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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, and BLACK ENTERTAINMENT TELEVISION, LLC,
Plaintiffs-Appellants,

- v. -

YOUTUBE, INC., YOUTUBE, LLC, and GOOGLE, INC.,
Defendants-Appellees.

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

BRIEF FOR MOTION PICTURE ASSOCIATION OF AMERICA, INC. AND INDEPENDENT FILM & TELEVISION ALLIANCE AS *AMICI CURIAE* SUPPORTING APPELLANTS

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THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED,
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PUBLISHERS' ASSOCIATION, THE RODGERS & HAMMERSTEIN
ORGANIZATION, EDWARD B. MARKS MUSIC COMPANY, FREDDY
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RAY DOG MUSIC, INC., FEDERATION FRANCAISE DE TENNIS, THE
MUSIC FORCE MEDIA GROUP LLC, SIN-DROME RECORDS, LTD.,
MURBO MUSIC PUBLISHING, INC., STAGE THREE MUSIC (US),
INC., THE MUSIC FORCE, LLC,

Plaintiffs-Appellants,

– v. –

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure:

The Motion Picture Association of America, Inc. certifies that it has no parent or subsidiary corporations and that no publicly held company owns 10% or more of its stock.

The Independent Film & Television Alliance[®] certifies that it has no parent or subsidiary corporations and that no publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*

Amici curiae the Motion Picture Association of America, Inc. (“MPAA”) and the Independent Film & Television Alliance[®] (IFTA[®]) respectfully submit this brief in support of appellants.¹

Founded in 1922, the MPAA is a trade association that serves as the advocate for the domestic motion picture, home video and television industries. The MPAA’s members and their affiliates include the largest producers and distributors of motion pictures and television programs in the United States.² The MPAA members responsible for this brief are not parties to this case or affiliates of those parties.

IFTA is the trade association for the independent film and television industry worldwide, representing over 155 independent production and distribution companies, as well as affiliated financial institutions that provide funding for independent production. IFTA also is the owner of the

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Second Circuit Rule 29.1(b), *amici* state that no counsel for a party has written this brief in whole or in part; and that no person or entity, other than the *amici*, the members of each *amici* or counsel for those members (with respect to the MPAA, such members do *not* include appellant Paramount Pictures Corporation or any of its affiliates), has made a monetary contribution that was intended to fund the preparation or submission of this brief.

² The members of the MPAA are, in addition to Paramount, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, Walt Disney Studios Motion Pictures and Warner Bros. Entertainment Inc.

American Film Market[®], the largest commercial film market in the world. IFTA members have produced, financed and/or distributed such critically and commercially successful films as *The Hurt Locker*, *Crash*, *Slumdog Millionaire*, *The Departed*, *Million Dollar Baby* and *Lord of the Rings*. Since 1984, IFTA member films have won over 64% of the Best Picture Academy Awards[®].

Amici's members depend upon effective copyright protection in order to protect the motion picture and television content that they invest in, create and distribute. As a result, *amici's* members have a significant interest in the important questions that this case presents concerning the interpretation of the Copyright Act, 17 U.S.C. §§ 101 *et seq.*, and in particular the Digital Millennium Copyright Act provisions codified at § 512 (the "DMCA"). *Amici* are filing this brief because of their profound concerns with the district court's decision. If not reversed by this Court, that decision threatens severe negative consequences for all copyright owners who suffer the devastating harms of mass Internet piracy.

SUMMARY OF ARGUMENT

The district court's summary judgment decision radically upends the fundamental balance that Congress codified in the DMCA's "safe harbors." The DMCA provides safe harbor limitations on copyright infringement liability only for those service providers who are innocent concerning infringing activity that as a technical matter occurs on or through their sites. The statute retains liability for culpable service providers, including those who know or are aware of infringing activity on their site but fail to act expeditiously to stop it. The district court's decision shifts the balance decisively to provide protection for service providers who are culpable. It removes the "strong incentives" that Congress sought to preserve for service providers as well as copyright owners "to cooperate to detect and deal with copyright infringements that take place in the digital networked environment." S. Rep. No. 105-190, at 20 (1998) ("Senate Report"). The decision instead incentivizes service providers to willfully blind themselves to apparent "red flags" of mass infringing activity. Congress did not enact this system – especially not one that provides safe harbor to service providers who (as the court here said) could reasonably be found to have "*welcomed*" widespread infringing activity as a way of boosting their bottom line. Appellants' Special Appendix 9 (C.A. Doc. No. 64-2) ("SPA")

(emphasis added). It is an inversion of the DMCA – and also fundamentally unfair – to interpret the statute to allow service providers to induce infringement, to reap the benefits of that infringement, and then to have no responsibility for dealing with the infringement they have induced unless and until copyright owners send them individual takedown notices.

The district court’s decision is flawed in multiple respects that warrant reversal. This brief addresses three of them.

First, the district court erred in holding that a service provider who may be liable for inducing infringement under *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), may as a matter of law qualify for § 512(c)’s safe harbor protection. Notwithstanding its conclusion that the record could support a finding that appellees “welcomed” infringing activity during YouTube’s growth phase, the district court held that appellees were entitled to summary judgment on their § 512(c) defense. The district court made passing reference to *Grokster* but deemed the case essentially irrelevant to a service provider’s eligibility for the safe harbor. The culpability that establishes inducement liability, however, cannot coexist with the innocence that a service provider must demonstrate to qualify for the safe harbor. *See Columbia Pictures Indus., Inc. v. Fung*, No. CV-06-5578-SVW, 2009 U.S. Dist. LEXIS 122661, at *67 (C.D. Cal. Dec.

21, 2009). At a minimum, the district court should have held that the existence of factual questions concerning appellees' liability under *Grokster* precluded granting them summary judgment under § 512(c).

Second, the district court erred in effectively *writing out* of the DMCA the “actual knowledge” and “awareness” tests for knowledge that are embedded in § 512(c)(1)(A). The statute requires that, if a service provider has either “actual knowledge” of infringing activity or “awareness” of it from “facts or circumstances” that make such activity “apparent,” the service provider must act expeditiously to stop that activity to be eligible for the safe harbor. 17 U.S.C. § 512(c)(1)(A). The district court, however, held that appellees' obligation to stop infringing conduct on YouTube existed only insofar as they had “knowledge of *specific and identifiable infringements of individual items*.” SPA 10, 18 (emphasis added). This novel test renders superfluous critical language in the statute. If not reversed, this test will incentivize service providers to bury their heads in the sand and deliberately avoid information that could require them to act – even in the face of known or apparent infringing activity. Such a result would be directly contrary to Congress's stated objective that service providers must act affirmatively when they become aware of “red flags” of infringing activity. Further, the court's test for knowledge effectively converts

§ 512(c) from a statute about *shared* service provider-copyright owner responsibility for “detect[ing]” as well as “deal[ing] with copyright infringements,” Senate Report at 20, to a pure notice and takedown regime, which Congress declined to enact.

Third, the district court erred by *writing into* the language of another requirement for safe harbor protection a knowledge test that does not exist. A service provider seeking safe harbor under § 512(c) must show (in addition to satisfying § 512(c)(1)(A)) that it “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.” 17 U.S.C. § 512(c)(1)(B). The district court held that “the provider *must know of the particular case* before he can control it.” SPA 29 (emphasis added). That knowledge test is not in the statute, and indeed is antithetical to the doctrine of vicarious copyright liability that Congress used as the model for § 512(c)(1)(B). The entire point of vicarious liability is to incentivize the party with the right and ability to supervise sites and facilities to exercise that right to uncover and remedy infringing conduct that otherwise would inure to its financial benefit. The district court’s holding eviscerates that incentive.

This case concerns evidence of appellees’ conduct during YouTube’s start-up and growth phase, not YouTube as it exists today. That fact does nothing to lessen the harmful policy consequences of the district court’s decision. The district court extended safe harbor protection as a matter of law notwithstanding the existence of factual questions about appellees’ inducement of infringement during YouTube’s early years. The decision not only misconstrues the DMCA but provides a road map for culpable service providers to build their businesses based on the infringement of others’ copyrighted works. *Amici* respectfully submits that the decision must be reversed.

ARGUMENT

I. A Service Provider That Is Liable For Inducing Copyright Infringement By Definition Is Not Eligible For Safe Harbor Protection

Appellants claimed, *inter alia*, that appellees were liable under *Grokster* for inducing the widespread infringement of their copyrighted works. In *Grokster*, the Supreme Court unanimously held that one who acts “with the object of promoting” infringing conduct “is liable for the resulting acts of infringement by third parties.” *Grokster*, 545 U.S. at 919. The district court recognized that on the summary judgment record here, a jury could conclude that appellees “not only were generally aware of, *but*

welcomed, copyright-infringing material being placed on their website[.]” because that material “was attractive to users,” “increased usage,” and “enhanced defendants’ income from advertisements displayed on certain pages of the website[.]” SPA 9 (emphasis added).³ Despite the evidence of inducement liability under *Grokster*, the district court held that appellees were entitled to summary judgment under § 512(c) because they had no obligation to stop any infringements until they had “knowledge of specific and identifiable infringements of particular individual items.” *Id.* at 18. The district court held that *Grokster* was largely irrelevant to the issue of appellees’ eligibility for the safe harbor. *Id.* at 24-25. On the contrary, a defendant who induces infringement cannot be eligible for the safe harbor.

A. The DMCA Protects Only Innocent Service Providers, While Leaving Culpable Providers Subject To Liability

The DMCA legislates a careful balance between limiting the liability of service providers who are innocent with respect to liability occurring on or through their sites, while preserving liability for providers who are not so

³ The summary judgment record contained considerably more evidence of defendants’ intentional inducement of infringing activity than the district court described. For example, the record showed that YouTube’s founders welcomed infringing material on the site – and the corresponding increase in user-base – because it enhanced the company’s value for a sale to a third party. See, e.g., Viacom’s Statement of Undisputed Facts 36-56 (Dist. Ct. Doc. No. 322) (“SUF”). YouTube’s founders achieved this objective when they sold their 18-month-old company to Google for more than \$1.6 billion. SUF 16.

innocent. Congress recognized that, “without clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet.” Senate Report at 8.

At the same time, Congress was acutely aware that the Internet had the potential to “recklessly facilitate infringement,” and Congress therefore strove for a solution that would “best combat the risk of copyright infringement facing content providers on the Internet.” *The Copyright Infringement Liability of Online and Internet Service Providers: Hearing on S. 1146 Before the S. Comm. on the Judiciary*, 105th Cong. 1-2 (1997) (statement of Sen. Hatch). Throughout the debate on the DMCA, members of Congress repeatedly expressed their concerns about the mass theft of copyrighted content and the devastating harms that such activity causes to copyright owners and the national economy.⁴ Senator Thompson summed up this concern during the floor debate on the statute:

Unscrupulous copyright violators can use the Internet to more widely distribute copyrighted material without permission. To maintain fair compensation to the owners of intellectual

⁴ See, e.g., 144 Cong. Rec. 9239 (1998) (statement of Sen. Ashcroft) (“Billions of dollars in pirated material is lost every year and [a]n impact is felt directly to our national bottom line.”); 144 Cong. Rec. 25808 (1998) (statement of Rep. Dreier) (“[A]s we look at the problems that we face as a Nation, and as we move rapidly towards this global economy, it is difficult to imagine an issue that is much more important than theft of intellectual property.”).

property, a regime for copyright protection in the digital age must be created.

144 Cong. Rec. 9242 (1998) (statement of Sen. Thompson).

Section 512 embodies the careful balance that Congress intended under the DMCA. The statute establishes “limitations on liability” – or “safe harbors” – for four defined categories of online activity. 17 U.S.C. § 512(a)-(d). The safe harbor at issue in this case is § 512(c)’s limitation on a service provider’s liability for infringement occurring “by reason of the storage at the direction of a user” of infringing material on the service provider’s system or network. 17 U.S.C. § 512(c). To claim a limitation on its liability under this safe harbor, a service provider must satisfy *each* of a number of statutory requirements. Congress expressly designed these requirements for safe-harbor protection to “*preserve[] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.*” Senate Report at 20 (emphasis added).

The requirements for the § 512(c) safe harbor start with the service provider’s obligation to act expeditiously to stop infringing activity occurring on its site as soon as the provider has “actual knowledge” or

“awareness” of such activity.⁵ As the Fourth Circuit explained, these requirements ensure that only those service providers who are innocent with respect to infringing activity may be eligible for the statute’s protections:

The DMCA’s protection of an innocent service provider disappears at the moment the service provider loses its innocence, *i.e.*, at the moment it becomes aware that a third party is using its system to infringe. *At that point, the Act shifts responsibility to the service provider to disable the infringing matter, preserving the strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.*

ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F.3d 619, 625 (4th Cir. 2001) (quotations and alterations omitted) (emphasis added).

B. A Service Provider That Induces Infringing Activity By Definition Is Not Innocent And Therefore Is Ineligible For Safe Harbor Protection

The district court dismissed *Grokster*’s relevance to the question whether appellees had the requisite innocence for the § 512(c) safe harbor.

⁵ The independent and additional requirements for protection also include, among others, that the service provider “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,” 17 U.S.C. § 512(c)(1)(B); that the provider “respond[] expeditiously” to notices of claimed infringement sent by copyright owners, *id.* § 512(c)(1)(C); and that the provider “adopt[] and reasonably implement[] ... a policy that provides for the termination in appropriate circumstances of subscribers ... who are repeat infringers[.]” *Id.* § 512(i)(1)(A). These requirements (and others in § 512) are cumulative, *i.e.*, the service provider must satisfy each one independently in order to be eligible for safe harbor protection.

The court said that *Grokster*'s relevance was "strained," because the Supreme Court dealt merely with the "general law of contributory liability for copyright infringement," and because the "*Grokster* model does not comport" with a service provider that responds to takedown notices. SPA 24-26. This was error. As other courts have recognized, there is a direct and obvious relationship between the mental state required for inducement liability and the issue of a service provider's eligibility for safe harbor under § 512(c): a service provider that induces infringement by definition cannot qualify for the safe harbor. *See Fung*, 2009 U.S. Dist. LEXIS 122661, at *67 ("inducement liability and the Digital Millennium Copyright Act safe harbors are inherently contradictory"); *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 142 (S.D.N.Y. 2009) ("if Defendants were aware of ... red flags, or worse yet, if they encouraged or fostered such infringement, they would be ineligible for the DMCA's safe harbor provisions") (emphasis added). *Cf. In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003) (rejecting safe harbor defense because "[t]he common element of [the statute's] safe harbors is that the service provider must do what it can reasonably be asked to do to prevent the use of its service by 'repeat infringers,'" and the defendant, *inter alia*, had "invited" repeat infringers to infringe plaintiffs' copyrights). The courts' recognition

of *Grokster*'s relevance to the question of safe harbor eligibility is sound and their analysis should apply in this case.

The *Grokster* defendants operated peer-to-peer services that were breeding grounds for copyright infringement. *Grokster*, 545 U.S. at 923. Notwithstanding the abundant evidence of defendants' infringement-inducing objectives, the Ninth Circuit held the defendants did not have the requisite mental state for secondary copyright liability. In particular, the Ninth Circuit accepted the defendants' argument that, because they did not know which specific works were being infringed at particular times, the defendants had no "*reasonable knowledge of specific infringement* to satisfy the threshold knowledge requirement." *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1162 (9th Cir. 2004). In reaching this conclusion, the Ninth Circuit relied heavily on *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("*Sony-Betamax*"), and in particular, the Court's holding there that the defendant (the maker of videocassette recorders) could not have knowledge of infringing uses imputed to it because the devices were "capable of commercially significant noninfringing uses." *Id.* at 442.

The Supreme Court unanimously rejected the Ninth Circuit's knowledge standard, and indeed, its entire framework for analyzing the

mental-state issue. The Court held that the Ninth Circuit erred in “converting” *Sony-Betamax* from a case “about liability resting on imputed intent to one about liability on any theory.” *Grokster*, 545 U.S. at 934. The Court found that the *Grokster* defendants were not simply aware that their services could be used for infringing conduct, but that the defendants consciously induced widespread infringement to further their bottom lines. The Court highlighted the facts that each defendant “showed itself to be aiming to satisfy a known source of demand for copyright infringement[;]” that no defendant “attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software[;]” and that “the commercial sense of [defendants’] enterprise turns on high-volume use, which the record shows is infringing.” *Id.* at 939-40. Based on the record evidence, the Court concluded that the defendants’ “unlawful objective is unmistakable[;]” that it was error to grant them summary judgment, and that the district court on remand had to reconsider the *plaintiffs*’ motion for summary judgment. *Id.* at 940-41.⁶

The district court did not discuss any of the history underlying the *Grokster* case or the Supreme Court’s articulation of the mental-state

⁶ On remand, the district court granted summary judgment to the plaintiffs. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966 (C.D. Cal. 2006).

standard. The court instead said that *Grokster* was essentially irrelevant to the DMCA issues in this case. SPA 24-26. The district court was wrong for at least four reasons.

First, a defendant who has the degree of culpability required for inducement liability cannot be the type of innocent service provider that Congress meant to protect through § 512. The courts that have addressed this issue have recognized correctly that a defendant cannot be liable under *Grokster* and simultaneously be eligible for the DMCA safe harbor. *See Fung*, 2009 U.S. Dist. LEXIS 122661, at *67; *Usenet.com*, 633 F. Supp. 2d at 142. The district court here concluded that the summary judgment record could support a finding that appellees not only knew about infringing activity but “welcomed” it in order to enrich themselves. *See* SPA 9. In light of that conclusion, the district court at a minimum should have held that appellees were not entitled to the § 512(c) safe harbor at summary judgment. The district court’s failure to do so is reversible error.

Second, the court’s decision extends safe harbor protection to deliberate unlawful conduct – inducement of infringement – that is well outside the scope of the statute’s protection. Section 512(c) limits a service provider’s exposure to infringement liability “by reason of the storage at the direction of a user” of infringing material on the service provider’s system or

network. 17 U.S.C. § 512(c). *Grokster* liability is predicated on statements or actions directed to promoting infringing activity. *Grokster*, 545 U.S. at 919. Such purposeful conduct is distinct and far removed from the performance of functions related to storing material at a user's direction. Section 512(c) provides no shelter for such unlawful conduct. *Fung*, 2009 U.S. Dist. LEXIS 122661, at *67-*68 ("Inducement liability is based on active bad faith conduct aimed at promoting infringement; the statutory safe harbors are based on passive good faith conduct aimed at operating a legitimate internet business.").

Third, the district court erred by disregarding *Grokster*'s directive that culpability is determined not just with reference to the nature of the defendant's technology but by what the defendant knows and intends. As demonstrated above, the Ninth Circuit adopted a standard of "reasonable knowledge of specific infringement" that was effectively impossible to satisfy; that court did so based on the mistaken belief that the potential noninfringing uses of the defendants' technology trumped all evidence of their intent to foster widespread infringing conduct. *Grokster*, 380 F.3d at 1162. The district court's decision here follows a similar mode of analysis:

The *Grokster* model does not comport with that of a service provider who furnishes a platform on which its users post and access all sorts of materials as they wish, while the provider is unaware of its contents, but identifies an agent to

receive complaints of infringement, and removes identified material when he learns it infringes.

SPA 25-26.

This analysis suffers from the same illogic underlying the Ninth Circuit’s analysis of the *Grokster* defendants’ liability. The district court assumed that because the YouTube platform could be used for noninfringing as well as infringing uses of copyright, the evidence of whether appellees “welcomed” or actively induced the latter as a general matter was irrelevant, so long as appellees removed the particular instances of infringing conduct of which they were notified. That cannot be squared with *Grokster*. What the Supreme Court held in *Grokster* – and what the Ninth Circuit in that case and the district court here fundamentally failed to recognize – is that those who disseminate technology that can be put to lawful, noninfringing use may be culpable and liable if they induce the use of that technology for unlawful infringement. *See Grokster*, 545 U.S. at 929-37.

Fourth, the district court’s stated reasons for rejecting *Grokster* would, if applied generally, have negative policy ramifications. Specifically, the district court suggested that *Grokster* was concerned with one type of defendant, whereas the DMCA safe harbor deals with a different class of defendant. As to the former, the court referred to a “*Grokster* model,” which it described as a defendant “with the expressed intent of succeeding” on a

model like that of “the notoriously infringing Napster.” SPA 25. The district court contrasted that “model” with YouTube, and said “the DMCA gives a safe harbor” to the latter type of provider, “even if otherwise he would be held as a contributory infringer under the general law.” *Id.* at 26.

That analysis cannot be correct. If it were, then numerous entities that (even according to the district court) indisputably should be held liable would attempt to claim safe harbor protection under the DMCA. Whether those defendants could succeed with such a defense would depend upon their ability to come within the various statutory requirements. But that would not stop such companies from trying and pointing to their notice and takedown policies as proof of their entitlement to safe harbor protection. Indeed, companies that the district court itself described as following a “*Grokster* model” – starting with Napster itself – *have* maintained notice and takedown policies and have cited the same as grounds for coming within one of § 512’s safe harbors. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1025 (9th Cir. 2001) (reserving for trial the issue of Napster’s entitlement to safe harbor protection under the DMCA); *Fung*, 2009 U.S. Dist. LEXIS 122661, at *56-*68 (considering and rejecting reliance on safe harbor defense based on notice and takedown policy); *Usenet*, 633 F. Supp.

2d at 141-42 (defendant service claimed safe harbor protection by virtue of its notice and takedown policy).

Nothing in *Grokster* or the law generally discriminates between “models” of defendants as the district court suggested. The law adjudges defendants based on their mental state and conduct. A defendant may engage in otherwise lawful activities but nevertheless be liable for acts that violate the law, including acts that induce copyright infringement. Whether appellees as a matter of undisputed fact had the mental culpability to be liable under *Grokster* was not resolved by the district court. The important point here is that neither their liability nor that of any other service provider claiming safe harbor protection can be resolved simply by asking if the provider had a notice and takedown policy or knew of specific and identifiable instances of infringing acts. All of the relevant facts and circumstances of appellees’ awareness of infringing activity or intent to facilitate such activity must be considered. The district court’s grant of summary judgment must be reversed.

II. The District Court Erroneously Wrote The Tests For Knowledge That Are In § 512(c)(1)(A) Out Of The Statute

In addition to its errors regarding *Grokster*, the district court fundamentally and erroneously rewrote critical requirements for the § 512(c) safe harbor. First, the district court effectively wrote out of § 512(c)(1)(A) the tests for knowledge that actually are embedded into the statute. Second, and as discussed in Section III, *infra*, the district court wrote into § 512(c)(1)(B) a knowledge test where none exists.

A. The District Court’s Test For Knowledge Requiring Service Provider Action Impermissibly Rewrites The Statutory Tests

As discussed, the district court held that appellees’ obligation to stop infringing activity did not arise until they had “knowledge of *specific and identifiable infringements of particular individual items*.” SPA 18 (emphasis added). This test rewrites the text of § 512(c) and undermines Congress’s objectives in enacting it. The text does not refer to “specific and identifiable infringements of particular individual items.” The text makes clear that a provider has knowledge requiring action if the provider has either “actual knowledge” of “material or an activity . . . [that] is infringing,” or “aware[ness] of facts or circumstances from which infringing activity is apparent.” 17 U.S.C. § 512(c)(1)(A)(i)-(ii). Adding a “specific and

identifiable” test into the statute, as the district court did, rewrites both prongs of § 512(c)(1)(A).

Subsection (A)(i) encompasses actual knowledge of infringing “activity,” not just infringing “material.” The district court, however, held that a service provider has actual knowledge only when it knows of a “specific and identifiable infringement[] of [a] particular individual item[.]” SPA 18. That reading renders infringing “activity” in subsection (A)(i) superfluous, since it leaves no circumstance in which a service provider actually knows about infringing activity without knowing of the specifically infringing material. That is an unreasonable and impermissible reading of the statute. *See, e.g., Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) (“one of the most basic interpretive canons” is “that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant”) (internal quotations and alterations omitted).

Even if subsection (A)(i) could be construed to bear the district court’s interpretation, subsection (A)(ii) clearly is not susceptible to that construction. Section 512(c)(1)(A) is phrased in the disjunctive: a service provider that has knowledge under *either* (A)(i) or (A)(ii) has the obligation to act. The two subsections cannot mean the same thing. The statutory

language makes it clear they do not. Subsection (A)(ii) says that a service provider has the requisite knowledge when it is “aware of facts or circumstances from which infringing activity is apparent.” “*Aware[ness]* of “*facts and circumstances*” that make “*infringing activity*” “*apparent*” must mean something different – and more encompassing – than knowledge of “specific and identifiable infringements of particular individual items.” If a service provider obtains knowledge of a specific and identifiable infringement of an individual item, then no additional “facts and circumstances” are necessary to make the service provider “aware” of the infringing activity. Construing both subsection (A)(i) and (A)(ii) to require knowledge of “specific and identifiable infringements of particular individual items” renders subsection (A)(ii) superfluous – again, an impermissible reading of the statute. *Corley*, 129 S. Ct. at 1566.

B. The District Court’s Test For Knowledge Encourages Willful Blindness By Service Providers

The district court’s test for knowledge not only is inconsistent with the statutory language, but undermines Congress’s clearly expressed intent in enacting the DMCA. First, that test incentivizes service providers to refrain from investigating and putting a stop to infringing activity of which they are aware. Service providers wanting to limit their liability under the district court’s test would never take such action on their own – because

doing so could lead to their “identify[ing] infringing material with sufficient particularity,” and thereby trigger their obligation to take that material down. SPA 29. The summary judgment record, in fact, contained significant evidence that appellees refrained from investigating and remedying known infringing activity unless and until copyright owners sent them takedown notices.⁷

By rewarding appellees’ strategy with the grant of summary judgment, the district court’s decision inverts Congress’s clear objectives that service providers act expeditiously to stop infringing activity of which they are “aware.” 17 U.S.C. § 512(c)(1)(A)(ii). The legislative history confirms that Congress intended for subsection (A)(ii) to create a “red flag” test: “[I]f the service provider becomes aware of a ‘red flag’ from which infringing activity is apparent, it will lose the limitation of liability if it takes no action.” Senate Report at 44; H.R. Rep. No. 105-551, pt. 2, at 53 (1998) (“House Report”). Congress’s conception of “red flag” knowledge has clear

⁷ See, e.g., SUF 57 (YouTube founder Steve Chen: “the copyright infringement stuff. i mean, we can presumably claim that we don’t know who owns the rights to that video and by uploading, the user is claiming that they own that video. we’re protected by DMCA for that. [W]e’ll take it down if we get a ‘cease and desist’”); SUF 64 (YouTube founder Chad Hurley: “can we remove the flagging link for ‘copyrighted’ today? we are starting to see complaints for this and basically if we don’t remove them we could be held liable for being served a notice. it’s actually better if we don’t have the link there at all because then the copyright holder is responsible for serving us notice of the material and not the users.”).

and direct parallels to the common law doctrine of “willful blindness.”

Under that doctrine, a defendant that turns its face away from apparent illegal activity in order to avoid obtaining culpable knowledge nevertheless will be deemed to have such knowledge. As Judge Posner described the doctrine, “a deliberate effort to avoid guilty knowledge is all that the law requires to establish a guilty state of mind[,]” and “[w]illful blindness is knowledge, in copyright law ... as it is in the law generally.” *Aimster*, 334 F.3d at 650. *See also Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 109-10 (2d Cir. 2010) (service provider that willfully blinds itself to counterfeit goods on its website has requisite knowledge for secondary liability under trademark law).

Congress further made it clear that a service provider can acquire “red flag” knowledge *regardless* of whether the copyright owner has notified the provider of the infringing material:

A service provider wishing to benefit from the limitation on liability under subsection (c) must “take down” or disable access to infringing material residing on its system or network of which it has actual knowledge or that meets the “red flag” test, *even if the copyright owner or its agent does not notify it of a claimed infringement*.

Senate Report at 45 (emphasis added); House Report at 54 (same).

The “red flag” standard of (A)(ii) reflects and enforces the Congress’s considered decision that service providers who become “aware” of

“apparent” infringing activity must act expeditiously to stop that activity if they want to enjoy the statute’s benefits. The district court’s decision reverses the incentives that Congress clearly intended to provide with the “red flag” standard. The decision cannot stand.

C. The District Court’s Test For Knowledge Effectively Relegates Copyright Owners To A Notice And Takedown Regime, Which Congress Did Not Adopt

The district court’s knowledge test further is inconsistent with Congress’s intent because it effectively transforms the DMCA into a notice and takedown statute. As discussed, the summary judgment record showed that appellees refrained from acting unless and until notified about specific infringements in takedown notices. *See* n.7, *supra*. The district court’s knowledge test validates that strategy, and as a practical matter guarantees that service providers will not “*cooperate to detect* and deal with copyright infringements,” Senate Report at 20 (emphasis added), but instead will only react to takedown notices.

The notice and takedown regime that the district court’s test embodies is one that Congress considered and rejected. A leading commentator on copyright law recounted the structure that the service providers urged Congress to adopt:

In broad strokes, copyright owners aggrieved over the illicit usage of their content over the Internet could serve notice on

ISPs that afforded access to that content; in response, the ISPs would take down the content, or otherwise disable access to it.

3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*

§ 12B.01[B][2], at 12B-22 (Matthew Bender, Rev. Ed.).

However, a broad range of copyright owners – not only those from the entertainment industries but from the computer software industries and others – argued forcefully that such a regime was unworkable and unjust.

As one representative of the computer software industry summed it up:

“Notice and take-down” is simply an unworkable model because it reduces the incentive for service providers to take action when they discover obvious infringements, and imposes the full burden for protecting copyright on software companies. Moreover, when conducting anti-piracy work, and given [the] nature of works in electronic form, making notice a precondition for suit would simply constitute an invitation for the pirate to destroy the evidence of his infringement.

WIPO Copyright Treatises Implementation Act; And Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary, 105th Cong. 121 (1997) (statement of Ken Wasch, President, Software Publishers Ass’n).

In the end, Congress did *not* adopt the pure “notice and takedown” regime for which service providers had advocated. One requirement for safe harbor protection under § 512(c) is that the service provider must “respond[]

expeditiously” to notices of claimed infringement sent by copyright owners. 17 U.S.C. § 512(c)(1)(C). But the statute provides additional requirements that the service provider must satisfy to come within the safe harbor, including the knowledge provisions of § 512(c)(1)(A). Congress could not have meant, and did not mean, for the notice and takedown requirements to supplant or be coterminous with the statute’s knowledge elements.

The district court indicated that its test was supported by § 512(m)(1), which says that the statute does not “condition the applicability of” the safe harbor on “a service provider monitoring its service or affirmatively seeking facts indicating infringing activity[.]” *Id.* § 512(m)(1). *See* SPA 19. That statement appears in a section of the statute entitled “Protection of Privacy.” *See also* Senate Report at 55 (stating that this provision was “designed to protect the privacy of Internet users”). The provision simply means that there is no stand-alone requirement that a service provider monitor its service or affirmatively seek out information regarding its users’ conduct in order to be eligible for safe harbor protection. The provision cannot reasonably be read to render nugatory the obligations that may arise by virtue of the operation of other provisions of the same statute, including § 512(c)(1)(A). *See Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 20 (1995) (“It is an elementary rule of construction that the act cannot be held to

destroy itself.”) (quotations omitted). If a service provider has either type of knowledge enumerated in § 512(c)(1)(A), then the provider *is* obligated to investigate and take action to stop it. Nothing in § 512(m)(1) eliminates that requirement.

* * *

The district court’s interpretation of § 512(c)(1)(A) fails under every available canon of statutory construction. The decision must be reversed.

III. The District Court Erroneously Wrote A Knowledge Test Into § 512(c)(1)(B)

The district court’s erroneous re-writing of the DMCA went beyond writing *out* the knowledge tests that actually are in § 512(c)(1)(A). The district court further erred by writing *into* § 512(c)(1)(B) a knowledge test where none exists.

Section 512(c)(1)(B) states that the service provider seeking safe harbor protection must demonstrate that it

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.

17 U.S.C. § 512(c)(1)(B).

The district court considered appellees’ ability to satisfy § 512(c)(1)(B) in a single paragraph. SPA 28-29. Without deciding the question of appellees’ receipt of financial benefit, the court held that

appellees could not have “the right and ability to control” infringing activity unless they had particularized knowledge of specific “cases” of infringement. In particular, the court held that “*the provider must know of the particular case before he can control it.*” *Id.* at 29 (emphasis added). The court thus imported into § 512(c)(1)(B) the same knowledge test the court had adopted for § 512(c)(1)(A). This was error.

The text of § 512(c)(1)(B) does not include a knowledge test. Given that Congress included knowledge tests in § 512(c)(1)(A) but omitted any such test in § 512(c)(1)(B), it was error for the district court to write such a test into the latter provision. *See, e.g., Jacobs v. New York Foundling Hospital*, 577 F.3d 93, 100 (2d Cir. 2009) (“The ancient maxim *expressio unius est exclusio alterius* (mention of one impliedly excludes others) cautions us against engrafting an additional exception to what is an already complex [statute].”) (quotation omitted).

The district court’s addition of a knowledge test not only disregards the *expressio unius* maxim, but further renders § 512(c)(1)(B) superfluous. If a service provider knows of particular infringing activity, then (even under the district court’s construction of § 512(c)(1)(A)) the provider must act expeditiously to stop that activity, or else lose any claim for safe harbor

protection.⁸ The service provider's obligations under § 512(c)(1)(A) exist whether or not the service provider receives a financial benefit that is directly attributable to the infringing activity. Hence, if the district court's construction of § 512(c)(1)(B) were correct, then that section would be unnecessary and superfluous in light of § 512(c)(1)(A). Again, that is an unreasonable reading of the statute. *Corley*, 129 S. Ct. at 1566.

The district court's importation of a knowledge test has no support in the legislative history. It also has no support in the common law doctrine of vicarious copyright liability, which obviously informed Congress's drafting of § 512(c)(1)(B). *See Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963). The common law formulation provides that vicarious liability may attach "[w]hen the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials[.]" *Id.* The common law test does not have a knowledge component. Indeed, this Court has long held that vicarious liability may attach "*even in the absence of actual knowledge that the copyright monopoly is being impaired[.]*" *Id.* *See id.* at 308 ("courts have consistently refused to honor the defense of absence of knowledge or

⁸ As demonstrated above, knowledge of a particular instance of infringing activity is not the only type of knowledge that triggers the service provider's obligation to act under § 512(c)(1)(A).

intention”); 3 *Nimmer on Copyright* § 12.04[A][2], at 12-77 & n.51 (“Lack of knowledge that the primary actor is actually engaged in infringing conduct is not a defense” to vicarious liability) (collecting cases). The fact that the common law test excludes a knowledge test further underscores the absence of support for the district court’s construction.

Finally, the district court’s importation of a knowledge test into § 512(c)(1)(B) also is insupportable as a matter of sound policy. As with its interpretation of § 512(c)(1)(A), the district court’s construction of § 512(c)(1)(B) encourages service providers to be deliberately ignorant of infringing activity occurring on their sites. Providing such incentives to those service providers who not only receive a direct financial benefit attributable to the infringing activity but also have the right and ability to control it undermines the statute’s language and Congress’s objectives in enacting the DMCA. For all of these reasons, the district court’s decision must be reversed.

CONCLUSION

Amici respectfully submit that the district court's judgment should be reversed.

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Respectfully submitted,

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Pursuant to Rule 32 of the Federal Rules of Appellate Procedure, I certify
that:

1. This brief complies with the type-volume limitation of Rule
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Dated: December 10, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 2010, a true and correct copy of the foregoing Brief for Motion Picture Association of America, Inc. and Independent Film & Television Alliance as *Amici Curiae* Supporting Appellants was served on all counsel of record in this appeal via CM/ECF pursuant to Second Circuit Rule 25.1(h)(1)-(2).

Dated: December 10, 2010

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