10-3270-cv
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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

VIACOM INTERNATIONAL, INC., COMEDY PARTNERS, COUNTRY MUSIC TELEVISION, INC., PARAMOUNT PICTURES CORPORATION, BLACK ENTERTAINMENT TELEVISION, LLC,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

(Additional Caption On the Reverse)

On Appeal from the United States District Court for the Southern District of New York (New York City)

BRIEF OF *AMICI CURIAE* NATIONAL ALLIANCE FOR MEDIA ART AND CULTURE AND THE ALLIANCE FOR COMMUNITY MEDIA IN SUPPORT OF DEFENDANTS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

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

Plaintiffs-Appellants,

and

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

Plaintiffs,

v.

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

Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Amici curiae submit the following disclosures pursuant to Fed. R. App. P. 26.1 and 29(c)(1):

1. The National Alliance of Media Arts Centers Inc., doing business as the National Alliance for Media Art and Culture ("NAMAC"), is a non-profit corporation organized pursuant to Section 501(c)(3) of the Internal Revenue Code. No parent corporation or publicly held corporation owns 10% or more of the stock of NAMAC.

2. The Alliance for Community Media (the "ACM") is a non-profit corporation organized pursuant to Section 501(c)(3) of the Internal Revenue Code. No parent corporation or publicly held corporation owns 10% or more of the stock of the ACM.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Federal Rules

Other

STATEMENT OF INTEREST

This brief is filed pursuant to Fed. R. App. P. 29(a) with the consent of all parties.

The National Alliance for Media Art and Culture ("NAMAC") consists of 225 organizations that serve over 300,000 artists and media professionals nationwide.[1] Members include community-based media production centers and facilities, university-based programs, museums, media presenters and exhibitors, film festivals, distributors, film archives, youth media programs, community access television, and digital arts and online groups. NAMAC's mission is to foster and fortify the culture and business of the independent media arts. NAMAC believes that all Americans deserve access to create, participate in, and experience art. NAMAC co-authored the Documentary Filmmakers' Statement of Best Practices in Fair Use and has advocated for orphan works reform.

The Alliance for Community Media (the "ACM") provides critical support services for community media centers—the public, educational, and governmental ("PEG") access cable television stations that enrich communities across the country—and for the primarily volunteer staff that keep these electronic outposts

[1] *Amici* hereby state pursuant to Fed. R. App. P. 29(c)(5) and Rule 29.1 of the United States Court of Appeals for the Second Circuit that none of the parties to this case nor their counsel authored this brief in whole or in part; nor did any party or any party's counsel contribute money intended to fund preparing or submitting the brief; nor did anyone else other than *Amici* and their counsel contribute money that was intended to fund preparing or submitting this brief.

of democracy in operation. The ACM's activities in providing technical assistance, grassroots organizing, and opportunities to share experiences promote the broader goals of supporting our nation's communities and families and promoting effective communication through community use of media.

The artists and creators represented by *amici*'s member organizations rely both on copyright protection and on its limitations, including fair use. To reach audiences, they use both traditional media platforms, such as television, and online platforms, including YouTube. *Amici* therefore have a strong interest in laws that appropriately balance copyright protection, innovation, and creative expression, and that support both traditional and Internet-based platforms. *Amici* are independent charitable organizations, have no interest in any party to this litigation, and have no financial stake in its outcome. Their sole interest in this case is the correct interpretation of the Digital Millennium Copyright Act's ("DMCA") safe harbors for online service providers ("OSPs").

SUMMARY OF ARGUMENT

Online media platforms such as YouTube offer independent media artists new opportunities for creativity and the chance to reach new audiences, both national and global. They have revolutionized both how artists and creators reach audiences and who can reach wide audiences. From minority youth, often represented negatively in mainstream media, becoming empowered and telling

their real-life stories about the struggles of growing up, to cancer survivors offering personal accounts of their battles and creating online support communities, to citizens around the globe demanding rights from oppressive regimes, online platforms give voice to all—but this is especially true for those neglected by or underrepresented in mainstream media. Online platforms have also revolutionized the way creators and audiences interact, removing geographic and temporal barriers and allowing for communication and collaboration on everything from art projects to international political movements.

Before online platforms, artists and creators were subject to the physical limitations and editorial gatekeepers of traditional media outlets—movie theaters, television, radio, and the like—which often limited their exposure. Online platforms changed this equation. By dramatically lowering the barriers to media dissemination and by giving artists, rather than gatekeepers, the power to decide what information is worthy of broadcast, online platforms make room for diverse and previously unrepresented voices.

The DMCA's safe harbors have made this shift possible by giving OSPs the certainty they need to innovate and provide beneficial technologies such as Internet platforms. Weakening the safe harbors would undermine these advances and harm artists by re-creating the legal uncertainty OSPs faced before Congress passed the DMCA, preventing OSPs from providing truly open platforms. Specifically, were

this Court to accept Appellants' attempt to improperly broaden the scope of "red flag" knowledge, OSPs would face a dramatic increase in potential liability, which would pressure them to over-police their services. Such pressure, coupled with the practical difficulty of determining the difference between lawful and illegal content, would likely lead OSPs to filter or otherwise restrict content. Because it is difficult to know when a copyrighted work is being used unlawfully, this would acutely harm independent artists, who often make fair or licensed uses of copyrighted material that are at risk of being ensnared in overbroad gatekeeping efforts. Further, in contravention to Congress' goals for section 512, Appellants' proposed rule would chill innovative and emerging online platforms instead of encouraging them, thus reducing competition in the online platform market and severely limiting the ability of independent media artists to reach audiences. Ultimately, such a result would greatly diminish the richness and diversity of expression currently available to the public via the Internet.

Under the district court's proper interpretation of section 512, independent artists and creators will continue to thrive online. Yet, Appellants ask this Court to reverse this course and rewrite the DMCA, replacing its "red flag" knowledge standard with an ambiguous generalized knowledge standard and arguing that YouTube does not fall under section 512(c)'s protections for providing "storage at the direction of a user." But the district court, following section 512's text, relevant

case law, and Congressional intent, correctly held that YouTube is protected by the safe harbors and that online service providers need not take action unless they have knowledge of specific and identifiable instances of infringing activity.

As such, the district court properly granted summary judgment in YouTube's favor; YouTube fulfilled its responsibilities under section 512 of the DMCA, and lacked the "red flag" knowledge required to lose the protections of the safe harbor. But more important for artists and creators, the district court rejected Appellants' attempt to erode the safe harbors' clear protections, which, by giving a wide variety of OSPs the certainty to provide online platforms, redound to the benefit of independent media artists and the public. For these reasons and others stated below, *amici* urge that the district court's decision be affirmed.

ARGUMENT

I. Independent Media Artists Marshal Open Online Platforms to Reach Global Audiences, Present Diverse Perspectives, and Enhance Societal Participation in Discourse.

Independent artists and creators have harnessed online platforms—including YouTube, Veoh, Vimeo, blip.tv, and many others—to redefine the distribution of art and media and to engage global audiences in collaboration and conversation. These platforms empower artists and other speakers to broadcast important issues that would otherwise go unheard and undiscussed. *Amici* care deeply about the proper interpretation of section 512, which protects these voices by giving OSPs

the certainty they need to build innovative services that do not require conservative policing and gatekeeping. This allows creativity and expression to flourish and diverse voices to be heard, including expression that may have little potential for commercial success or distribution via traditional media platforms but that nonetheless exemplifies our societal free expression values.

This is the case because Internet-based platforms provide powerful, low-barrier tools for disseminating media. These services allow individuals, amateur artists, and media professionals alike to share information and find audiences in ways not possible through traditional broadcast models, which by their nature are constrained in how much and what kind of material they can carry. As such, online platforms, directly supported by the robust protections section 512 provides to the OSPs that develop them, have enabled countless creators and speakers to publish their works and contribute their voices to the creative community and to public discourse.

a. Internet-Based Platforms Dramatically Lower Barriers Facing Independent Artists and Creators, Enabling Them to Reach Global Audiences.

Internet-based platforms give independent creators and individual speakers a unique opportunity to expand their reach to global audiences because they present far fewer barriers to entry than traditional platforms. Many independent voices lack access to traditional broadcast media, which are limited in capacity by physical and

regulatory constraints. For example, the scarcity of radiofrequency spectrum necessarily restricts over-the-air broadcast television channels. *F.C.C. v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 799 (1978) ("The physical limitations of the broadcast spectrum are well known. … [A] finite number of frequencies can be used productively; this number is far exceeded by persons wishing to broadcast to the public."). These channels are in turn owned by only a handful of companies, further limiting the number of slots available for programming. *See* U.S. Gov't Accountability Office, GAO-10-369, Factors Influencing the Availability of Independent Programming in Television and Programming Decisions in Radio (2010). The programming that airs on traditional broadcast networks generally holds some promise of a return on investment; many independent producers are unable to offer that certainty, making it difficult for them to find a voice on traditional broadcast platforms. *See id.*; Yochai Benkler, *The Wealth of Networks, How Social Production Transforms Markets and Freedom* 197 (2006) (noting limits caused by traditional networks' need to maximize advertising revenues). Cable television and mainstream film distribution present similar barriers, as they are physically limited by cable transmission capacity and the number of available cinema screens, and even by the number of hours in the day in which content can be scheduled.

Online platforms do not face these same constraints—with sufficient bandwidth, OSPs can provide nearly unlimited broadcast capability. This major shift has created a veritable explosion of discussion and creativity. YouTube users alone upload 35 hours' worth of video content every minute. YouTube Press Statistics, http://www.youtube.com/t/press_statistics (last visited Mar. 18, 2011). This means that in 60 days, there is more expression shared on YouTube than the three major U.S. broadcast networks have aired in the last 60 years—the "equivalent of 150,000+ full-length movies in theaters each week." *Id*. In the online world, many can speak, and many can listen and respond.

These key features of online platforms—low financial and procedural barriers—are especially important to independent media professionals, whose works require capital in the form of equipment, human resources, and time, but whose voices have limited outlet in traditional media. Today, the ability of NAMAC and the ACM's member organizations to use online platforms as primary or supplemental distribution tools is critical to their success in reaching audiences and supporting independent voices that would not find space on crowded traditional platforms. Further, many member organizations provide education and outreach to their constituents on very limited budgets. Online platforms sweep these hurdles away, giving reach and effect to the support *amici* provide to independent voices.

For example, NAMAC member Bay Area Video Coalition ("BAVC"), *see* Bay Area Video Coalition, http://www.bavc.org/about/mission, is a non-profit media arts organization that uses YouTube in its work to make video technologies and their use more accessible to independent media artists, including youth. Three "Aha!" Moments With BAVC's Factory Program, http://www.bavc.org/bavc-blog-16 (describing BAVC's youth filmmaking program, which uses online platforms and open-source software to equip teenagers with video tools they can use in their own documentaries). Another NAMAC member, non-profit Media That Matters, uses YouTube to broaden the reach of its film festival for independent short films—on contemporary issues "from gay rights to global warming"—far beyond its physical festival location in New York City. And by using online platforms to extend their reach, the ACM's member public, educational, and governmental access channels further their mission to educate, deliver critical local programming, and serve as local anchor institutions. Because they distribute content through channels that depend upon agreements between cable operators and franchising authorities, *see* 47 U.S.C. § 531 (2011), it is especially important for community media centers to have supplemental platforms. Overall, independent artists and organizations alike have discovered myriad ways to use low-cost online platforms in fulfilling their missions.

b. In Contrast to Traditional Media Models with Gatekeepers, Artists and Creators Decide What Content to Distribute via Online Platforms, Making Room for a Wide Variety of Viewpoints.

In addition to dramatically increasing independent expression overall by lowering barriers of physical access and cost, online platforms give voice to those unheard in traditional media. Prior to the development of online platforms, a speaker's ability to reach a wide audience was limited by access to traditional platforms governed by gatekeepers. Because of the need for content that will be widely accepted and consumed, the range of issues and perspectives presented on traditional platforms is limited. *See* Benkler, *supra*, at 197. (noting that traditional media programming is focused on catering to majority preference). Online platforms, however, empower each artist, creator, or other speaker to independently decide what content he or she wants to make available to audiences. Member organizations of NAMAC and the ACM, among many other independent media artists, have been able to take advantage of this feature of online platforms to offer a diversity of perspectives, including differing or marginalized viewpoints.

Media That Matters uses online streaming, including its YouTube channel, to disseminate films that tell stories from a wide variety of perspectives. YouTube - mediathatmatters's Channel, http://www.youtube.com/user/mediathatmatters (last visited Mar. 20, 2011). For example, five years ago, 16-year-old Kiri Davis' film "A Girl Like Me" won the Media That Matters Diversity Award for its

portrayal of young African American girls struggling with negative self-image because of their race. Media That Matters Launches Multiple City Premieres in its Tenth Year, May 28, 2010, http://www.mediathatmattersfest.org/press (describing how the film went "viral" and exposed millions of viewers to racial issues in the 21st century). In 2010, Media That Matters worked to illuminate diverse voices and new points of view regarding healthcare and immigration. *Id.* To that aim, Media That Matters distributed Julie Winokur's film "Denied," the story of a woman with cancer who is denied healthcare, and Sara Hopman's film "Day Job," featuring day workers in the United States and the challenges they face. Media That Matters has also featured "I'm Just Anneke," a documentary about a 12-year old girl struggling with gender identity.

The National Black Programming Consortium ("NBPC") is another NAMAC member organization that uses online media—integrating Kaltura and YouTube video players on its website—to collect and distribute a diverse range of stories. NBPC focuses on "developing black digital authorship and distributing unique stories of the black experience." The Official Website of the National Black Programming Consortium, http://blackpublicmedia.org/about (last visited Mar. 13, 2011). For example, the NBPC is currently collecting web videos uploaded by users through YouTube to create a multi-media portal of stories about Haiti after the 2010 earthquake. And in a past project, the NBPC invited independent

filmmakers to submit ideas for inclusion in The Masculinity Project, a series of documentaries addressing the topic of masculinity in the African American community.

Similarly, BAVC's Next Generation program works with over 800 young people through in-school and after-school programs, seeking to empower diverse voices in media and to help students preserve their own stories and the stories of their communities. About Next Gen Programs, Bay Area Video Coalition, http://www.bavc.org/youth-programs/about-next-gen-youth-programs (last visited Mar. 17, 2011). For example, in 2006, Next Generation participants Jazmin Jones and Nick Parker learned of the Apollos, a group of students at Oakland Tech High School in the late 1970s whose efforts led to the passage of a California bill recognizing Martin Luther King Jr.'s birthday as a state holiday. Justin Berton, *Student Film Tells of Drive for King Holiday*, S.F. Chron., July 16, 2008, at E1. Jones and Parker were inspired to make the award-winning documentary "The Apollos" to preserve the story after they were unable to find information online about the Apollos. Next Generation student films are made available through the Internet platform blip.tv and on BAVC's YouTube channel.

c. Independent Artists, Creators, and Individual Speakers Use Online Platforms to Interact with Audiences, Form Communities, Foster Discourse and Collaboration, and Build Movements.

Beyond allowing for individual voices and diverse viewpoints, many online platforms, including YouTube, allow for more than mere dissemination—they also create the possibility of two-way communication, participatory interaction, and community-building. In traditional media, content is distributed to audiences in a top-down manner from a limited number of broadcast organizations, and audience members are passive recipients. By contrast, online platforms give audience members the power to determine which content is relevant to them and the opportunity to engage with that content. *See, e.g.*, Jason Potts et al., *Consumer Co-creation and Situated Creativity*, 15 Indus. and Innovation 459, 467 (2008). Artists, creators, and speakers use these features to connect with identity-based communities, to co-create media, and to disseminate information on local events in a way that would not be possible in traditional media.

i. Creators Use Online Platforms to Reach Beyond Geographic Barriers to Connect Identity-Based Communities.

Online platforms allow creators to reach out directly to identity-based communities and for community members to build connections by creating, discussing, and sharing content. Artists, creators, and speakers with diverse backgrounds can share stories and foster discussion, increasing public discourse on topics that may not otherwise be covered in traditional media. *See* Jean Burgess &

Joshua Green, *YouTube: Online Video and Participatory Culture* 80 (2009) (discussing how the ability to share individual thoughts with a public audience allows social boundaries and pre-existing assumptions to be questioned and refashioned).

For example, in September 2010, author Dan Savage and his partner Terry Miller created a YouTube video in response to a number of news reports of lesbian, gay, bisexual, or transgender ("LGBT") students taking their own lives after being bullied in school. YouTube - Itgetsbetterproject's Channel, http://www.youtube.com/user/itgetsbetterproject (last visited Mar. 13, 2011). Savage and Miller invited LGBT supporters from around the world to make and upload videos to their YouTube channel. Supporters were asked to speak directly to LGBT youth, telling them that they are not alone and explaining how the speakers' own lives have improved in the years since high school. Within two months, the "It Gets Better Project" turned into a worldwide movement, generating over 30 million views and inspiring nearly 10,000 user-created videos. The videos ranged from the homemade to the professionally produced and featured everyone from private individuals, to celebrities such as Anne Hathaway and Ellen DeGeneres, to public officials such as President Barack Obama and Secretary of State Hillary Clinton—all reaching out to LGBT youth to tell them that that life will get better in adulthood.

Similarly, the Asia Society uses YouTube as a forum for discourse, bringing Asian Americans together to discuss their shared experiences about what it means to be Asian American. YouTube - Asiasociety's Channel, http://www.youtube.com/user/asiasociety (last visited Mar. 13, 2011). For example, as a part of Asian Pacific American Heritage month, the Asia Society posted a video on its YouTube channel featuring prominent Asian Americans describing what being Asian American means to them, and asking viewers to generate their own response videos. Many of the responding viewers spoke about the importance of the Asian-American narrative in the greater story of America.

Online platforms also allow close-knit but far-flung groups to unite community members in a centralized electronic space. Minneapolis Telecommunication Network (MTN), Welcome to MTN, http://www.mtn.org/ (last visited Mar. 13, 2011), is a public access television station and a member of both NAMAC and the ACM. Through online platforms, MTN's community users can connect to a far wider audience than can be reached through MTN's cable channels alone. "Somali TV of Minnesota" is an MTN community production that reaches well beyond the range of Minneapolis public access cable by using YouTube to connect local Somali-Americans with the broader Somali diaspora and to provide far-flung members of the community with content that is relevant and responsive

to their interests. Somali TV of Minnesota, http://www.somalitv.org/ (last visited Mar. 13, 2011).

In these and many other examples, independent voices use online platforms to overcome local isolation and to build discussion and community far beyond local borders.

ii. Independent Artists and Creators Harness the Interactive Nature of Online Platforms to Innovate and Co-create Media.

Online platforms also allow creators to connect and share resources globally, facilitating the co-creation of media by a worldwide network of users. For example, collaborators use online platforms to request and collect material, bringing diverse and distributed viewpoints together in a single project. Both the "It Gets Better Project" and the Asia Society project show that many voices can collaboratively contribute to the discussion of important societal issues. Artists go even further in their use of online platforms to support the co-creation of integrated works. For example, the "Life in a Day" project marshaled the collaborative features of online platforms to collect 80,000 clips—more than 4,500 hours of footage, from 190 countries—shot on a single day. YouTube - Lifeinaday's Channel, http://www.youtube.com/user/lifeinaday (last visited Mar. 13, 2011). The result was a user-generated feature length film that included over 1,000 clips. The film later premiered at Sundance Film Festival 2011, and was simultaneously broadcast on YouTube.

iii. Speakers Use Online Platforms to Spotlight Local Events for Global Audiences, Generating International Discussion and Building Movements.

Independent voices also use online platforms to galvanize societal participation and change, on issues of local to global concern. As dramatically exemplified by recent events in the Middle East, online platforms put the power in the hands of the censored and oppressed, giving them the ability to speak their minds and highlight their struggles, on their terms, and in their words. In giving a voice to activists, online platforms have helped democratic movements to grow, to influence public perception, and to gain the global recognition and support needed to transform political systems. Where citizens' views are suppressed in traditional local media and international media is restricted or censored, user-generated content can be a primary source of information on global news. For example, the Zero Silence Project used YouTube and Vimeo to post interviews from Tahrir Square in Cairo during the 2011 Egyptian Revolution. YouTube - ZeroSilence Project's Channel, http://www.youtube.com/user/ZeroSilenceProject (last visited Mar. 18, 2011). And while Libya has been largely closed off to foreign media during the 2011 uprising, Libyan citizens have provided video footage of what is happening within the nation's borders. For example, a member of the "One Day on Earth" community used the site's Vimeo plug-in to share video of a mass grave in Tripoli. The film was later aired on CNN. Crowdsourced Documentary Project

Yields Footage Out of Libya, http://www.cloudcamb.org/services/crowdsourced-documentary-project-yields-footage-out-of-libya (Mar. 18, 2011).

These examples and a great many others flow directly from the protection that section 512's safe harbors have given OSPs, allowing them to provide options that dramatically lower the barriers to independent voices reaching audiences. By, as Congress intended, protecting platform providers from having to act as *ex ante* gatekeepers, the safe harbors likewise shelter and support a chorus of diverse voices and allow creators to find audiences, build communities, and foster discussion.

II. Independent Artists Would Be Harmed if Section 512's Red Flag Knowledge Requirement Were Replaced by Appellants' Erroneous "Generalized Knowledge" Standard.

Appellants' interpretation of section 512's "red flag" knowledge requirement would harm independent media artists by reinstating the legal uncertainty Congress intended to obviate with the statute. Specifically, if liability is assigned to OSPs based only on a generalized awareness of infringement, OSPs will be pressured to reduce their levels of innovation and restrict the breadth and depth of content they carry. Appellant's Br. (Viacom) 23-24. As the district court properly recognized, generalized awareness "furnishes at most a statistical estimate of the chance any particular posting is infringing." *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 524 (S.D.N.Y. 2010). Liability based on a mere

probability, rather than on specific, identified infringements, is likely to cause OSPs to adopt conservative gatekeeping practices, harming independent voices.

Knowing this, Congress appropriately placed the initial burden for policing infringement on those in the best position to do so—copyright holders—and balanced this responsibility with OSPs' responsibilities to take down infringing material. To upset Congress' balance would greatly increase the burden on OSPs, exposing them to uncertainty and fear of high statutory damages or even injunctive relief against their services. Where OSPs now know their responsibilities under section 512—for example, to respond to takedown notices or other evidence of specific and identifiable infringements—the generalized and probabilistic standard pressed by Viacom would likely push OSPs to police content prior to allowing it on their platforms. This would mean that service providers, not creators, would make choices about what content to distribute.

a. A "Generalized Knowledge" Standard Would Harm Independent Artists by Pressuring Platforms to Over-Police Their Services and to Engage in Overbroad Gatekeeping.

Independent artists and creators are likely to be acutely harmed if OSPs' generalized knowledge that infringing material may be present on their services triggers "red flag" knowledge. This is because such increased pressure—combined with the difficulty of determining if a particular posting is an infringement or a lawful use—will lead OSPs to engage in overly conservative policing of their

platforms out of fear that they could be wrong about the legal status of a work. Possible copyright infringements are often markedly difficult to evaluate. 3 Nimmer § 12B.04[A][1] (discussing the difficulty of determining infringement, "from proper ownership . . . to lack of license . . . to the perennially murky issue of fair use, and beyond."). Examples of this problem abound in this very case. *See e.g.*, Mem. of Law in Supp. of Def.'s Mot. for Summ. J., 37-44 (describing challenges in evaluating copyright status, including how several clips at issue in the litigation are either so short or contain such limited content as to be nearly unrecognizable, while other clips are distributed to the public in a way that intentionally obscures who created the video, as in the case of some of Viacom's viral marketing campaigns). Yet the strong remedies available for copyright infringement create a high downside risk to incorrectly concluding that a use is noninfringing. Faced with such pressure, OSPs would likely employ overbroad gatekeeping methods or takedowns, severely limiting the ability of independent artists to make legitimate uses of other works.

i. A "Generalized Knowledge" Standard Would Pressure Platforms to Disallow Material Making Fair Use of Copyrighted Works.

The acute example of the harms caused by overbroad gatekeeping is the detrimental impact it would have on fair use. *Amici* believe that a robust fair use doctrine is a critical feature of the copyright regime. A great many creators depend

upon it, including independent media professionals. Courts have long recognized that fair use is key to creativity and free expression. *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574-575 ("From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose.").

At the same time, materials making fair uses of copyrighted works are particularly susceptible to being removed or screened by platforms because of the fact-specific analysis required by the fair use doctrine and the high risk such works represent if they are found to not be fair use. For example, film critic Kevin B. Lee found his entire account removed from YouTube in response to takedown notices complaining of clips Lee used in the criticism he posted there. *See* Nate Anderson, *What fair use? Three strikes and you're out… of YouTube,* Ars Technica, (Jan. 15, 2009) http://arstechnica.com/tech-policy/news/2009/01/what-fair-use-three-strikes-and-youre-out-of-youtube.ars (describing Lee's dispute with YouTube). While Lee's account was eventually reinstated, Lee's story is emblematic of the problems speakers face when overbroad policing ensnares works that make fair use of copyrighted material. *See, e.g.*, Center for Democracy & Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech*,http://www.cdt.org/files/pdfs/copyright_takedowns.pdf (describing how broadcasters sent DMCA takedown notices to remove political ads from a number

of campaigns without considering fair use and finding that such removal chilled political speech); *update on Warner Music (UPDATED)(AGAIN)*, (Apr. 30, 2009), http://www.lessig.org/blog/2009/04/update_on_warner_music.html (describing how YouTube removed a lecture by Prof. Lawrence Lessig that in his opinion made fair use of copyrighted material, and which was later reinstated).

Yet if policing content becomes the norm for online platforms fearful of their infringement liability, fair use may be far less available to creators, similar in many ways to the realities independent artists—for example, documentary filmmakers—encounter in distributing their works in more traditional media, where decisions are made *ex ante* by gatekeepers. In that world, the uncertainty of fair use can keep meritorious and important stories from being seen. *See*, *e.g.*, Patricia Aufderheide & Peter Jaszi, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*, Center for Social Media Report, 9 (Nov. 2004), http://www.centerforsocialmedia.org/sites/default/files/UNTOLDSTORIES_Report.pdf.

ii. Requirements or Strong Pressure for Online Platform Providers to Adopt Filtering Technology Would Exacerbate the Harms Caused to Independent Artists by Overbroad Policing.

The ability of independent artists to distribute works that incorporate other copyrighted works could be severely hampered if uncertainty caused by liability

for "generalized knowledge" pushed OSPs to adopt filtering technology as a de facto requirement. Further, Viacom's *amici* argue that filters should be required more generally because new technology allows copyrighted material to be detected when users upload it. See Br. Amici Curiae Stuart N. Brotman, Ronald A. Cass, and Raymond T. Nimmer in Support of Appellants 18-20.

Filtering technology is clearly not required by section 512. *See* 17 U.S.C. § 512(m) (2011) (applicability of the safe harbors does not depend on a service provider "monitoring its service"); *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1111 (C.D. Cal. 2009) (holding that the DMCA does not require service providers to "implement filtering technology at all"). Moreover, holding otherwise would harm all artists who incorporate other works into their own because, as explained more fully by Public Knowledge, filtering technology is wholly inadequate at determining if copyright infringement has occurred. Br. Amici Curiae Public Knowledge in Support of Appellees, Section I.

The acute case is again fair use. Determining whether a use is fair requires the careful weighing of at least four factors, *see* 17 U.S.C. § 107 (2011), including critically important inquiries into the purpose of the use and its effect on the market for the copyrighted work. Filtering technology, however, is capable of evaluating only *one* of the four factors—"the amount and substantiality of the portion used in relation to the copyrighted work as a whole." *Id*. This dramatically

unbalances the traditional fair use analysis and ignores precedent finding fair use when a significant—even the entire—portion of the copyrighted work is used. *See, e.g., Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006) (holding that even when the entire portion of the plaintiff's copyrighted material was used in the new work, it did not count against fair use); *Blanch v. Koons*, 467 F.3d 244, 258 (2d Cir. 2006) (holding that the defendant's use of a substantial portion of the plaintiff's copyrighted work was reasonable); *Perfect 10, Inc. v.Amazon.com, Inc.*, 508 F.3d 1146, 1167-68 (9th Cir. 2007) (holding that use of an entire photographic image was reasonable in light of the purpose of a search engine). Because filtering technologies focus on only one of the four fair use factors, they have the potential to ensnare legitimate transformative uses without conducting a complete fair use analysis.

Beyond its failure at judging fair use, filtering technology can also fail to identify permissioned use. For example, the current filtering technology used by YouTube, Content ID, screens new uploaded material against a database to see if there is a match. *See* "Audio ID and Video ID" at http://www.youtube.com/t/contentid (last visited Mar. 3, 2011). But Content ID can miss information about whether the use of matched material is by permission. *See, e.g.*, Greg Sandoval, *YouTube users caught in Warner Music spat*, CNET, (Jan. 27, 2009), http://news.cnet.com/8301-1023_3-10150588-93.html?tag=mncol

(describing how users who had permission to use material copyrighted by Warner Music in videos nonetheless had their content pulled from YouTube).

While OSPs are certainly free to use filtering software, H.R. Conf. Rep. 105-796, at 73 (1998) ("Courts should not conclude that the service provider loses eligibility for limitations on liability under section 512 solely because it engaged in a monitoring program"), the broad screening of creative works that would come with a de facto *requirement* to filter would almost certainly result in overbroad gatekeeping and fewer options for independent artists, resulting in less expression reaching the public.

b. Appellants' Attempt to Erode Section 512's Protections or Remove Them Entirely Would Harm Artists by Decreasing Available Online Services and by Increasing Barriers to Entry for Emergent Online Platforms.

Moreover, accepting Appellants' requested revisions to the safe harbors would raise barriers to entry for new platform providers and possibly even pressure existing OSPs to forego some of the services independent artists rely upon today. Service providers assume significant capital, opportunity, and legal risks in developing their platforms and services. Increasing OSPs' liability risk and demanding *ex ante* policing would undermine the protection Congress sought to provide to innovators through the DMCA, *see* S. Rep. 105-190, at 8, and would also raise costs for existing platforms significantly. Such a burden, placed upon emerging or smaller platform services that lack the financial resources and

technical sophistication of YouTube, could be insurmountable. This would lead to a reduction in the number or usefulness of services available to independent artists.

While raising OSPs' legal burdens may lead to fewer or less useful services for independent artists, Viacom's incredibly narrow reading of section 512(c)'s protection, limiting it to providers of "passive storage," Appellant's Br. (Viacom) 49-54, would prevent platforms from providing the very services that today allow for the discourse and creativity described in Section I above, undermining completely online platforms' benefits to independent media artists and the public. Not only is Viacom's argument legally incorrect, but it would also severely hamper competition in the marketplace of ideas. Online platforms have created a renaissance in grassroots creativity because they provide individuals the tools to compete, even with material on historically prominent traditional media platforms.

Amici believe that maintaining the DMCA's robust safe harbors is essential if independent media artists are to effectively reach audiences with their creative work. Exposing OSPs to the uncertainty that would arise if Appellants' arguments prevail would severely limit OSPs' ability to develop and maintain beneficial online platforms, harming *amici*'s constituency and leading to less content being available for the public.

III. This Court Should Affirm the District Court's Decision in Order to Ensure the Continued Vitality of Online Platforms for Independent Media and the Public.

The district court properly rejected Appellants' arguments that YouTube was liable for its users' infringements based on generalized knowledge that some material on the YouTube platform was infringing and despite YouTube's prompt removal of identified infringing material. *Viacom*, 718 F. Supp. 2d at 523, 529 (S.D.N.Y. 2010). The district court also properly rejected Viacom's argument that YouTube is precluded from section 512's protections because its platform provides more than "passive storage." Appellant's Br. (Viacom) 49-54. The district court's decision is consistent with relevant case law, and with the text, structure, and history of the DMCA.

a. The District Court's Interpretation of the "Red Flag" Knowledge Requirement Is Correct and Is Supported by Section 512's Text, Case Law, and Legislative History.

The district court properly construed section 512's "red flag" knowledge standard in finding that "aware[ness] of facts or circumstances from which infringing activity is apparent," 17 U.S.C. § 512(c)(1)(A)(ii) (2011), requires "knowledge of specific and identifiable infringements of particular individual items." *Viacom*, 718 F. Supp. 2d at 523 (S.D.N.Y. 2010). The district court's reasoning also tracks relevant case law, in which courts, have consistently refused to equate generalized awareness of a possibility of infringement with "red flag"

knowledge. *See e.g.*, *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007) ("*CCBill*") (holding that defective notices, the words "illegal" and "stolen," and disclaimers warning that copyrighted materials might be hosted on a website were not red flags under the meaning of 512(c)); *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1102-03 (C.D. Cal. 2009) ("*UMG II*") (refusing to preclude the application of 512(c) for a "provider's general awareness of infringement, without more").

The district court's reading of section 512's text also carefully follows Congressional intent. Importantly, Congress placed the initial "burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of the copyright." *CCBill*, 488 F.3d at 1113 (9th Cir. 2007); *see also* 17 U.S.C § 512(m) (2011) (stating that the safe harbor does not require "monitoring [a] service or affirmatively seeking facts indicating infringing activity"). At the same time, Congress sought to balance responsibilities and encourage cooperation between OSPs and copyright owners through section 512's notice-and-takedown provision. *See* 17 U.S.C. § 512(c)(1)(C) (2011) (preserving applicability of safe harbors when OSPs respond to a notice that complies with 512(c)(3) by expeditiously removing the material claimed to be infringing).

Viacom, however, presses a reinterpretation of section 512 that seeks to recalibrate Congress' careful balance. Viacom highlights email exchanges between YouTube founders and managers to argue that "YouTube was at least 'aware of facts or circumstances from which infringing activity is apparent.'" Appellant's Br. 23-24. As the district court properly understood, however, equating the knowledge of a probability that infringing material exists to actual or "red flag" knowledge runs counter to the knowledge standard of 17 U.S.C. § 512(c)(1)(A)(ii). *Viacom*, 718 F. Supp. 2d at 524 (awareness of pervasive infringement "furnishes at most a statistical estimate of the chance any particular posting is infringing—and that is not a 'red flag' marking any particular work."). OSPs, with only a probabilistic idea that a work might be infringing, would still need to search for specific items and investigate their provenance before taking down any content. But infringing activity does not qualify as a "red flag" if it requires investigation. *See CCBill*, 488 F.3d at 1114; *UMG II*, 665 F. Supp. 2d at 1108; H.R. Rep. 105-551, Pt. 2, at 53, 57; *see also* 17 U.S.C. § 512(m)(1) (2011). The distinction between "red flag" knowledge and generalized, "statistical" knowledge is an important one—Viacom's interpretation of section 512's knowledge requirement would create substantial uncertainty for OSPs and likely force them engage in overbroad policing of their platforms.

Beyond harming independent artists, this would contravene Congress' goals. In drafting section 512, Congress foresaw and responded to the need to provide OSPs the certainty required for investment and innovation in online services. *See* H.R. Conf. Rep. No. 105-796, at 72 (1998), reprinted in 1998 U.S.C.C.A.N. 649. Recognizing that, "[i]n the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability," S. Rep. 105-190, at 8 (1998), Congress feared that without a safe harbor, OSPs "may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet." *Id*. With the safe harbors in place, Congress hoped OSPs would invest in new Internet technologies and services. *See* S. Rep. 105-190, at 8 (1998). Re-creating the very uncertainty that Congress intended to alleviate would undermine the safe harbors' essential purpose.

b. The District Court Correctly Rejected Viacom's Attempt to Improperly Cabin Section 512's Protection to "Passive Storage" by Users.

Viacom seeks a radical reinterpretation of section 512 by arguing that YouTube loses section 512's protection because its display and transmission of materials hosted on its platform goes beyond the "passive provi[sion] of storage." Appellant's Br. (Viacom) 50. This interpretation was properly dismissed by the district court. *Viacom*, 718 F. Supp. 2d at 526. Other courts have uniformly

rejected similar arguments when presented with OSPs providing platform services very similar to YouTube's, including "automatically process[ing] user-submitted content and recast[ing] it in a format that is readily accessible to its users." *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1147-48 (N.D. Cal. 2008); *see UMG Recordings, Inc. v. Veoh Networks*, 620 F. Supp. 2d 1081, 1089 (C.D. Cal. 2008) ("*UMG I*"). These results are unsurprising, as limiting the safe harbors to "passive" storage—without covering the display and transmission of the stored data that constitute the main function of many online services—would contradict the fundamental purpose of section 512's protections by removing from its coverage the very OSPs that Congress sought to protect. This would directly harm independent media artists, as it would deter OSPs "from performing their basic, vital, and salutary function—namely *providing access to information and material to the public*." *UMG I*, 620 F. Supp. 2d at 1089 (emphasis added).

This Court should not allow Appellants to rewrite section 512, undermining Congress' intent in passing the DMCA and eroding the necessary protections that the statute's safe harbors provide to OSPs. Not only would it harm OSPs, it would also harm independent media artists, who rely both on copyright protection and on access to online platforms.

CONCLUSION

For the above reasons, *amici* NAMAC and the ACM respectfully request that the Court affirm the judgment below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,934 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(iii).

2. 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 in Times New Roman, 14 point font.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 7th day of April, 2011, I electronically filed the foregoing Brief of *Amici Curiae* NAMAC and the ACM in support of Defendants-Appellees with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served with a Notice of Docket Activity, pursuant to Second Circuit Rule 25.1 by the appellate CM/ECF system.

Dated: April 7, 2011

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