed them on their computers.

A brief video of a young music student, Neda Agha Soltan, who was fatally shot during a street protest (likely by a paramilitary sniper), became a tragic illustration of the power of social networks to transform what previously would likely have been a local matter, into a national and international clarion call. "The video wound up with the Guardian, Voice of America and five individuals, one of whom put it on Facebook. Someone else uploaded it to YouTube, and from there the video went viral."[11] Both in Iran and abroad, Neda's death became emblematic of the Green Revolution, and of the measures taken to suppress it.[12]

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[11] Donna Trussel, *Anonymous Captured Neda's Death, and Now the Polk Award*, POLITICS DAILY (2010), *available at* www.politicsdaily.com/2010/02/18/anonymous-captured-nedas-death-and-now-the-polk-award/ [hereinafter Trussel, *Neda's Death*].

[12] *See* Adam LeBor, *When Iran's Regime Falls this will be Remembered as the YouTube Revolution*, TIMES OF LONDON, Dec. 29, 2009, *available at* www.timesonline.co.uk/tol/news/world/middle_east/article6969958.ece [hereinafter LeBor, *YouTube Revolution*].

Social media platforms like Facebook and YouTube played "a significant role in the broad protest movement that ultimately brought down the Government of Egyptian President Hosni Mubarak and his government."[13] The use of social media to bring to light human rights abuses, including of dissenters using the internet to criticize the government, played a role in catalyzing longstanding public discontent with the Mubarak regime. After a young man, Khaled Said, was beaten to death by Egyptian government security forces in Alexandria in June 2010, possibly because had come into possession of videos revealing police corruption, photos of his disfigured face were posted on the internet, prompting public outrage in Egypt and elsewhere. In response, an Egyptian marketing executive based in Dubai, Wael Ghonim, set up a Facebook page called "We are all Khaled Said," which became a widely subscribed clearing house for grievances about the Mubarak regime, with hundreds of thousands of Egyptian participants by January 2011.[14] Ghonim then proceeded to use this internet community to help organize the massive protests during early 2011.[15] While it would be too simplistic to

[13] DuPont, Public Sphere, *supra* note 3. For discussions of the role of social media in the Egyptian protest movement, see Jennifer Preston, *Movement Began With Outrage and a Facebook Page That Gave It an Outlet*, N.Y. TIMES, Feb. 6, 2011 [hereinafter Preston, *Movement*].

[14] *See* Profile: Wael Ghonim, BBC NEWS, Feb. 8, 2011, *at* www.bbc.co.uk/news/world-middle-east-12400529 [hereinafter Ghonim Profile].

[15] *See generally* Mark Giglio, The Facebook Freedom Fighter, NEWSWEEK, Feb. 13, 2011, *available at* www.newsweek.com/2011/02/13/the-facebook-

proclaim that social media tools "caused" a complex and long-gestating political upheaval in a country of over 80 million people, social media did play an important role in helping to focus, catalyze, and publicize Egyptian protesters' efforts.[16]

Social media played an important role in the recent Tunisian protest movement, catalyzed by a street vendor's self-immolation in Sidibouzid, that culminated in the end of the 23-year authoritarian rule of President Zine El Abidine Ben Ali. Slim Amamou, an influential blogger and activist (and now official in the interim government), has described the role played by social media:

> When people begun demonstrating in Sidibouzid, part of the rage they were feeling was because media did not talk about them. They felt ignored * * * At that time all media was controlled by the government. The only media that took on itself to talk/report about Sidibouzid was us, Internet users. Hence the importance that social media took. In a few weeks people were compulsively following and sharing information in social media and censorship could not follow: they've been overwhelmed and information was getting through and everyday more people were rallying the cause.[17]

In the ongoing uprisings and protests across much of the rest of the Arab world in early 2011, social media have likewise played an important role.[18] Video

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freedom-fighter.html. *See* Ghonim Profile, *supra* note 14.

[16] In an interview on Egyptian TV, Wael Ghonim stated, "This is the revolution of the youth of the internet, which became the revolution of the youth of Egypt, then the revolution of Egypt itself." Ghonim Profile, *supra* note 14.

[17] Global Voice Online, Tunisia: Slim Amamou Speaks About Tunisia, Egypt and the Arab World, http://globalvoicesonline.org/2011/02/11/tunisia-slim-amamou-speaks-about-tunisia-egypt-and-the-arab-world/. *See also* Dupont, Public Sphere, *supra* note 3.

[18] *See* Slackman, *Arab Spring*, *supra* note 5 ("The movement is still forcing

from many of these countries may be seen on the "Arab Spring" compilations on YouTube's Citizentube channel. While the outcome of these events remains uncertain, that the futures of all these countries has been, and will continued to be, influenced by the ability of ordinary citizens to communicate with each other and with the rest of the world via social media *is* certain.

Such social upheavals are complex and depend upon multiple factors, including the sheer courage, perspicacity and effort of those who risk their lives to challenge autocratic regimes. The varying results of these uprisings stand as a reminder that new technologies are not a fail-safe means of defeating repressive regimes. But it is increasingly clear that social media platforms can in some instances help alter the balance between authoritarian regimes and the people seeking to overcome them, and that they have introduced a promising new dynamic into age-old struggles for political freedom and human rights.

As Egypt's example illustrates, social media can help address police brutality — a chronic source of severe human rights violations in Egypt as in much

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change in places like Morocco and Jordan, guiding transitions in Egypt and Tunisia, and playing out in countries like Algeria and Yemen. Young people remain out front, wielding the online tools they grew up with to mobilize protests, elude surveillance and cross class lines."); Megan O'Neill, *How YouTube is Aiding the Libyan Revolution*, SOCIAL TIMES, Feb. 26, 2011, *at* www.socialtimes.com/2011/02/youtube-libyan-revolution/ [hereinafter O'Neill, *Revolution*].

of the world — thereby further enabling challenges to repression.[19] Social media platforms are also potentially very effective means of publicizing and responding to other major human rights problems worldwide, such as human trafficking, child labor, and persecution of ethnic or religious minorities. Organizations combating massive human rights abuses and the refugee crisis in Darfur, for example, have relied heavily upon social media to mobilize responses and raise aid funds, as have humanitarian groups responding to disasters in Haiti, Chile, New Zealand and Japan, and elsewhere.

C. Social Media Platforms Face Censorship and Suppression

The fundamental principle of which the DMCA safe harbor is among the world's most important embodiments — that bona fide online service providers should not be sanctioned for materials they host — is imperiled in many countries where service providers have recently been broadly censored for merely hosting material deemed dangerous. In July 2010 a Russian judge ordered an access provider to block access to online libraries, as well as YouTube and Web.archives.org, on the basis that these sites had stored "extremist" material — in

[19] *See* Ernesto Londono, *Egyptian Man's Death Became Symbol of Callous State*, WASH. POST, Sept. 2, 2011, *available at* www.washingtonpost.com/wp-dyn/content/article/2011/02/08/AR2011020806360.html. *See* Preston, *Movement*, *supra* note 14; Murray Whyte, *Police Brutality, the YouTube Hit*, TORONTO STAR, Mar. 7, 2009, *available at* www.thestar.com/news/gta/article/598176.

YouTube's case, a user-uploaded Russian nationalist video.[20]

As Secretary of State Clinton observed, even as social media have "opened up new forums for exchanging ideas," they have at the same time "created new targets for censorship."[21] Precisely because they are such potent means of documenting abuses and of expressing and mobilizing dissent, social media by nature threaten repressive governments, who often attempt to restrict their citizens' access to these services.[22]

During the recent uprising, the Egyptian government took extreme steps to try to foreclose use of the internet. In an effort to thwart protestors from using services like Twitter and Facebook, the Mubarak government shut down mobile and broadband networks, and basically shut down the internet in Egypt.[23]

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[20] RWB, *Internet Enemies* 78 (March 2011), *available at* http://march12.rsf.org/i/Internet_Enemies.pdf. [hereinafter *Internet Enemies*]. The YouTube blocking order was "a first in Russia" and was ultimately was not enforced. *See id*. *See also id*. at 92-93 (discussing blocking of YouTube in Turkey on the basis of its hosting of videos deemed inappropriate by authorities and noting that "[i]n June 2010, the Turkish Supreme Council for Telecommunications and ID (TIB) based Internet service providers to block new YouTube-linked IP addresses").

[21] Hon. Hillary Rodham Clinton, Speech, Remarks on Internet Freedom (Jan 21, 2010).

[22] *See Internet Enemies*, *supra* note 20, at 15-53.

[23] *See* James Cowie, *Egypt Leaves the Internet*, RENESYS BLOG, Jan. 27, 2011 ("[I]n an action unprecedented in Internet history, the Egyptian government appears to have ordered service providers to shut down all international connections to the Internet."), *available at* www.renesys.com/blog/2011/01/egypt-leaves-the-internet.shtml.

Blocking social media sites, or slowing or barring access to the internet, has been a common response of autocratic regimes in countries including Iran, Burma, and numerous Arab states facing citizen protests.

China has written entire chapters in the annals of internet censorship, and has responded harshly to the uploading of videos critical of its human rights record — including those showing Chinese security officers shooting citizens attempting to cross a snowy mountains to cross from Tibet into India; protests and state violence in Tibet; Chinese officials beating Tibetan monks; and ethnic riots in western China.[24] China has in recent years blocked YouTube, Facebook, Twitter, Flickr, Bing, and other services.[25]

Activists have shown great ingenuity in evading censorship to continue documenting abuses and communicating with supporters within and outside the country.[26] However, governments have become more aggressive and sophisticated at monitoring citizens' activity and blocking activities deemed threatening.

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[24] *See, e.g.*, Associated Press, *China Blocks YouTube Over Tibet Protests*, Mar. 16, 2008, *at* www.msnbc.msn.com/id/23657906/ns/world_news-asia-pacific/; Quentin Sommerville, *China Blocks YouTube Video Site*, BBC NEWS, Mar. 24, 2009; Owen Fletcher & Dan Nystedt, *Twitter Blocked in China City After Ethnic Riot*, PC WORLD, July 8, 2009, *available at* www.pcworld.com/businesscenter/article/167884.

[25] On China's recent policies toward the internet and actions against internet users, see *Internet Enemies*, *supra* note 20, at 15-23.

[26] *E.g.*, LeBor, *YouTube Revolution*, *supra* note 11 ("'Citizen journalists in Iran are technically very savvy.'"); O'Neill, *Revolution*, *supra* note 18.

Although all too many governments have proved willing to take harsh measures to reduce citizens' ability to express dissent, governments' readiness to do so may be constrained by international norms and citizen expectations concerning access to the internet and its social networking tools. As Secretary Clinton explained in her January 2010 Remarks on Internet Freedom, *see supra*, note 21, governments that impede internet access "contravene the Universal Declaration on Human Rights, which tells us that all people have the right 'to seek, receive and impart information and ideas through any media and regardless of frontiers.'" Reaffirming and abiding by those norms ensures that governments that do make that choice pay a steep price in terms of international opinion and prestige, and the esteem of their own citizens. The Mubarak regime's recent efforts to shut down the internet were widely criticized throughout Egypt and by foreign governments — and likely contributed to the erosion of the regime's remaining support both in Egypt and abroad. When vigorously affirmed, norms favoring unimpeded access to online communication raise the expected costs of censorship for governments contemplating it.

II. THESE IMPORTANT GLOBAL DEVELOPMENTS DEPEND DIRECTLY ON PRESERVING THE EFFECTIVE SAFE HARBOR CONGRESS ENACTED

A. Appellants' Unwarrantedly Narrow Readings of DCMA Safe Harbor Would Threaten The Viability and Public Value of Social Media Services.

Were the Court to accept Appellants' narrow construction of the DMCA safe harbor and hold it does not protect against imposition of massive copyright liability based upon infringements by YouTube users, its decision would deal a serious blow to the distinctive role that such services, overwhelmingly operated by U.S. companies responsive to U.S. law, have come to play in struggles for human rights around the world. Affirming the district court's decision, by contrast, would not only allow the dynamic discussed in the brief to continue, but would be faithful to the fundamental judgments expressed in the text and structure of the safe harbor provisions.

There is no claim that Congress in 1998 specifically intended that services like YouTube, Facebook and Twitter would be entitled to — or excluded from — the safe harbor provisions it was enacting. Even the most forward-looking member of the 105th Congress would have struggled to comprehend what these yet-unlaunched services would do, let alone the role they would within a decade play in the political, cultural, and economic life of the nation and the world. Indeed, it

is almost certainly the case that YouTube's founders (who, Appellants repeatedly insist, *see* Class. Br. 8, Viacom Br. 9, 48, "secret[ly]" hoped to sell the company) did not foresee, let alone intend, the pervasive role it would soon play in American electoral politics, not to mention in political revolts and freedom movements in far-off places where public dissent had lain dormant for decades.

But it does not follow that these unpredicted and extraordinarily important uses to which YouTube (and other media) have been put have no relevance to the resolution of the issues presented here. On the contrary, these developments forcefully confirm the basic judgments Congress did enact in 1998. The DMCA safe harbor provisions codified general policy judgments about the internet and the role and legal responsibilities of service, which in turn made platforms like YouTube and Twitter possible. The regime Appellants ask the Court to impose not merely goes against the grain of statutory text, but fails to respect these foundational legislative premises.

The Appellants can be expected to stipulate to the social importance of the uses of YouTube and other social media, but to object that these beneficial and even history-shaping contributions to global democracy are beside the point — all the more in a case like this, involving the application of Copyright Act provisions to (alleged) garden-variety infringements of intellectual property rights in entertainment content, much of which was likely uploaded by Americans, from the

safety of their home computers, to a site maintained by a U.S. for-profit corporation with abundant resources. To permit liability here, the argument would be, is not to condone repression or censorship, and allowing defendants the benefit of the safe harbor will not inhibit future misbehavior by repressive governments in distant lands.

While we recognize the intuitive force of such objections, they are seriously mistaken. To begin, it would be surprising were Appellants to seriously dispute that the questions before the Court are *relevant* to the political developments described above. Whatever effect a judgment in their favor here might have, the prospect of billions of dollars in damages claims (and reported litigation costs into the nine digits) is certain to deter firms that might otherwise enter the field to develop the next "generation" of internet-based platforms and media, those that will make Facebook and YouTube seem dated. That prospect would surely drive smaller firms and non-profits to the sidelines.

Nor is it necessary for a case to proceed to judgment for the chilling effect to take hold. A "safe harbor" that yields "at least," Viacom Br. 40, a federal trial if there is disputed evidence that a service provider was "generally aware" of infringement on its platform and could have done more to detect it, is no real protection at all. In this case, Viacom served and obtained enforcement of a sweeping subpoena seeking user information, and later scaled back its demands

only after public protest. *See Viacom Int'l, Inc. v. YouTube, Inc.*, 253 F.R.D. 256, 262 (S.D.N.Y. 2008) (rejecting user-privacy-based objections as "speculative"). In fact, the *prevailing* DMCA defendant in *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1111-12 (C.D. Cal. 2009), filed for bankruptcy, citing the shadow the long-running suit had cast on its efforts to raise capital. Joe Mullin, *Uh-oh Veoh: Big Copyright Win Can't Save Online Video-Sharing Company*, CORP. COUNSEL (Mar. 4, 2010).

And providers that already are in the arena can be expected to change their behavior in two significant ways: (1) they will, of necessity, assume a fundamentally different, affirmative "monitoring" stance vis-à-vis those who use their services and the content they load onto it, and (2) they will take special care to avoid rankling those with the power to hale them into court. As this case shows, decisions to initiate suit and to sue particular parties are highly discretionary, and businesses and governments welcome the opportunities, which litigating bona fide federal claims can offer, to impose costs and obtain sensitive information from opponents, competitors, market leaders, and acquisition targets. Each of these essentially common sense implications — retreat, censorship, and self-censorship — would be extraordinarily bad news for the future of movements and alliances like those described above.

This case does not require the Court to recognize an exception outside the text of the DMCA to prevent these baneful consequences from occurring. It involves applying a statutory *safe harbor* regime enacted *with concerns like these in mind*.

It is indeed hard to imagine a *less* hospitable setting than this one in which to brush off considerations of the vast social benefit of platforms like YouTube as arguing that "two wrongs make a right." First, despite the resonance of describing plaintiffs as victims asking the Court to vindicate rights that have been "violated," the relationships, behavior, and economic realities apparently underlying this case, like "[t]he policies served by the Copyright Act are . . . complex," *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994), and "a successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim," *id.* at 526.[27] But the only "wrongs" even asserted here involve defendants' "allowing" — *i.e.*, not preventing — users (out of millions), who had read and agreed to terms of service

[27] As this case illustrates, copyright owners often benefit from activities that are legally "unauthorized." Just as the "time shifting" in *Sony* enabled a larger audience to see recorded broadcasts, a significant number of the possibly infringing clips on YouTube are more a complement to than a substitute for plaintiffs' telecasts. *See MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981) ("fair use" analysis considers effect of infringing use upon "potential market for or value of the copyrighted work"); 17 U.S.C. § 512(j)(2)(B) (requiring consideration of "harm to be suffered by the copyright owner in the digital environment"). That presumably is why Viacom continued to (covertly) authorize uploads of its content. *See* Google Br. 45-48.

prohibiting infringing content, to nonetheless upload content that they (but not YouTube) knew exceed their rights under copyright law and that YouTube "allowed" it to remain thereafter, *i.e.* did not affirmatively undertake to investigate which user-posted content was actionably infringing.

There is no allegation that YouTube responded inappropriately or insufficiently once directly alerted of infringing material — itself a significant data point, given the quantity and diversity of content on YouTube.[28] *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 960 (2005) (Breyer, J., concurring) ("*Sony* [*Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984)] . . . makes clear [that] the producer of a technology which *permits* unlawful copying does not himself *engage* in unlawful copying — a fact that makes the attachment of copyright liability to the creation, production, or distribution of the technology an exceptional thing.").

When Congress enacted the DMCA safe harbor, *it* expected that unauthorized infringing content would be uploaded by users. *See* S. Rep. 105-190 (1998) at 8. *Cf. Grokster* 545 U.S. at 950 ("Sony knew many customers would use its VCRs to engage in unauthorized copying and 'library-building.' But that fact . .

[28] *See* Reuters, *YouTube Serves Up 100 million Videos a Day online*, USA TODAY, July 16, 2006, *available at* www.usatoday.com/tech/news/2006-07-16-youtube-views_x.htm (reporting that 65,000 new videos were being added each day to "[t]he site specializes in short — typically two-minute — homemade, comic videos created by users").

. was insufficient to make Sony itself an infringer."). Indeed, this prospect was why protection against awards of "monetary relief" for violations occurring "by reason of the storage at the direction of a user" was legislated. In view of (1) the volume of matter that would be loaded, S. Rep. 105-90 at 8 (noting "all kinds of [ordinary] activities that expose [operators] to potential copyright infringement liability" and that internet transmission entails making "innumerable electronic copies"); (2) the fundamental difficulty of monitoring for copyright infringements case-by-case and distinguishing between lawful and unlawful uses, *see* H.R. Rep. 105-555 (II) (1999) at 44; (3) the *undesirability* of service-providers' monitoring (and functioning as private censors of) content their customers loaded, S. Rep. 105-190 at 32; 17 U.S.C. § 512(m); (4) the size of statutory damage awards for single violations; and (5) the near certainty that the provider — with a corporate bank account and who could readily be accused of "maintaining" a service with significant quantities of (user-loaded) infringing content — would be a more attractive litigation target for rights owners whose material was wrongly uploaded, especially as compared to the inefficient, unpopular alterative of bringing damage suits directly against culpable individuals. *See* S. Rep. 105-190 at 8 ("without clarification of their liability, service providers may hesitate to make the necessary innovation in the expansion of and speed and capacity of the Internet").

At the same time, Congress continued to recognize the importance of "effective – not merely symbolic-protection of [a copyright holder]'s statutory monopoly," *Sony*, 464 U.S. at 442. But it struck a different "balance," *id.*, than the one prevailing in other areas of copyright law (*e.g.*¸ strict liability for direct infringers subject to a multi-factor equitable "fair use" defense), instead legislating a clear, readily available safe harbor, one that would preclude monetary liability (and the threat of costly, open-ended litigation), but in exchange require "repeat infringer" policies and provide rights-holders a fast and effective mechanism for ensuring that works whose presence on the provider's site the owner did not authorize would not remain. 17 U.S.C. § 512(c)(1)(C). Nor does this description exhaust the fairly remarkable prescience of the regime Congress designed. As unaware as Congress was — and must have been — of where the statute would lead, the safe harbor provision also reflects a core vision of the defining features of "the internet" — openness, universality, and rapid, highly unpredictable change. YouTube and Twitter were no more imaginable in 1998 than their 2024 successors are now. Yet Congress understood that allowing "service providers" to become facilitators of users' activities, rather than antagonistic monitors, and trusting copyright owners to "police" incursions on their intellectual property and cause it to be promptly "take[n] down" when they deem necessary, was most likely to realize that core vision. (Indeed, although clearly superior to the regime of

widespread *preemptive* removal that Appellants' rule of "general awareness"-based liability would induce providers to adopt, the DMCA summary mechanism has been criticized by many, including some *Amici*, as *too* solicitous of parties invoking copyright -- and insufficiently protective of individual users' free expression and process rights).

Copyright cases typically call on courts to "respon[d] to significant changes in technology." *Sony*, 464 U.S. at 430; *see Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 158 (1975). But in this respect, this case is an unusually straightforward one. The basic judgments Congress codified in 1998, on necessarily incomplete information, themselves stand against Appellants' claims that the certainty and predictability (and protection from potentially massive retrospective liability for "secondary" infringement) Congress provided might be overcome by allegations (or evidence) of generalized "awareness" that users were infringing. Thus, even if YouTube had not developed along the socially important lines it in fact has, defendants would *still* be entitled to judgment as a matter of law.

But neither is what has actually taken place since and as a result of the 1998 law (and what would occur if the Court were to impose on it a newly narrow construction) legally *irrelevant*. These unforeseen benefits implicate the stated

rule for construing the DCMA "when technological change has rendered its literal terms ambiguous":

> The sole interest of the United States and the primary object in conferring the monopoly, lie in the *general benefits derived by the public* from the labors of authors [and] must be construed in light of this basic purpose.

Aiken, 422 U.S. at 156. These remarkable developments — and the real potential they would discontinue under Appellants' view — reinforce the wisdom of 105th Congress's judgment and the correctness of the decision below.

B. Construction Of the Safe Harbor Has Important Implications For Global Internet Freedom

While affirming the judgment would not in itself prevent repression abroad, a decision in this closely-watched case that permitted copyright plaintiffs to breach the citadel and cast service providers as monitors, legally responsible for the violations committed by user-loaded content, would threaten broad harm to freedom internationally. First, and indisputably, because companies like YouTube are U.S.-based and operate under U.S. copyright law, an erosion of federal law protection would immediately impair the social media capacity of residents of other countries, who rely on U.S. platforms for free expression and association.

Moreover, keeping truly open platforms in the U.S. has "virtuous" effects on censorship and repression in other countries. The freedom of press and expression the United States has long championed internationally was surely a harder "sell"

when repressive regimes could *effectively* control the flow of information that reached their people — and that reached the world about their country. But that is less true today when dissent from even closed societies can still "find its way to YouTube" and reach a world audience. A regime of robust (U.S.-based) social media fosters the growth of civil society institutions that are difficult for dictators to suppress, and that makes them pay a price for attempting to.

Finally, reversal here would have ominous implications, especially for citizens of countries where rule of law norms are least respected. How this Court decides will be a precedent for how authorities elsewhere approach not only their copyright laws, but general questions about the role and responsibilities of platforms for "offending" content uploaded by users — and the power of those aggrieved to take legal action against the host. Repressive governments do not follow the nuances of U.S. legal doctrine, but they are alert for opportunities to create difficulties for opponents, for colorable legal pretexts, and for signs that the United States has fallen short of the ideals it urges on others.

Efforts to impose sanctions and legal liability on service providers users' actions provide an especially ready tool for governments (and powerful nongovernmental interests) whose actions may be scrutinized, and misdeeds uncovered. Through such means, they can shut services down entirely — or prompt self-censorship that effectively makes them unavailable to human rights

monitors, dissidents, and grassroots movements. And suits seeking copyright liability based upon user-posted material posted would deter providers from allowing material they expect will displease powerful government or private interests.

It is not far-fetched to envision the use (or threat) of copyright litigation — or other domestic intellectual property claims — as a means of harassing, deterring, surveilling and retaliating against those who are hosting or otherwise enabling dissemination of "objectionable" content. Indeed, the Russian government has used purported copyright infringement concerns to justify raids on, and broad seizures from, nonprofit advocacy groups.[29]

Indeed, the ease with which pretextual or concocted copyright claims could be devised is suggested by facts in this case: Only through the rigors of exhaustive discovery in this intensely-contested litigation did defendants ascertain that many of the items plaintiffs identified as unlawful, unauthorized infringements were loaded onto YouTube *by plaintiffs themselves*. In a regime with less opportunity for discovery, or where the defendants lacked similar resources, copyright could

[29] *See* Clifford J. Levy, *Russia Uses Microsoft to Suppress Dissent*, N.Y. TIMES, Sept. 11, 2010, *available at* www.nytimes.com/2010/09/12/world/europe/12raids.html (explaining "newest tactics for quelling dissent: confiscating computers under the pretext of searching for pirated Microsoft software," reporting raid on offices of environmental group critical of government's decision to reopen a paper factory that had polluted Lake Baikal).

readily be employed to shut down media platforms by deliberately placing infringing material on their services.

Because of the United States's continued preeminent role in developing both the technical capacities of and legal ground rules for the internet, including in the copyright area, the rules adopted here have the potential to stand as guiding precedent elsewhere in the world. If services like YouTube may be subjected to massive liability for content placed on them by others, there is scant hope for fostering and maintaining openness in countries with less well entrenched traditions of free expression and governmental restraint.

"The greatest single contribution that Western societies can make to the Internet's potential to empower repressed populations abroad would be to preserve at home the very openness of social media that has inspired the likes of Wael Ghonim." Steve Coll, *The Internet for Better or Worse*, N.Y. REV. OF BOOKS 20, 24 (April 7, 2011).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ David T. Goldberg

Sean H. Donahue
Donahue & Goldberg, LLP
2000 L St., N.W., Suite 808
Washington, D.C. 20036
(202) 277-7085

David T. Goldberg
Donahue & Goldberg, LLP
99 Hudson St., 8th Floor
New York, NY 10013
(212) 334-8813

CERTIFICATE OF COMPLIANCE

As counsel of record to the Amici Curiae, I hereby certify that this brief complies with the type - volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. I am relying upon the word count of the word-processing system (Microsoft Word) used to prepare the brief, which indicates that 6,963 words appear in the brief.

/s/ David T. Goldberg

SEAN H. DONAHUE
DONAHUE & GOLDBERG, LLP
2000 L Street, NW, Suite 808
Washington, DC 20036
(202) 277-7085

DAVID T. GOLDBERG
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Floor
New York, New York 10013
(212) 334-8813