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 (New York City)

BRIEF OF AMICUS CURIAE NATIONAL VENTURE CAPITAL ASSOCIATION IN SUPPORT OF APPELLEES AND AFFIRMANCE

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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, 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,

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 Federal Rule of Appellate Procedure 26.1, counsel for amicus curiae certifies the following information:

The National Venture Capital Association ("NVCA") is a not-for-profit trade association for venture capital firms; it has no parent company, and no publicly held company owns more than 10% of NVCA's stock.

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Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief by amicus curiae.

IDENTITY AND INTEREST OF AMICUS CURIAE

NVCA represents the interests of more than 400 venture capital firms in the United States, which together account for over 90% of all the venture capital funds under management in the United States. As the only national trade group for the venture community, the NVCA's mission is to foster public awareness of the vital role that venture funding plays in driving the United States economy and to advocate public policies that stimulate entrepreneurship and innovation.[1]

Venture capital firms and the companies they fund are profoundly important to the United States economy. A recent study estimates that, in 2008, venture-backed businesses were responsible for more than 12.1 million American jobs and accounted for more than $2.9 trillion of the United States Gross Domestic Product ("GDP"), representing 11% of private sector jobs, and 21% of US GDP. Such

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1, NVCA states that counsel for the parties has not authored this brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and no one other than NVCA and its members has contributed money that was intended to fund preparing or submitting this brief. Google Ventures, the venture-capital arm of Google Inc., is a member of NVCA, but took no part in authoring this brief and contributed no money that was intended to fund preparing or submitting this brief.

economic mainstays as Intel, Federal Express, Home Depot, Genentech, Google, and Starbucks were incubated with venture funding.

Venture capital firms obviously do not invest randomly; rather, they invest in some of the most critical sectors of the American economy, and in some of the most significant employment markets in the country. In 2008, venture-backed companies provided over 80% of jobs in the software sector, over 70% of jobs in the semiconductor sector, and over half the jobs in the electronics/instrumentation sector. Such companies provided the lion's share of the revenue generated in such sectors as well: 55% in the semiconductor sector, and over two-thirds in the electronics/instrumentation sector. And while California continues to be the top-ranked state for both venture-backed employment and revenue, New York is second, with almost 1.7 million venture-backed jobs in 2008, and over $325 million in revenue generated by venture-backed firms in that year.[2]

The venture capital industry has a significant interest in this case in particular because the imposition of copyright liability on YouTube would discourage innovation and investment in Internet-based businesses. The venture

[2] The statistics in this section are taken from *Venture Impact: The Economic Importance of Venture Capital-Backed Companies to the U.S. Economy* (5th ed. 2009), a study based on data provided by IHS Global Insight. *See* http://www.nvca.org/index.php?option=com_content&view=article&id=255&Itemid=103 (last visited Apr. 5, 2011).

capital industry, and the entrepreneurs they back, keep the United States at the cutting edge of technological innovation and economic progress by driving the economic engine of the Internet. Indeed, in 2008, venture-backed companies contributed over 58% of the jobs in the networking and equipment sector. Because virtually all Internet businesses involve user-generated content, that economic engine depends on a clear, fixed, and stable safe harbor that protects service providers from liability when Internet services are misused by others to infringe copyrights, and when the service providers respond appropriately to "take-down" notices.

INTRODUCTION

Twitter. eBay. Facebook. Yelp. Google.

These companies are the stars of the Internet, contributing billions of dollars a year to the American economy. They exist only because the American venture capital community risked investing in them, long before they had made a nickel, while they were still in the "inventor's garage." And they exist only because the DMCA's safe harbor, 17 U.S.C. § 512, shields them from liability for their users' activities, providing investors with certainty that they will not face the sort of ruinous damages Viacom seeks in this case. "In short, by 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. No. 105-190 at 8 (1998).

In the short sections that follow, we make three simple points. First, without a clear and stable safe harbor, Internet-based companies face a real and substantial threat of liability. Second, in enacting the DMCA, Congress acted to remove that risk, because it recognized that predictability and stability were necessary to ensure investment in new technology. Third, since the DMCA's enactment, courts—like the court below here—have consistently and correctly applied the safe harbor provision to prevent imposition of liability on Internet companies that behave responsibly by complying with the DMCA's terms. We respectfully submit that this Court should affirm that decision, and thus maintain the settled expectations of the investing community as to both existing and future investments in this critical area of the nation's economy.

ARGUMENT

I. Congress Understood That Internet Companies Faced Real Risks Without a True Safe Harbor

Almost all of today's Internet innovation depends, to some degree, on user-generated content. Video- and photo-sharing sites are made up almost entirely of materials uploaded by users. Blogging services like Blogger and "micro-blogging" services like Twitter likewise display primarily user-provided content. Social networking sites like Facebook, too, display messages, photos, videos, and other

materials that users provide. Online auction and general e-commerce sites like eBay and Amazon allow users to make available product photos and descriptions, as well as the user-provided products themselves. Newspaper sites accept submissions and allow users to comment on stories.

Any time a user provides content, it is possible that the content infringes some third party's rights in some respect. It is impossible to determine with certainty whether that content is licensed merely by inspecting the content—assuming such an inspection were feasible, given the amount of content posted. This is particularly true in the instant case, where Viacom uploaded a large amount of content that was indistinguishable from unauthorized uploads by other users, and deliberately modified authorized content it uploaded in order to make it look like unauthorized content. *See* YouTube Br. at 45-47.

The only way for the operator of an Internet site to know with any certainty that a particular clip was uploaded without permission is for the copyright holder to notify the site. That is the principle upon which the DMCA is built: that so long as Internet sites take down complained-of materials, they are not liable for infringing materials uploaded by users.

Congress was keenly aware of this fundamental risk when it enacted the DMCA. "In the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability.

For example, service providers must make innumerable electronic copies by simply transmitting information over the Internet. Certain electronic copies are made to speed up the delivery of information to users. Other electronic copies are made in order to host World Wide Web sites. Many service providers engage in directing users to sites in response to inquiries by users or they volunteer sites that users may find attractive. Some of these sites might contain infringing material." 144 Cong. Rec. S4,884 (daily ed. May 14, 1998) (statement of Sen. Orrin Hatch). As explained below, Congress acted to eliminate that risk when it enacted the DMCA.

II. To Promote Innovation, the Growth of the Internet, and the Nation's Economy, Congress Enacted the DMCA With a Clear, Strong, and Stable Safe Harbor.

Congress intended to promote investment by amicus when it drafted the DMCA's safe-harbor provisions. Congress recognized that—in light of the risks outlined above—"[t]he OSPs and ISPs needed more certainty in this area in order to attract the substantial investments necessary to continue the expansion and upgrading of the Internet." 144 Cong. Rec. S11,889 (daily ed. Oct. 8, 1998) (statement of Sen. Orrin Hatch). A wealth of evidence supports the conclusion that the safe harbor of § 512 was intended to "provide a clear path for OSPs to operate without concern for legal ramifications or copyright infringement that may occur in the regular course of the operation of the Internet, ***or*** that occur without the OSPs

knowledge." 144 Cong. Rec. S4,889 (daily ed. May 14, 1998) (statement of Sen. John Ashcroft) (emphasis added). As the Conference Report on the DMCA clearly stated, Congress intended the safe harbor to "provide[] greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities." H.R. Rep. No. 105-796 at 72 (Conf. Rep.). Senator Hatch likewise noted, "[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. 144 Cong. Rec. S4,884 (daily ed. May 14, 1998) (statement of Sen. Orrin Hatch).

To address those concerns, and to promote continued investment in Internet companies, Congress passed the DMCA and its safe harbor provisions. Congress made clear that it was providing the protection of the safe harbor because it knew that investment in those companies was vital to the continued growth of the Internet, and the nation's economic health. As the Senate Report observed: "by 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. No. 105-190 at 8 (1998). Senator Ashcroft echoed those sentiments: "[w]ithout these issues being clearly delineated we would have faced a future of uncertainty regarding the growth of Internet and potentially whether it could have operated at all. Make no mistake that the

clarification of on-line service provider liability was one of my fundamental concerns in this debate. While this was not the only crucial change in the legislation it is a change that I found essential for this legislation to even be considered, which is why Title I of my original legislation was devoted to clearly defining liability." 144 Cong. Rec. S4,889 (daily ed. May 14, 1998) (statement of Sen. John Ashcroft).

Similarly, Senator Hatch recognized that "the potential of the Internet, both as information highway and marketplace, depends on its speed and capacity. Without clarification of their liability, service providers may hesitate to make the necessary investment to fulfill that potential. In the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability." 144 Cong. Rec. S4,884 (daily ed. May 14, 1998) (statement of Sen. Orrin Hatch). Senator Hatch correctly understood that the safe harbor was necessary to solve that problem: "In short, by 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." *Id.* at S4,884-85.

Congress was not promoting the growth of the Internet for the Internet's sake. It understood that the Internet provided jobs and strengthened the nation's economic well-being. "As the digital revolution sweeps over industries and

countries it will provide new opportunities for market growth and innovation, easier access to remote information, and new distribution channels for products and services. The United States clearly leads the world in software products such as computer programs, movies, music, books and other multimedia products. In a post-GATT, post-NAFTA environment—in which we have made an implicit national economic decision to essentially let low-end jobs go and migrate to developing countries—we have an obligation as policymakers to ensure that we establish the climate in which America garners the lion's share of the high end, knowledge-based jobs of the new global economy." 144 Cong. Rec. H10,619 (daily ed. Oct. 12, 1998) (statement of Rep. Edward Markey).

Congress' insight was correct, and (as explained at pages 1-2, above) the solution it crafted has paid handsome dividends for the country's economy. Investment in Internet companies, and those companies themselves, thrived—all protected by the stability and predictability created by the DMCA's safe harbor provisions.

III. Courts Have Consistently and Correctly Applied the DMCA's Safe Harbor as Congress Intended, Rejecting Efforts to Create Ad-Hoc Exceptions to It.

The DMCA's safe harbor, of course, is not self-executing. It must be—and, thankfully, to date has been—correctly and consistently interpreted and applied by the courts, in the face of a series of challenges brought by copyright holders asking

to carve ad-hoc exceptions out of the protection provided for by Congress. In each of the cases we discuss briefly below, and as is the case here, the copyright holders sought to justify an ad-hoc exception based on the supposed bad intent or generalized knowledge of the Internet company, and based on the assertion that dire harm would befall the copyright holder were it forced to comply with the terms of the statute as enacted by Congress. In each case, the courts correctly declined to do so, appreciating that a safe harbor with ad-hoc exceptions based on state of mind or generalized knowledge, and the potential impact on third parties, is no safe harbor at all.

Thus, for example, in *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099 (C.D. Cal. 2009), the plaintiff urged the court to disregard Veoh's[3] compliance with the DMCA, and award astronomical statutory damages, based on allegations that, *inter alia*, Veoh "knew that it was hosting an entire category of content—music—that was subject to copyright protection," that "Veoh should have sought out actual knowledge of other infringing videos by searching its system for all videos by the artists identified in the RIAA notices," and that "its founders, employees, and investors knew that widespread infringement was occurring . . . ." The *Veoh* court correctly rejected those arguments, reiterating that

[3] Veoh was a "startup" Internet company whose venture backers included NVCA members Intel Capital and Adobe Systems.

"[t]he 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." *Id.* at 1108, 1110, 1111 (quoting *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007)). The *Veoh* court emphasized that digressing from the clear dictates of the DMCA would defeat its essential purposes:

> No doubt it is common knowledge that most websites that allow users to contribute material contain infringing items. If such general awareness were enough to raise a "red flag," the DMCA safe harbor would not serve its purpose of "facilitat[ing] the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age," and "balanc[ing] the interests of content owners, on-line and other service providers, and information users in a way that will foster the continued development of electronic commerce and the growth of the Internet." S. Rep. 105-190 at 1-2 (1998); H.R. Rep. 105-551(II) at 21. *See also Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, *4*94 F.3d 788, 794 n.2 (9th Cir. 2007). Congress explained the need to limit service providers' liability by noting that "[i]n 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.

Id. at 1111.

Similarly, the Fourth Circuit, in *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004), affirmed both the salutary purposes of the DMCA and its firm grounding in common law principles, rejecting a claim that a real estate listing site was vicariously liable for infringing photographs posted by users because the site's manual review of those photographs gave it knowledge of the infringement:[4]

> Where the infringing subscriber is clearly directly liable for the same act, it does not make sense to adopt a rule that would lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet.... The court does not find workable a theory of infringement that would hold the entire Internet liable for activities that cannot reasonable [sic] be deterred.

Id. at 548-49 (quoting *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361, 1372-73 (N.D. Cal.1995)).

[4] LoopNet's venture backers included NVCA members Trinity Ventures and Rustic Canyon Partners.

Time and again, nascent venture-backed Internet companies, which have since grown to be the mainstays of the modern economy, have been protected from ruinous secondary liability claims by the DMCA, and by courts' strict adherence to its terms. In *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001), eBay[5] was accused of multiple instances of copyright infringement for repeated listings of a film ("Manson") on the theory that eBay should know that *all* DVD copies of that work were unauthorized, and that repeated notices of some infringing sales should shift the burden of searching out others from the copyright holder to the website. The court correctly rejected that argument. And in multiple cases against Amazon,[6] courts have repeatedly rejected claims that either generalized knowledge of infringement, or even repeated notice of infringement by the same users, vitiates the DMCA safe harbors. *See, e.g.*, *Hendrickson v. Amazon.com, Inc.*, 298 F. Supp. 2d 914 (C.D. Cal. 2003); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090 (W.D. Wash. 2004).

More recently, in *Wolk v. Photobucket.com*,[7] No. 10 Civ. 4135, 2011 WL 940056 (S.D.N.Y. Mar. 17, 2011), the court denied a request for an injunction

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[5] eBay was backed, among others, by NVCA member Benchmark Capital.

[6] Amazon's venture backing included NVCA member Kleiner Perkins Caulfield & Byers.

[7] Photobucket is backed by News Corporation, NVCA member Oak Investment Partners, and others.

based on alleged posting of copyrighted photographic works, declining to expand liability to works other than those specifically identified by the plaintiff: "The Court does not accept her invitation to shift the burden from her to Photobucket . . . ." *Id.* at *5 (citing *Veoh*, 665 F. Supp. 2d at 1110 and *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007)).

In each of these cases, the NVCA members who enabled the creation and growth of these now-prominent Internet successes were able to do so only because they could be confident that their investments would not be wiped out by *post hoc* imposition of astronomical statutory damages for secondary liability. Moreover, absent clear and consistent safe harbors, it benefits a startup company and its backers little if, after tens of millions of dollars in litigation costs, it eventually prevails. Veoh, discussed above, *won* its case, but was bankrupted by the costs of litigation before it prevailed. Only the clearest of unambiguous legal protection can prevent such "death by litigation."

That protection flows, in the main, from the DMCA's clear and deliberate allocation of the rights and obligations between copyright holders and Internet service providers. "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." *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007).

If Appellants succeed in erasing that clear allocation, rational investors such as the NVCA's members will be loath to risk their clients' capital on the next eBay, Amazon, Google, Twitter, Facebook, or Yelp.

CONCLUSION

Amicus respectfully submit that this Court should affirm the decision below, the clear language and intent of Congress, and the weight of authority addressed above, by confirming that the investment community may continue to support innovative entrepreneurs who advance the development of the Internet and the nation's economic progress.

DATED: April 7, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 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 written in 14-pt Times New Roman font, and with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), because it contains 3977 words, excluding the portions excluded under Fed. R. App. P. 32(a)(7)(A)(iii). This count is based on the word-count feature of Microsoft Word.

DATED: April 7, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on April 7, 2011.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that, for any participants in the case who are not registered CM/ECF users, I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days.

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