

10-3270-cv

IN THE
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,

—against—

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

Defendants-Appellees.

(caption continued on inside cover)

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

BRIEF OF AMICI CURIAE
BROADCAST MUSIC, INC. (BMI), AMERICAN SOCIETY OF
COMPOSERS, AUTHORS AND PUBLISHERS (ASCAP), SESAC, INC.
(SESAC), THE SOCIETY OF COMPOSERS AND LYRICISTS (SCL),
THE ASSOCIATION OF INDEPENDENT MUSIC PUBLISHERS
(AIMP), THE SONGWRITERS GUILD OF AMERICA (SGA),
THE RECORDING ACADEMY, THE NASHVILLE
SONGWRITERS ASSOCIATION INTERNATIONAL (NSAI),
AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM),
MUSIC PUBLISHERS' ASSOCIATION OF THE UNITED STATES (MPA),
LISA THOMAS MUSIC SERVICES, LLC, GARTH BROOKS,
BRUCE HORNSBY, BOZ SCAGGS, STING, ROGER WATERS;
GLENN FREY, DON HENLEY, TIMOTHY B. SCHMIT,
JOE WALSH (THE EAGLES)

IN SUPPORT OF APPELLANTS AND REVERSAL

RUSSELL J. FRACKMAN
MITCHELL SILBERBERG & KNUPP LLP
11377 West Olympic Boulevard
Los Angeles, California 90064
(310) 312-2000

Attorneys for Amici Curiae

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10-3342-CV

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 FRANCAIS 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,

—against—

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

Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* submit the following corporate disclosure statements with respect to those *Amici* that are corporations:

Broadcast Music, Inc. (BMI) has no parent corporation. The only publicly held company that directly or indirectly owns 10% or more of its stock is Gannett Co., Inc., through an indirect, wholly owned subsidiary.

The American Society of Composers, Authors and Publishers (ASCAP) has no parent corporation, and no publicly held company holds more than 10% of its stock.

SESAC, Inc. (SESAC) has no parent corporation and no publicly held company holding more than 10% of its stock.

The Society of Composers and Lyricists (SCL) is a private, non-profit organization. It has no parent company, and no publicly held company holds more than 10% of its stock.

The Association of Independent Music Publishers (AIMP) has no parent corporation, and no publicly held company holds more than 10% of its stock.

The Songwriters Guild of America (SGA) has no parent corporation, and no publicly held company holds more than 10% of its stock.

The Recording Academy is a private, non-profit organization. It has no parent company, and no publicly held company holds more than 10% of its stock.

The Nashville Songwriters Association International (NSAI) has no parent corporation, and no publicly held company holds more than 10% of its stock.

The American Association of Independent Music (A2IM) has no parent corporation, and no publicly held company holds more than 10% of its stock.

The Music Publishers' Association of the United States (MPA) has no parent corporation, and no publicly held company holds more than 10% of its stock.

Lisa Thomas Music Services, LLC has no parent corporation, and no publicly held company holds more than 10% of its stock.

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INTEREST OF *AMICI CURIAE*

Amici Curiae are individuals, companies, associations, and organizations that create or whose members create a wide variety of musical compositions and sound recordings. Collectively, *Amici* represent hundreds of thousands of songwriters, composers, music publishers, recording artists, and others who own millions of copyrights. (A more detailed description of each *Amicus Curiae* is in Schedule A attached hereto.)¹

All parties have consented to the filing of this brief.

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1, *Amici* state 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 *Amici* and their members has contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici collectively represent hundreds of thousands of music content owners and creators including music publishers, songwriters and composers, record companies, and recording artists whose income depends on being paid for the musical works that they create and own.² For them the creative process is not only an avocation; it is their business. They rely on copyright protection to obtain a fair return on their time, effort, and investment in creating and producing millions of copyrighted works that America listens to and performs. For many, it is their sole livelihood.³

The Digital Millennium Copyright Act (“DMCA”) was a recognition of the threat to copyright owners posed by the internet’s unprecedented ability to enable the copying, performance, display, and distribution of copyrighted works instantly and globally. It was intended and designed to guarantee the continued viability of copyright in this new internet age, while also encouraging the development of the technology that disseminates *Amici*’s works to the world.

² “Sound recordings and their underlying musical compositions are separate works with their own distinct copyrights.” *Newton v. Diamond*, 204 F. Supp.2d 1244, 1248-49 (C.D. Cal. 2002), *aff’d*, 388 F.3d 1189 (9th Cir. 2004).

³ Many others are involved in creating and earning their livelihood from these works, including producers, arrangers, sound engineers, and background musicians and singers.

The DMCA was structured to ensure this dual goal by providing qualifying service providers “safe harbor” from monetary liability for their activities in return for their compliance with a series of conditions designed to address the legitimate concerns of copyright owners. S. Rep. No. 105-190, at 8 (1998) (“In the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability.”). These conditions for “safe harbor” include each of the following: (1) service providers remove from their system or disable access to “material or an activity using that material” when they have actual knowledge that it is infringing *or* (2) service providers remove or disable access to infringing material when they become aware of “facts and circumstances” from which infringing activity is apparent (“red flag knowledge”); (3) service providers do not receive a direct financial benefit from infringement they have the right and ability to control; and (4) service providers respond to “take-down notices” from copyright owners or their representatives by removing or disabling access to infringing material referenced. 17 U.S.C. § 512(c)(1).⁴ Each of these conditions serves a specific purpose and collectively they provide a measure of protection to copyright owners.

⁴ All statutory references are to the Copyright Act, 17 U.S.C. § 101, *et seq.*, and specifically to the DMCA, 17 U.S.C. § 512.

The District Court destroyed this balance by construing the DMCA in a way that eliminated most of the qualifications and conditions for “safe harbor” and limited the statute’s protections *solely* to the “notice and take-down” procedure. Further, the District Court very narrowly construed the service provider’s obligation in responding to such a notice from a copyright owner. Under the District Court’s flawed reasoning, after receiving detailed notice from copyright owners identifying the specific URL locations of the infringing works, all that service providers need do is remove those specific copies present only at the identified locations on their websites. Moreover, by the time the infringing works can be and are located (if ever) by a copyright owner and notice given, the works have been made widely and irretrievably available to the public to be performed, copied, and further distributed.

Amici encompass a broad and diverse spectrum of the music community. Collectively, they have attempted to deal with protecting copyrights in a variety of ways. As the experience of various individual *Amici’s* experience proves, the District Court’s construction of the DMCA imposes an impossible burden on copyright owners, especially in the context of businesses not envisioned a decade ago that monetize and depend on the uncompensated dissemination of *Amici’s* music and other copyrighted content. Far from providing “safe harbor” for “innocent” service providers acting “in good faith,” the District Court encourages

service providers to remain willfully blind to infringement on their own websites, to ignore or selectively implement (when it is to their economic advantage) technologies designed to prevent infringement *before* it happens, and to disregard infringing content after it becomes rampant and obvious.

Appellants have persuasively argued both the facts and the law that conclusively show that Appellees have not complied with the four separate conditions and the intended meaning of Section 512(c)(1) (as well as other key qualifications for “safe harbor”). The District Court’s opinion, however, has broad implications beyond the facts of this case. Instead of providing protections for both copyright owners and qualifying service providers, the District Court has perversely turned the DMCA into a roadmap to build a business based on massive use of copyrighted works without paying for them. As a result, copyright owners – both large and small – lose control of their creations and are limited significantly in their ability to license their works, while their property is disseminated virally over the internet worldwide to anonymous users, without consent or compensation.

Amici wish to inform the Court of the real world consequences to them (and ultimately to the public) if the District Court’s errors in construing the parameters of Section 512(c)(1) are not corrected. This brief begins with a description of that reality and the attendant consequences, and then analyzes the ways in which the

District Court’s conclusions are contrary to the statutory language of the DMCA and its policy.

ARGUMENT

I. THE NOTICE AND TAKE-DOWN PROCEDURE TO WHICH THE DISTRICT COURT HAS RELEGATED COPYRIGHT OWNERS IS AN INEFFECTIVE MEANS TO PREVENT OR LIMIT INFRINGEMENT OVER THE INTERNET.

Amici embrace the argument made by Appellants that Appellees’ performance and licensing of user-uploaded content are not the activities protected by Section 512(c) of the DMCA. *See generally* Brief for Plaintiffs-Appellants, The Football Association Premier League Limited, *et al.*, at 56-58 (Premier League Brief”); Opening Brief for Plaintiffs-Appellants, Viacom International, Inc., *et al.*, at 49-54 (“Viacom Brief”). That section provides a “safe harbor” only in certain limited circumstances for “storage at the direction of a user.” Appellees engaged in acts far beyond these limited circumstances by reproducing, displaying, publicly performing, and licensing the material that is uploaded by its users. Section 512(c) does not immunize the service provider from liability for such acts. *Amici* completely agree with this position. Therefore, in this brief *Amici* will focus on the District Court’s errors in applying the “safe harbor” of Section 512(c), without conceding that Appellees’ business meets its qualifying criteria.

* * * *

The DMCA provides that a service provider engaging in specific functions is entitled to “safe harbor” from monetary damages “if the service provider –

(A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; *or*

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; *and*

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”

§ 512(c)(1) (emphasis added).

As described herein, the District Court remade the DMCA into solely a notice and take-down statute by (1) defining “actual knowledge” to require knowledge of specific infringement, which a service provider could obtain only through a formal DMCA-compliant notice from the copyright owner, thus nullifying Section 512(c)(1)(A)(i); (2) rendering “red flag” knowledge or awareness superfluous by defining it to mean the same thing as “actual knowledge,” thus nullifying Section 512(c)(1)(A)(ii); (3) eliminating the ability to provide notice of a “representative list” of infringing works under Section 512(c)(3)(A)(ii); and (4) interpreting Section 512(c)(1)(B) (which disqualifies a service provider if it receives a financial benefit directly attributable to the infringing activity and has the right and ability to control such activity) to also

require actual knowledge (as the District Court narrowly defined it). The District Court compounded these errors by very narrowly defining a service provider's obligations when it does receive a take-down notice. The end result is not the multi-tiered protection that Congress intended or that the DMCA provides. These errors by the District Court and their impact on *Amici* are discussed in greater detail below.

Amici understand that the notice and take-down procedure of Section 512(c)(1)(C) is an element of DMCA protection. However, it is not the only element and, in the context of current technology, it is largely ineffective. That is illustrated by the record here. Even assuming, as the District Court stated, that when Appellees were given notice they removed "the material," that is far from the entire story. *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 526 (S.D.N.Y. 2010) (hereinafter "*Viacom*"). Notwithstanding the tens of thousands of notices from Appellants, infringement of their works was permitted by Appellees to continue essentially unabated. *See, e.g.*, Premier Brief at 13-14; Viacom Brief at 16-17. That is precisely why Appellees adopted a policy of doing nothing, waiting to see if infringement would be located and a DMCA-compliant notice sent by a copyright owner, and then removing only the specifically identified single copy of the infringing work (and not other copies of the same work). *See, e.g.*, Premier Brief at 10, 11 (quoting Appellees' internal e-mails).

Although *Amici* and their members cannot possibly expend the human and financial resources necessary to continuously search for infringing copies of their works *throughout the internet*, many have attempted to use the notice and take-down process (and also have contacted infringing users directly or offered licenses to infringing websites, among other efforts). That has proven to be a largely futile effort and has not succeeded in controlling the appropriation of *Amici's* music because notice and take-down cannot by itself replace the panoply of DMCA safeguards. It is burdensome, time consuming, expensive and, most important, ineffective. It is impossible for *Amici* to monitor the use of their music among thousands of sites and millions of works. However, the District Court has limited *Amici* to the sole option of using this ultimately unavailing notice and take-down procedure and has removed any obligation by service providers to deal in any other way with infringement, even when they knowingly use and profit from *Amici's* music and refuse to exercise their ability to control the unauthorized use of that music.

Amici have experienced many times over the predictable effects of the District Court's opinion. That is, when they attempt to provide take-down notice to a service provider using their music, the following "dance" invariably ensues:

The copyright owner herself (or her representatives) first must search many hundreds of websites and millions of works in an attempt to locate the

unauthorized use of her work on a specific website at a specific URL. These works have been indexed by the service provider and likely copied onto its own server. The service provider also determines what search results to return. It also may prohibit access by copyright owners to materials that are widely made available to groups of users (often large groups) who designate them “private.” Additionally, and unlike the service provider, the copyright owner is able to search for, and perhaps locate, her works only *after* (frequently long after) they have been made available over the internet. By then, the horse has left the proverbial barn and the works likely have been virally posted and distributed throughout the internet.⁵

If the copyright owner has the resources or ability to look for and succeed in locating some of her infringing works, she next must send a formal take-down notice (or tens of thousands of them) to the service provider, while the infringing works remain available. Only after receipt of the notice must the service provider remove or “expeditiously” disable access to the infringing works. §512(c)(1)(C).

⁵ See, e.g., *Twentieth Century Fox Film Corp. v. Streeter*, 438 F. Supp. 2d 1065, 1073 n.2 (D. Ariz. 2006) (“When digital works are distributed via the internet ... every downloader who receives one of the copyrighted works from defendant is in turn capable of transmitting perfect copies of the works ... threatening virtually unstoppable infringement.”).

(The statute does not define “expeditiously.”) During the intervening period, the infringing works remain available.

Even then, the service provider need only remove or disable access to the specific single copy of the work at the particular URL found by the copyright owner. *Viacom*, 718 F. Supp. 2d at 528-29. The service provider need not remove other copies of the *exact same work* indexed by it and remaining on its server, even though multiple copies of the same work frequently are present and, as here, the service provider has and is using for its own purposes technological tools able to remove and block infringement. The service provider also need not prevent the *exact same work* from re-appearing immediately, either replaced by another user or the same user, even though, again as was the case here, it has the ability to do so.⁶ The service provider can avoid doing anything to limit ongoing infringement. All the service provider need do is sit back and wait to see if another notice will be sent.

In this way, the notice and take-down process, as the District Court constricted it, requires the copyright owner continually to search for all of her

⁶ Even if the copyright owner were able to locate infringement of the same work re-posted by *the same user* (something only the service provider might know), the District Court held that conduct did not require termination of that user’s access under a “repeat infringer” policy. §512(i). *See Viacom*, 718 F. Supp. 2d at 527-28 (describing and validating Appellees’ “three strikes” repeat infringer policy).

works all of the time on all unlicensed services, and after an unauthorized use is located, to repeat the entire process over and over from the beginning.

II. AMICI DEPEND ON THE DMCA SAFEGUARDS TO OBTAIN COMPENSATION FOR THE USE OF THEIR WORKS ON THE INTERNET.

Amici's income largely results from three uses of their copyrighted works: public performances, increasingly in the form of streaming over the internet; reproductions and distribution, traditionally in the form of records, tapes, and compact discs, and now increasingly through internet downloads; and synchronizations (for musical compositions) and master uses (for sound recordings), *i.e.*, the use of music in synchronization with visual images, also increasingly internet based. *See* § 106 (listing exclusive rights); *see also* *Arista Records LLC v. Doe 3*, 604 F.3d 110, 117 (2d Cir. 2010) (“The fundamental copyright principles are clear. The owner of a copyright has the exclusive right to – or to license others to – reproduce, perform publicly, display publicly, prepare derivative works of, and distribute copies of, his copyrighted work.”).

Amici's ability to enforce these rights and protect the legitimate online marketplace is crucial to their ability to be paid for their music. *See, e.g.,* *Agee v. Paramount Commc'ns, Inc.*, 59 F.3d 317, 324 n.5 (2d Cir. 1995) (“producers of movies, television shows, and commercials often obtain master use licenses from sound recording copyright owners that allow them to synchronize sound recordings

with visual images, as well as to copy and distribute the audiovisual work.”). *See generally*, J. Shanker, D.E. Gunn & H. Orenstein, *Entertainment Law and Business* § 12.1 *et seq.* (2d ed. 2009). Appellees were well aware of *Amici’s* rights, but nonetheless decided to use *Amici’s* music without paying for it. *See, e.g.*, Figueira Decl., Dkt. No. 166-61, Tab 61 at 1 (“for these mixed videos will we get in trouble for them because the music is copyrighted?”); *id.*, Dkt. No. 274-12, Tab 72 at 4 (listing reproduction, performance, distribution, and synchronization rights and methods to obtain legitimate licenses); *id.*, Dkt. No. 276-171, Tab 336 at 7 (“music pub rights not cleared yet”).

It is no secret that in recent years the ability of *Amici* to obtain payment for their music has been reduced significantly by the decline in the traditional music business and by the (not coincidental) infringing and uncompensated use of their music over the internet by technologies not contemplated a decade ago. Some websites and services have agreed to license *Amici’s* works before exploiting them. Many others have not, including User Generated Content (“UGC”) sites such as that operated by Appellees that are now a major form of entertainment and a significant user of *Amici’s* music. Nevertheless, UGC services continue to use *Amici’s* music in audiovisual works to attract users and expose them to advertising, the revenue from which they may share with the very users they have encouraged to provide (upload) the infringing content. Copyright owners do not get paid for

the commercial use of their music; they also cannot control the nature of the advertising that is tied to their creations. These service providers further extend their distribution of and their benefit from infringing copyrights by making the infringing works capable of being “embedded” on other websites (including Facebook, “blogs,” and even web versions of major newspapers).

The record amply supports that Appellees recognized and capitalized on the popularity and attractiveness of *Amici*’s music. *See, e.g.*, Figueira Decl., Dkt. No. 166-4, Tab. 4 at 4 (“The most popular queries are for head content-music ...”); *id.*, Dkt. No. 274-5, Tab 24 at 1 (“music videos ... are being searched a lot”); *id.*, Dkt. No. 166-66, Tab 66 at 1 (“music content is a key element to Youtube’s success. Premium music content is the most watched genre of content on YouTube.”); *id.*, Dkt. No. 276-6, Tab 194 at 2 (tracking music among “Top 100 Playback Queries.”).⁷ *See generally*, Premier Brief at 8-20; Viacom Brief at 8-17. Although the District Court did not address the issue of “financial benefit” (because of its erroneous rulings on the “right and ability to control” (discussed below in Section III.B), this pervasive involvement is evidence not only of financial benefit but also of knowledge (actual or “red flag”) and the right and ability to control infringement.

⁷ *Amici* have had limited access to non-confidential portions of the record.

III. THE DISTRICT COURT’S REASONING IS INCONSISTENT WITH THE LANGUAGE AND POLICY OF THE DMCA.

A. The DMCA Implemented A Shared Responsibility To Protect Against Infringement On the Internet.

Historically, the copyright law has adapted to new technologies to preserve the rights of copyright owners and their incentive to create. S. Rep. No. 105-190, at 2 (“With this constant evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials.”). As the internet developed, Congress acknowledged that the internet could enable infringement in manners and magnitudes that never previously existed, and thus posed a significant and unique threat to copyrights. *See id.* at 8 (“Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the internet without reasonable assurance that they will be protected against massive piracy.”). For the first time, exact copies of copyrighted works could be made, without any investment in time or money, and distributed worldwide for free, to be redistributed virally and anonymously.

In response, Congress structured the DMCA to protect copyright proprietors against unprecedented infringement, while also providing “safe harbor” from monetary damages to “innocent” service providers supplying “passive” internet services “in good faith.” *See ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239

F.3d 619, 625 (4th Cir. 2001) (“This [DMCA] immunity, however, is not presumptive, but granted only to ‘innocent’ service providers who can prove they do not have actual or constructive knowledge of the infringement.”); *Columbia Pictures Indus., Inc. v. Fung*, No CV 06-5578, 2009 WL 6355911, at *18 (C.D. Cal. Dec. 21, 2009) (“[T]he statutory safe harbors are based on passive good faith conduct aimed at operating a legitimate business.”). In this way, the copyright law could fairly and profitably encourage the development of new technologies, provide incentives to copyright holders to create, and give the public access to the works of a vital creative community.

The DMCA was designed to foster this partnership and shared responsibility and not, as the District Court concluded, to place the burden of policing copyright infringement on the owners of the copyrights. *Viacom*, 718 F. Supp. 2d at 523. *See* S. Rep. No. 105-190, at 40 (purpose of DMCA was “to preserve[] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital network environment.”); H.R. Rep. No. 105-551, pt. 2, at 21 (1998) (DMCA “balanced the interests of content owners, on-line and other service providers, and information users.”); *see also Tur v. YouTube*, No. CV-064436, 2007 WL 1893635, at *2 (C.D. Cal. June 20, 2007) (DMCA was “to facilitate cooperation among internet service providers and copyright owners ‘to detect and deal with copyright

infringements that take place in the digital networked environment’.)” (*quoting* S. Rep. No. 105-190, at 20).

In order to implement this policy, the DMCA was structured to potentially provide service providers “safe harbor” if they first met certain qualifications. *See* §512(k) (definition of “service provider”); §§512(a)-(d) (specific covered functions); and §512(i) (repeat infringer policy). Crucially, an otherwise qualifying service provider forfeited its right to “safe harbor” if it lost its “innocence” by acquiring either actual or constructive (“red flag”) knowledge of infringement and failing to expeditiously remove the infringing material; *or* by receiving a direct financial benefit from infringing activity that it had the right and ability to control; *or* by failing to remove infringing material after receiving a take-down notice. §512(c)(1).

By design, each of these conditions to “safe harbor” was separate and independent. 3 M. Nimmer & D. Nimmer, *Nimmer On Copyright*, § 12B.04 at 12B-59 (2010 ed.) (“[C]opyright owners are not obligated to give notification of claimed infringement in order to enforce their rights.”). The legislative history repeats this basic tenet more than once. S. Rep. No. 105-190, at 45 (“Section 512 does not require use of the notice and take-down procedure.”); H.R. Rep. No. 105-551, pt. 2, at 54 (“The Committee emphasizes that new Section 512 does not specifically mandate use of a notice and take-down procedure.”). The burden

remains on the service provider to prove *all* the elements of this affirmative defense. *Hendrickson v. Amazon.com, Inc.*, 298 F. Supp. 2d 914, 915 (C.D. Cal. 2003) (“[B]ecause Amazon is asserting an affirmative defense on the vicarious liability claim, it must establish *all elements* of the “safe harbor” rule under the DMCA.”) (emphasis added).

B. The District Court Has Converted The DMCA Into A Pure Notice and Take-Down Statute And Eliminated Other Conditions To Qualify For “Safe Harbor”.

The District Court turned the DMCA’s calibrated *series* of shared burdens and conditions into a statute that places the entire burden of policing online infringement on copyright owners. The District Court reached this result by tethering all eligibility conditions for “safe harbor” under Section 512(c)(1) to the notice and take-down procedure, at the same time eliminating all service provider obligations other than to respond, after the fact and in a very limited fashion, to noticed infringement. This leaves copyright owners with no effective means to deal with infringement on the internet and leaves service providers with no incentive to do so. The District Court reached this devastating result through a series of erroneous interpretations.

First, the District Court construed section 512(c)(1)(A)(i), which disqualifies a service provider that has “actual knowledge” of infringing “activity” or “material,” to require that the copyright owner provide “knowledge of specific

and identifiable infringements of particular individual items” (*Viacom*, 718 F. Supp. 2d at 523); *i.e.*, “knowledge” will always require notice identifying a particular copy of an infringing work located at a specific location (URL). In doing so, the District Court added the concept of “specific” knowledge to the statute, at the same time ignoring that this part of the statute does not mandate notice as the exclusive means of acquiring knowledge, but does include knowledge of infringing “activity” *or* “material” that is acquired in *any* way.

The District Court further eviscerated Section 512(c)(1)(A)(i) by reasoning that a service provider can never obtain the requisite “specific knowledge” other than by a DMCA-compliant notice. That is because, contrary to the record here, the District Court hypothesized that: (1) even if it were clear that copyrighted works were being unlawfully used in massive numbers, there was a theoretical possibility that the service provider could not determine whether the use was licensed or fair use (*Viacom*, 718 F. Supp. 2d at 524);⁸ and (2) other than its extremely limited obligation in responding to a formal take-down notice, a service provider does not have any duty to remove or disable infringing material that it has the ability to remove or disable. *Id.* at 528-29.

⁸ This is an argument virtually any secondary infringer could make. *See, e.g., A&M Records, Inc., v. Napster, Inc.*, 114 F. Supp. 2d 896, 920 (N.D. Cal. 2000), *aff’d*, 239 F.3d 1004 (9th Cir. 2001).

The District Court’s reasoning is faulty in another way. It conflates “knowledge” with “notice”; however, the two terms are not synonymous. Notice is simply one way, among others, to acquire knowledge (either actual or constructive). *See Fonovisa, Inc. v. Napster, Inc.*, No. 3:01-CV-02669, 2002 WL 398676 (N.D. Cal. Jan. 28, 2002), at *8-11 (no court has “held that notice is the exclusive means by which sufficient knowledge is acquired or that it is a separate requirement” for contributory infringement.). This dichotomy clearly is reflected in the structure of the DMCA itself: the *only* prong of Section 512(c)(1) that mentions “notification” or that refers to the elements of “notification” is the notice and take-down procedure in Section 512(c)(1)(C). By contrast, Sections 512(c)(1)(A)(i),(ii) refer to “knowledge” or “awareness,” not “notice.” The distinction between the two concepts is further evident from the proscription that a take-down notice that fails to comply with the elements of notification cannot be considered under paragraph 1(A) in determining whether a service provider has actual knowledge or is aware of facts and circumstances from which infringing activity is apparent. § 512(c)(3)(B)(i). This necessarily implies that such knowledge can be obtained by a service provider in ways *other than* by notice from a copyright owner. Yet, the District Court never described *any* means by which a service provider could obtain actual knowledge save by take-down notice from a copyright owner.

Second, the District Court obviated Section 512(c)(1)(A)(ii) “red flag” knowledge by defining the “facts or circumstances” that provide “knowledge *or* awareness of infringing activity” to be the same as actual knowledge, *i.e.*, knowledge of a specific infringement at a specific location. *Viacom*, 718 F. Supp. 2d at 523 (“ ‘actual knowledge that the material or an activity’ is infringing,” *and* “‘facts or circumstances’ indicating infringing activity, describe knowledge of specific and identifiable infringements of particular individual items.”) (emphasis added). Again, the District Court did not provide a single example of any means by which a service provider could obtain “red flag” knowledge except by notice and take-down.

By rendering superfluous “red flag” knowledge as an independent condition to qualify for “safe harbor,” the District Court controverted the clearly expressed intent to include in the DMCA a form of knowledge distinct from actual knowledge. H.R. Rep. No. 105-551, pt. 1, at 25 (a “red flag” includes any “information of any kind that a reasonable person would rely upon” to indicate infringement). At the same time, the District Court’s reading of “red flag” knowledge encouraged self-imposed blindness, the opposite of Congress’ intention. “If the exemption were limited to actual knowledge, it would provide an incentive to look the other way and deliberately avoid learning of the infringement.” 143 Cong. Rec. E1453 (daily ed. July 17, 1997) (statement of Hon.

Howard Coble). *See Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1177 (C.D. Cal. 2002) (DMCA does not “endorse business practices that would encourage content providers to turn a blind eye to the source of massive copyright infringement while continuing to knowingly profit.”); *Fung*, 2009 WL 6355911, at *17 (defendant may not “turn[] a blind eye to red flags of obvious infringement”).⁹

The DMCA does not constrict “red flag” knowledge to the definition of actual knowledge, but leaves the “facts and circumstances” constituting “knowledge or awareness” to be decided on a case by case basis. *See, e.g.*, S. Rep. No. 105-90, at 44. This Court need not define all instances where “red flag” knowledge is present; it clearly was present here. *See, e.g.*, Premier Brief at 41-46;

⁹ The District Court relied on *Tiffany (NJ), Inc. v. eBay, Inc.*, 600 F.3d 93 (2d Cir. 2010), to justify its narrow (and redundant) reading of “red flag” knowledge. *Viacom*, 718 F. Supp. 2d at 524-25. The District Court ignored that in that case this Court discussed “willful blindness” as knowledge; that, unlike here, eBay had many affirmative procedures in place to address infringement on its website; and that the decision below was based on extensive findings after trial. *Tiffany*, 600 F.3d at 97-100, 109-110. More to the point, the District Court was wrong when he stated “the DMCA applies the same principle” against “generalized notice” as this Court applied to a trademark claim in *Tiffany*. (*Viacom*, 718 F. Supp. 2d at 525). This Court actually *contrasted* the requisite “narrow” knowledge for *trademark infringement* in *Inwood Labs, Inc. v. Ives Labs, Inc.*, 456 U.S. 844 (1982), with the broader standard of knowledge in *copyright law*. 600 F.3d at 108-09, *citing Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 439 n.19 (1984) (“Given the fundamental differences between copyright law, in this copyright case we do not look to the standard for contributory infringement set forth in *Inwood* ... which was crafted for application in trademark cases.”).

Viacom Brief at 23-34. At a minimum, “red flag” knowledge, if not actual knowledge, exists when a service provider aggregates, indexes, and places infringing works on its server in large amounts, uses them as the foundation of its business model, views and comments repeatedly on the significant presence and importance of infringing content on its service, receives repeated notices of infringement (and even reads about it in the press), and actually blocks or filters infringing content of its “partners” when doing so is in its own economic benefit, but refuses to do so for other copyright owners. This Court should reaffirm that even without take-down notice, “if 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.” H.R. Rep. No. 105-551, pt. 2, at 53 (quoted in *Fung*, 2009 WL 6355911, at *16). The service provider must take reasonably available steps to prevent or limit infringement.

Third, the District Court severely limited the copyright owners’ ability even to give notice by eliminating the option to provide a “representative list” of infringing works. § 512(c)(3)(A)(ii) (permitting a single notification of a “representative list” of “multiple copyrighted works at a single online site.”) The ability to provide such representative notice is especially necessary to many *Amici*, who represent hundreds of thousands of individuals and many millions of musical works in an era where computer technology has permitted unauthorized digital

transactions of copyrighted works in staggering numbers. As unequivocally stated in the legislative history:

“[I]t is not necessary that the notification list every musical composition or sound recording that has been, may have been, or could be infringed at that site. Instead, it is sufficient for the copyright owner to provide the service provider with a representative list of those compositions or recordings in order that the service provider can understand the nature and scope of the infringement being claimed.”

H.R. Rep. No. 105-551, pt. 2, at 55. After a “representative list” is provided, the service provider would be on notice that its service is being used repeatedly for infringing “activity.” This is certainly one “red flag” that triggers the service provider’s duty to investigate, remove, and prevent infringement.

Here, too, the District Court reverted to his restrictive definition of actual knowledge, requiring that a “representative list” be more than “representative”; that it be inclusive and specific. *Viacom*, 718 F. Supp. 2d at 528-29 (“representative list” “would eviscerate the required specificity of notice” if it did not require “giving the works’ locations at the site”). Appending this requirement is contrary to the express statutory language and the intent to aid copyright owners who cannot possibly locate and identify multiple infringements of hundreds or thousands of their own or their members’ works. *See ALS Scan*, 239 F.3d at 625

(The “requirements are written so as to reduce the burden of holders of multiple copyrights who face extensive infringement of their works.”).¹⁰

Fourth, the District Court eliminated the protections and conditions of Section 512(c)(1)(B) by requiring that, in addition to a “direct financial benefit” and the “right and ability to control infringing activity,” a service provider (once again) possess the same actual knowledge of specific infringements as for actual knowledge (§ 512(c)(1)(A)(i)) and “red flag” knowledge (§ 512(c)(1)(A)(ii)) (and which the service provider could obtain only by notice from the copyright owner). *Viacom*, 718 F. Supp. 2d at 527 (“The ‘right and ability to control’ the activity requires knowledge of it, which must be item-specific.”). In his cursory dismissal of this separate condition for “safe harbor” (which was relegated to “Other Points”), the District Court ignored that “knowledge” (of any type) is never mentioned in Section 512(c)(1)(B) or its legislative history.

¹⁰ The District Court had it backward when he opined that a “representative list” would put the service provider to the factual search prohibited by § 512(m). *Viacom*, 718 F. Supp. 2d at 529. Under the District Court’s construct, the copyright owners are the ones who must search, not only the works posted on a specific website, but the millions posted throughout the internet, and they must do so without access to the service provider’s database and tools that permit it to locate or limit infringing content on its own server. Requiring a service provider to engage in that type of activity in order to locate infringing works that it offers to the public with its users’ knowledge and acquiescence cannot be the type of “monitoring” that could invade a user’s privacy under Section 512(m), on which the District Court erroneously relied.

That knowledge is not a prerequisite to the “right and ability to control” is consistent with the common law of vicarious liability embodied in Section 512(c)(1)(B). *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1117 (9th Cir. 2007) (“[W]here Congress uses terms that have accumulated settled meaning under common law ... Congress means to incorporate the established meaning of these terms” (referring to § 512(c)(1)(B)) (*quoting MPAA v. Rossi*, 391 F.3d 1000, 1004 n.4 (9th Cir. 2004)) (construing another provision of the DMCA). But whether or not the common law definition applies, it is clear that Section 512(c)(1)(B) does not require actual (or any) knowledge. If it did, that section would become irrelevant because a service provider has an independent obligation under Section 512(c)(1)(A) to remove infringing material once it obtains actual knowledge. Rather, 512(c)(1)(B) is consistent with the policy reiterated almost fifty years ago by this Court that one who profits from controllable infringement is liable, even if he lacks knowledge of infringement:

“The imposition of liability upon the [defendant], even in the absence of an intention to infringe or knowledge of infringement, is not unusual....[T]he imposition of *vicarious* liability in the case before us cannot be deemed unduly harsh or unfair. [Defendant] has the power to police carefully the [infringing] conduct ...; our judgment will simply encourage it to do so, thus placing responsibility where it can and should be effectively exercised.”

Shapiro Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 308 (2d Cir. 1963)
(emphasis in original).¹¹

The District Court’s conclusion that “the provider must know of the particular case before he can control it” (*Viacom*, 718 F. Supp. 2d at 527) is contrary to almost a century of jurisprudence. The DMCA did not inject a new (and unstated) requirement of knowledge into the “vicarious liability” prong of 512(c)(1)(B). To the contrary, vicarious liability is not concerned with *removing* infringement after the fact (or after knowledge), but with preventing or limiting infringement *before it occurs* by a business that refuses to exercise the ability to do so. It is for that reason that, unlike Sections 512(c)(1)(A) and 512(c)(1)(C), Section 512(c)(1)(B) does not provide “safe harbor” even if the service provider expeditiously removes infringing content.

CONCLUSION

The District Court transformed Section 512(c)(1) from a series of independent conditions for “safe harbor” into a single and very limited notice and

¹¹ The Court cited the venerable cases holding a “dance hall” proprietor liable for infringements resulting from performances of music in his establishment, “whether or not the proprietor has knowledge of the compositions to be played or any other control over their selection.” 316 F.2d at 307, *citing Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198-99 (1931).

take-down provision. This Court should restore the DMCA balance by giving the intended separate meaning to all of the conditions of Section 512(c)(1).

Dated: December 10, 2010

Respectfully submitted,

RUSSELL J. FRACKMAN
MITCHELL SILBERBERG & KNUPP LLP

By /s/ Russell J. Frackman .

Russell J. Frackman
Attorneys for *Amici Curiae*
on Behalf of Appellants in
Support of Reversal

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,387 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman.

Dated: December 10, 2010

RUSSELL J. FRACKMAN
MITCHELL SILBERBERG & KNUPP LLP

By /s/ Russell J. Frackman .
Russell J. Frackman
Attorneys for *Amici Curiae*
on Behalf of Appellants in
Support of Reversal

SCHEDULE A

DESCRIPTION AND INTEREST OF *AMICI CURIAE*

1. Broadcast Music, Inc. (BMI) is a music performing rights organization (PRO) society as defined in the Copyright Act, 17 U.S.C. § 101. BMI issues blanket licenses to music users for the public performing rights of its affiliated songwriters', composers', and music publishers' musical works, collects license fees on behalf of its affiliates, and distributes those fees as royalties to BMI affiliates whose works have been performed on media such as cable television, radio, and the internet. BMI licenses the non-dramatic public performing right in approximately 6.5 million musical works on behalf of its affiliates, which comprise over 475,000 American songwriters, composers, lyricists, and music publishers. Through affiliation with foreign performing rights societies, BMI also represents in the U.S. thousands of works of many of the world's foreign writers and publishers of music. Typical BMI licensees include internet music services and websites, mobile entertainment services, television and radio broadcasting stations, broadcast and cable/satellite television networks, cable system operators and direct broadcast satellite services, concert promoters, background music services, municipalities, sports arenas, and others that publicly perform music.

2. The American Society of Composers, Authors and Publishers

(ASCAP) was formed in 1914 at the behest of composing legends Victor Herbert, Irving Berlin, and John Phillip Sousa. ASCAP was the first PRO in the U.S. Its mission is to enable American music authors to receive fair remuneration for the public performance of their work. ASCAP's almost 400,000 songwriters, lyricists, composers, music publishers, and foreign society members grant the society a non-exclusive right to license non-dramatic public performances of their works.

ASCAP in turn offers blanket licenses to parties seeking to perform these works, conferring the right to perform, for the stated term, any and all of the millions of musical works composed by ASCAP members. Like BMI, ASCAP licenses public performing rights to a wide variety of users, including internet service providers, wireless providers and websites, television and radio stations, restaurants, hotels, and sports arenas.¹²

¹² The licensing activities of BMI and ASCAP are governed by consent decrees entered into by each PRO with the Department of Justice. *United States v. Broad. Music, Inc., et al.*, 1996 Trade Cases (CCH) 71,941 (S.D.N.Y. 1966), amended by 1996-1 Trade Cases (CCH) 71,378 (S.D.N.Y. 1994); *United States v. American Society of Composers, Authors and Publishers*, 2001-2 Trade Cases (CCH) 73,474 (S.D.N.Y. 2001). These consent decrees provide, among other things, that music users desiring to obtain repertoire-wide licenses from the PROs may automatically do so upon written request. If the parties cannot negotiate a rate, the rate will be set by the judges in the Southern District of New York. BMI and ASCAP blanket licenses are thus readily available to internet services that perform music publicly,

(...continued)

3. SESAC, Inc. (SESAC) is a musical performing rights society that services both the creators and the users of nondramatic musical works through licensing and royalty collection and distribution. SESAC licenses the public performance of more than 250,000 songs on behalf of its many thousands of affiliated songwriters, composers, and music publishers. SESAC is one of three performing rights societies recognized under the Copyright Act. Established in 1930, SESAC is the second oldest and fastest growing performing rights society in the United States.

4. The Society of Composers and Lyricists (SCL) is a non-profit organization representing film, television, and video game composers and lyricists, with a distinguished 60-year history in the art of creating music for motion pictures, television, and video games. SCL members include top creative professionals whose experience and expertise are focused on many of the creative, technological, legal, newsworthy, and pressing issues of the film/television/game music industry. SCL's membership consists predominantly of composers whose

(...continued)

including so-called “user-generated content” services. If the conditions for “safe harbor” eligibility are not appropriately construed by the courts, service providers will have fewer incentives to seek or pay for licenses under the consent decrees. Thus, the erroneous ruling below, if affirmed, likely will generate unnecessary litigation between PROs and internet services about the scope of the “safe harbors,” and significantly harm composers of music.

main source of income is at the “back-end” through performance royalties distributed by performing rights organizations when the composer’s music is included in a production that is broadcast or transmitted on television or via the internet.

5. The Association of Independent Music Publishers (AIMP) is dedicated to serving the independent music publishing community by providing continuing professional education and analyses of trends and developments in creative, business, and legal areas relating to the exploitation of music copyrights. AIMP’s primary focus is to educate and inform music publishers about current industry trends and practices by hosting seminars on copyright and licensing issues and providing a forum for the discussion of issues confronting the music publishing industry.

6. The Songwriters Guild of America (SGA) is the nation’s oldest and largest organization run exclusively by and for songwriters, with more than 5,000 members nationwide and over seventy-five years advocating for songwriters’ rights. It is a voluntary association of songwriters, composers, and the estates of deceased members. SGA provides a variety of services to members, including contract advice, copyright renewal and termination filings, and royalty collection and auditing to ensure that members receive proper compensation for their creative efforts. SGA’s efforts on behalf of all U.S. songwriters include advocacy before

regulatory agencies and Congress, and participating as *amicus* in litigation of significance to the creators of the American canon of popular music.

7. The Recording Academy, established in 1957, is an organization of musicians, producers, engineers, and recording professionals that is dedicated to improving the cultural condition and quality of life for music and its makers. Internationally known for the GRAMMY Awards – the preeminent peer-recognized award for musical excellence and the most credible brand in music – The Recording Academy is responsible for groundbreaking professional development, cultural enrichment, advocacy, education, and human services programs. The Recording Academy continues to focus on its mission of recognizing musical excellence, advocating for the well-being of music makers and ensuring music remains an indelible part of our culture. Through its affiliated MusiCares Foundation and GRAMMY Foundation, and its unique network of field offices across the country, the Recording Academy advocates on behalf of over 18,000 members, representing the music community on such critical issues as protection of intellectual property rights, record piracy, and freedom of expression, and supports archival programs to preserve the recorded musical heritage of the U.S.

8. The Nashville Songwriters Association International (NSAI) is a not-for-profit trade association of songwriters located in Nashville, Tennessee. NSAI

consists of a body of creative minds, including songwriters from all genres of music, professional and amateur, who are committed to protecting the rights and future of the profession of songwriting, educating, elevating, and celebrating the songwriter, and acting as a unifying force within the music community and the community at large. NSAI acts as an advocacy group on behalf of American songwriters and composers. From the legislative process to court cases to the marketplace, NSAI is involved in songwriter and copyright issues on an international level. NSAI also governs the California Songwriters Association and works in conjunction with the Texas Songwriters Association under the banner “The National Songwriters Association.”

9. The American Association of Independent Music (A2IM) is a not-for-profit trade organization that represents a broad coalition of independent music labels, a sector that comprised more than 38% of digital sales of recorded music in 2009. A2IM’s music label community includes music companies of all sizes throughout the United States, representing musical genres as diverse as its membership. Unless A2IM members are able to protect their copyrights online, there will be little or no room for a business model for this important group of creators to receive the financial reward for their music necessary to sustain themselves and compete internationally.

10. The Music Publishers' Association of the United States (MPA), established in 1865, is the oldest musical trade organization in the United States. It fosters communication among publishers, dealers, music educators and all ultimate users of music, and addresses issues pertaining to all areas of music publicly with particular emphasis on issues concerning publishers of print music for concert and educational purposes.

11. Lisa Thomas Music Services, LLC, since 1993 has administered and managed the music publishing catalogs of recording artists and songwriters. Its clients include Eagles Recording Co. II and songwriters Don Henley and Glenn Frey. Among other things, it monitors internet sites to attempt to locate and remove or license infringing content belonging to its clients.

12. Garth Brooks, Bruce Hornsby, Boz Scaggs, Sting, Roger Waters; Glenn Frey, Don Henley, Timothy B. Schmit, and Joe Walsh (the Eagles) are well-known recording artists and songwriters whose valuable copyrighted works are enjoyed throughout the world. Their sound recordings and musical works are made available through legitimate online sources, but also are copied, performed, and distributed in large numbers over the internet without license or compensation.

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10-3270, 10-3342 Viacom International v. YouTube, Inc

I hereby certify that I caused the foregoing BRIEF OF AMICI CURIAE BROADCAST MUSIC, INC. (BMI) et al to be served on Pro Se Plaintiff-Appellants and Defendants-Appellees via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1:

Susan J. Kohlmann
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

Attorneys for Plaintiffs-Appellants

Matthew D. McGill
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

Attorneys for Plaintiffs-Appellants

Andrew H. Schapiro
MAYER BROWN LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

Attorneys for Defendants-Appellees

David H. Kramer
WILSON SONSINI GOODRICH
& ROSATI P.C.
650 Page Mill Road
Palo Alto, CA 94304
(650) 493-9300

Attorneys for Defendants-Appellees

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/s/ Ramiro A. Honeywell

Sworn to me this

December 10, 2010

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Notary Public, State of New York

No. 01HO6118731

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Commission Expires November 15, 2012

/s/ Renee Anderson

RENEE ANDERSON

Record Press, Inc.

229 West 36th Street, 8th Floor

New York, New York 10018

(212) 619-4949