

NO. 11-3190

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FLAVA WORKS, INC.,

PLAINTIFF-APPELLEE,

v.

MARQUES RONDALE GUNTER d/b/a/
myVIDSTER.com and SalsaIndy, LLC,

DEFENDANTS-APPELLANTS.

On Appeal From The United States District Court
For The Northern District of Illinois, Eastern Division
Case No. 1:10-cv-06517
Honorable John F. Grady, District Judge

**BRIEF OF AMICI CURIAE ELECTRONIC FRONTIER FOUNDATION AND PUBLIC
KNOWLEDGE IN SUPPORT OF DEFENDANTS-APPELLANTS
MARQUES RONDALE GUNTER**

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Appellate Court No: 11-3190

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STATEMENT OF INTEREST

The Electronic Frontier Foundation (“EFF”) is a nonprofit civil liberties organization that has worked for more than 20 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its almost 15,000 dues-paying members have a strong interest in assisting the courts and policy-makers in striking the appropriate balance between copyright law and the public interest. As part of its mission, EFF has often served as *amicus* in key copyright cases, including *Golan v. Holder*, 131 S. Ct. 1600 (2011), *Costco Wholesale Corp. v. Omega, S.A.*, 131 S. Ct. 565 (2010), *UMG Recordings, Inc. v. Veoh Networks, Inc.*, Case No. 09-56777 (9th Cir.), and *Viacom Int’l, Inc. v. YouTube, Inc.*, Case Nos. 10-3720 and 10-3342 (2d Cir.). Also, along with several law school clinics, EFF created the Chilling Effects website, which monitors and collects data on legal complaints made on the Internet.

Public Knowledge is a non-profit public interest 501(c)(3) corporation, working to defend citizens’ rights in the emerging digital culture. Its primary mission is to promote innovation, protect the legal rights of all users of copyrighted works, and ensure that copyright law remains balanced and does not slow technology innovation, unduly burden free speech, shrink the public domain, or prevent fair use. In furtherance of these goals, Public Knowledge has participated as *amicus curiae* in several central copyright cases before the Supreme Court and appellate courts, including *Golan v. Holder*, 131 S. Ct. 1600 (2011), *Costco Wholesale Corp. v. Omega, S.A.*, 131 S. Ct. 565 (2010), and *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no one, except for the parties, has authored the brief in whole or in part, or contributed money towards the preparation of this brief.

I. INTRODUCTION

Over the last decade, the Internet has grown into an unprecedented, global, accessible, vibrant platform for free speech and creative expression. Never before have so many citizens been able to reach an audience across so many mediums at such low cost. All of this activity depends upon a thriving marketplace of innovative online service providers offering inexpensive (or free) public platforms for expression. To grow and innovate, these platforms had a stable legal climate, and, if they are subject to legal challenge, a fair opportunity to continue to operate while the matter is being decided. Conversely, an unbalanced standard for injunctive relief as well as an unstable legal climate for service providers can have profound consequences for free expression online. Unfortunately, the district court below failed to heed direction from the Supreme Court with regard to a fair injunctive relief standard and muddled the law surrounding the crucial safe harbor provisions of 17 U.S.C. § 512(i). The resulting confusion harms the public interest, which, as groups representing that very interest at its intersection with technology, *amici* are uniquely situated to represent.

A wide spectrum of services interact with and use copyrighted works. These range from the completely uncontroversial, such as iPods or the original Netflix DVD-by-mail service; to those that have been challenged in court; to highly controversial outlets, like the original Napster service or Grokster. Within this wide range exist many innovative communities, businesses, and entrepreneurs. Many of these nascent entities cannot survive an extended interruption of operations pending lengthy litigation. An unbalanced standard for preliminary injunctions in copyright litigation therefore can easily chill innovation, as services are effectively put out of business long before a court can ever reach a determination on the merits of the infringement claim. This was especially true in the recent past, when many courts granted plaintiffs a presumption of irreparable harm in cases involving copyright infringement.

The Supreme Court’s decision in *eBay, Inc. v. MercExchange L.L.C.*, and subsequent courts’ application of it in the copyright context, represent a significant step towards correcting this imbalance. 547 U.S. 388 (2006). Despite widespread recognition of *eBay*’s broad application, the district court below failed to follow *eBay*’s mandate, instead stating that “as a practical matter, the [preliminary injunction] analysis boils down to a single factor—the plaintiff’s likelihood of success.” *Flava Works, Inc. v. Gunter*, No. 10 C 6517, 2011 WL 3205399, at *6 (N.D. Ill. July 27, 2011). This conclusion runs clearly contrary to Supreme Court precedent, appellate court decisions following it, and the equitable nature of injunctive relief.

The district court also introduced new legal uncertainty regarding the requirements of § 512(i) of the Digital Millennium Copyright Act (“DMCA”). Specifically, the court ordered Appellant to police its site and, by filtering and removing certain content, create prior restraints on user-generated content that may not infringe Appellee’s (or anyone’s) copyrights. Because it is not clear if the order is remedial in nature or representative of the district court’s interpretation of the § 512(i) requirements, it promises to muddle a series of cases that illuminate vague legislative language and set clearer standards for service providers. Clear standards and set expectations are the cornerstone of the DMCA, and the district court’s order threatens to create unnecessary confusion.

II. ARGUMENT

A. Injunctive Relief Cannot Be Determined By Categorical Rules

In *eBay*, a patent infringement case, the Supreme Court ruled that courts could not apply “general rules” to the “traditional equitable principles” underlying the grant of injunctive relief. 547 U.S. at 392-93. Criticizing the lower courts for applying overly formulaic analyses to a question of whether or not an injunction should issue against a patent infringement, the Court faulted the district court with “adopt[ing]...expansive principles suggesting that injunctive relief

could not issue” when the patentee was not practicing the invention and held that such a “categorical rule...cannot be squared with the principles of equity adopted by Congress.” *Id.* at 393. The Court was equally critical of the Federal Circuit’s contrary “general rule” that ““a permanent injunction will issue once infringement and validity have been adjudged.”” *Id.* at 393-94 (quoting *MercExchange L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1338 (Fed. Cir. 2005)). Notably, the Court did not restrain its analysis to the question of irreparable harm alone. Indeed, the Court focused on the *entire* four-factor test when it vacated the judgment. *Id.* at 394.

Nothing in *eBay* suggests that a court should consider only one or two of the various factors in deciding to issue an injunction. Quite the contrary: the entire enterprise of injunctive relief is based on principles of equity, and the same principles articulated by the Supreme Court that prevent the mechanical application of a presumption of irreparable harm likewise bar courts from mechanical applications of categorical rules to questions of the public interest or of the balance of hardships. *See Salinger v. Colting*, 607 F.3d 68, 79 (2d Cir. 2010) (“[A]t minimum, we must consider whether irreparable injury is *likely* in the absence of an injunction, we must balance the competing claims of injury, and we must pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”) (citation omitted); *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 543-47 (4th Cir. 2007).

1. Ninth Circuit: Perfect 10 and Flexible Lifeline

The Ninth Circuit followed the Supreme Court’s ruling in two cases earlier this year. *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976 (9th Cir. 2011); *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989 (9th Cir. 2011) (*per curiam*). *Perfect 10* applied the lessons of *eBay* in the context of copyright infringement, finding that “the Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed.” 653 F.3d at 980

(quoting *eBay*, 547 U.S. at 392-93). The *Perfect 10* court explicitly pointed out that injunctive relief “may” issue under 17 U.S.C. § 502(a), permissive language that “does not evince a congressional intent to depart from traditional equitable principles.” *Id.* at *9.

The Ninth Circuit revisited the issue in *Flexible Lifeline*. In that case, the Ninth Circuit reiterated the Supreme Court’s ruling in *eBay* that “a plaintiff may not be granted injunctive relief until he satisfies the four-factor test.” 654 U.S. at 995. *Flexible Lifeline* also clearly demonstrated that *eBay*’s ban on categorical rules in the injunctive context applies equally to patent and copyright, and also equally to both permanent and preliminary injunctions. *Id.* at 995-96.

2. Second Circuit: *Salinger*

The Second Circuit in *Salinger* also explicitly overturned its pre-*eBay* precedents presuming irreparable harm in copyright cases. 607 F.3d at 76. There, the Second Circuit explained that it would also apply the equitable standards of *eBay* to preliminary injunctions in copyright cases, not limiting its reach to merely patent cases or permanent injunctions. *Id.* at 77-78.

Not only did the Second Circuit overrule the district court’s impermissible categorical finding of irreparable harm, it also held that courts, in balancing hardships, must account for the property rights and First Amendment rights of *both* the plaintiff and the defendant. *Id.* at 81. While plaintiffs in a copyright infringement suit certainly may have interests that cannot be remedied absent an injunction, an injunction may also harm fundamental interests of a defendant that cannot be remedied after a final adjudication. Just as a plaintiff has a property interest in its copyrighted work and a First Amendment right to not speak, a defendant “has a property interest in his or her work to the extent that work does not infringe the plaintiff’s copyright. And a

defendant also has a core First Amendment interest in the freedom to express him or herself, so long as that expression does not infringe the plaintiff's copyright." *Id.* at 81.

The Second Circuit was also careful to offer a distinct analysis of the public interest factor, noting that while the parties to a litigation represent many of the interests to be considered when issuing injunctive relief, the public at large has an interest separate and distinct from that of the defendant or plaintiff: "By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information. *Id.* at 82 (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986)).¹

3. Fourth Circuit: *Phelps* and *Bethesda Softworks*

The Fourth Circuit has also followed *eBay*'s mandate in the copyright context. In *Phelps*, the court rejected the plaintiff's contention that it should be entitled to injunctive relief as a matter of course when there is a threat of continuing copyright infringement. 492 F.3d at 543. Citing *eBay*, the Fourth Circuit held that, though an infringement was likely *and* that irreparable injury was likely, plaintiffs still were not entitled to injunctive relief.

The court refused to enjoin defendant from selling or leasing his house, which was built using copyright-infringing plans. First, the court carefully weighed the balance of harms, noting both the effects of the continuing infringement upon plaintiff, but also the burdens of the proposed injunction upon the defendant. *Phelps*, 492 F.3d at 544. The Fourth Circuit also noted the potential harm to defendant, as an injunction against the sale of the house would reach far

¹ The Second Circuit does recognize that "[s]ome uses, however, will so patently infringe another's copyright, without giving rise to an even colorable fair use defense, that the likely First Amendment value in the use is virtually nonexistent." *Salinger*, 607 F.3d at 82-83. Even if this dicta, reminiscent of the now-barred presumptions, were to hold sway, this would not excuse a court from entirely ignoring the public interest—it must at least find that there was such blatant infringement as to meet this standard. This would presumably require egregious conduct beyond what would merely show a likelihood of success for the plaintiff, otherwise it would render the public interest factor redundant with the likelihood of success factor.

beyond the copyrighted house itself, as the injunction “would encumber a great deal of property unrelated to the infringement.” *Id.* at 545. That overbreadth, the court held, would mean that the injunction “would take on a fundamentally punitive character, which has not been countenanced in the Copyright Act’s remedies.” *Id.* at 545. Finally, the court held that the public interest could not simply be satisfied by reiterating the interests of enforcing copyright law. The Fourth Circuit recognized the competing public interest in promoting clear property rights and finality, interests that would be undermined by an injunction against transfer of the infringing property. *Id.* at 545.

The Fourth Circuit also applied *eBay* in the context of preliminary injunctions in copyright cases, as seen in *Bethesda Softworks, L.L.C. v. Interplay Entm’t Corp.*, No. 11–1860, 2011 WL 5084587 (4th Cir. Oct. 26, 2011). In affirming the district court’s denial of a preliminary injunction, the Fourth Circuit reaffirmed the holding in *eBay* that courts cannot even countenance a rebuttable presumption that copyright infringement necessarily leads to irreparable harm. Rejecting plaintiff’s interpretation of *Phelps* (which noted that irreparable injury flows from the intangible nature of copyrights), the court held that a formulaic presumption (even a rebuttable one) was “impermissibly broad ... such reasoning would lead to the very presumption that *eBay* prohibits...” *Bethesda*, 2011 WL 5084587, at *3.

B. The District Court Applied a Categorical Rule in Presuming Irreparable Harm

In this case, the district court makes a cursory statement that “‘irreparable injury may normally be presumed from a showing of copyright infringement,’” *Flava Works*, 2011 WL 3205399, at *6, citing only *Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, a case from 1982. All of the major appellate cases applying *eBay* to copyright cases have explicitly overturned their own prior precedents that applied this presumption of irreparable injury. *See Flexible Lifeline*, 654 F.3d at 995 (“[T]his circuit’s long-standing practice of presuming

irreparable harm upon the showing of likelihood of success on the merits in a copyright infringement case is no longer good law”); *Perfect 10*, 653 F.3d at 981; *Salinger*, 607 F.3d at 79-80 (“This Court’s pre-*eBay* standard for when preliminary injunctions may issue in copyright cases is inconsistent with the principles of equity set forth in *eBay* ... [t]he court must not adopt a “categorical” or “general” rule or presume the plaintiff will suffer irreparable harm ... ”); *Bethesda*, 2011 WL 5084587, at *2-3.

The presumption of irreparable harm made by the district court below has been explicitly overturned in the Second, Fourth, and Ninth Circuits as precisely the type of categorical formula to be eschewed post-*eBay*. Whether or not that showing of irreparable harm is easy to meet or not, it must be made, and not simply presumed. *Flexible Lifeline*, 654 F.3d at 1000.

C. The District Court Applied a Categorical Rule to its Balance of Hardships Analysis

The district court also erred in analyzing the balance of hardships, concluding that “courts typically fail to invoke [the balance of hardships] in copyright cases because if it were applicable, a knowing infringer would be permitted to construct its business around its infringement.” *Flava Works*, 2011 WL 3205399, at *6 (quoting 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 14.06[A][2][c], at 14-138 (2009) (citation omitted)). Like the defunct irreparable harm presumption, ignoring or disregarding the balance of harms in copyright cases is precisely the sort of general or categorical rule prohibited by *eBay*.

To begin with, as the Ninth Circuit notes, *Nimmer on Copyright* has, since *eBay*, recognized that “*eBay* caused a new day to dawn No longer applicable is the presumption of irreparable harm, which allowed the collapse of factors that plaintiff must prove down to one...” *Flexible Lifeline*, 654 F.3d at 999-1000 (“*Nimmer* has now seen the light.”). In recognizing the

inapplicability of the irreparable harm presumption, *Nimmer* can no longer stand for the proposition that copyright infringement cases can dispense with balancing hardships.

A general rule that courts should discount hardships resulting from an injunction against allegedly infringing activities removes the court's proper exercise of discretion from the equitable inquiry, just as a presumption of irreparable harm does. If equity is to consist of considerations apart from law, then there must be room for a court to acknowledge a plaintiff's likelihood of success on the merits and yet also find for defendants on the balance of hardships. *eBay* and its progeny caution against just such a removal of a court's equitable discretion.

Furthermore, the district court's approach—discounting all hardships resulting from an injunction against infringing behavior—would render the balance of hardships factor redundant. Since any injunction, in order to be issued, must necessarily be linked with a defendant's allegedly infringing behavior, abiding by the district court's rule would nearly always prevent courts from considering *any* harms to any defendants. Courts would merely cite language like that of the district court's, repeat their recitation of the plaintiff's likelihood of success, and move on. Given that injunctive relief is an extraordinary remedy, not to be considered automatic (*See, e.g., Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2761 (2010)), a rule that would “collapse [the] factors that plaintiff must prove down to one” cannot be countenanced. *Flexible Lifeline*, 654 F.3d at 1000.

If the balance of harms test is to serve any purpose, it must be to ensure that the varied interests of both parties must be taken into account, including those interests beyond those in the copyrighted work in dispute. As the Second Circuit noted in *Salinger*, both the property interest of the plaintiff in the work and the defendant in the copy must be considered, as well as the competing First Amendment interests of both parties. 607 F.3d at 81. As the Fourth Circuit held

in *Phelps*, other equitable considerations, like a defendant's ability to access and use his property, and remain secure in its ownership, should also be considered. 492 F.3d at 544-45.

The preliminary injunction factors exist to give a district court the opportunity to minimize the costs of its being mistaken. *Am. Hosp. Supply Corp. v. Hosp. Prod., Ltd.*, 780 F.2d 589, 593-94 (7th Cir. 1986). If this is to occur, then no part of the traditional test can be dispensed with, since, even if a plaintiff has a high likelihood of success, potential harms to a defendant might be so great as to caution against the granting of an injunction.

In balancing harms, therefore, a court should certainly consider the harms of a continuing infringement upon a plaintiff, but should also ensure that an injunction would not burden a defendant's property unrelated to the infringement, or serve an unduly punitive purpose. *Phelps*, 492 F.3d at 545.

D. The District Court Applied a Categorical Rule to its Public Interest Analysis

The district court's analysis of the public interest likewise rests upon a single line, which merely states that "the fourth factor requires little discussion because there is a strong public policy interest in protecting copyrights." *Flava Works*, 2011 WL 3205399, at *6. This analysis of the public interest is too cursory not to be the sort of categorical rule that *eBay* and the cases that follow it clearly caution against. If the *eBay* decision is to mean anything, it must mean that equity cannot be decided through axioms.

The quoted language in the district court's public interest analysis comes initially from *Apple Computer, Inc. v. Franklin Computer Corp.*, a Third Circuit case long predating *eBay*. 714 F.2d 1240 (3d Cir. 1983). Not only is the categorical nature of its public interest analysis suspect in light of these later decisions, but *Apple* also applied the now-clearly-impermissible presumption of irreparable harm in deciding to issue an injunction. Moreover, the *Apple* court

links its determination on the public interest to its finding of irreparable harm: “Normally, however, the public interest underlying the copyright law requires a presumption of irreparable harm. ...” *Apple*, 714 F.2d at 1254. Considering the explicit overruling of the irreparable harm presumption, a public interest determination that rests upon that presumption also cannot be sustained.

Furthermore, as indicated in *Salinger* and *Phelps*, there are competing public policy interests that courts must balance against the interest in protecting copyrights. These include the public interest in maintaining free speech and the avenues of receiving it (*Salinger*, 607 F.3d at 82), as well as in preventing restraints on alienation of personal property (*Phelps*, 492 F.3d at 544-45).

* * * *

In the context of emerging technologies, it is critical that the lessons of *eBay* are followed, and that courts properly weigh all four factors of the injunction test. To do otherwise risks the availability of valuable services that allow the creation of new works, commentary or criticism of existing ones, or simply provide consumers with access or backups to existing, lawful copies.

III. THE DMCA DOES NOT ALLOW FOR ACCOUNT TERMINATION PROCEDURES AS OUTLINED IN THE COURT’S ORDER

The district court’s order also goes well beyond the requirements set forth in § 512(i). Because the district court did not explain that the relief granted was tailored for Appellant, it could be interpreted to impermissibly expand the § 512(i) requirements. Moreover, the failure to comply with the DMCA safe harbors signals a loss of their protection and, ostensibly, some sort of damages, not the type of potentially unconstitutional prior restraint the court below mandated.

A. The DMCA Legal Framework

Congress passed the DMCA to “facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education” S. REP. NO. 105-190, at 1-2 (1998). “[B]y limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.” *Id.* at 8.

In order to accomplish these goals, Congress fashioned a set of “safe harbors” designed to “provide ‘*greater certainty*’ to service providers concerning their legal exposure for infringements that may occur in the course of their activities.” *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (*quoting* S. REP. NO. 105-190, at 20 (1998)) (emphasis added). Congress focused on creating a more predictable legal environment because it recognized that “without clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet.” S. REP. NO. 105-190, at 8.

In order to qualify for § 512’s safe harbors, service providers must, among other things, “adopt[] and reasonably implement[], and inform[] subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.” 17 U.S.C. § 512(i)(1)(A). However—despite Congressional efforts to create a predictable legal framework—§ 512(i) does not say when and how service providers must terminate the accounts of “repeat infringers,” nor does it define “repeat infringer.” *See, e.g., Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1176 (C.D. Cal. 2002) (“In crafting these policies, Congress has given a vague indication of what constitutes ‘appropriate’ circumstances.”); Andres Sawicki, *Repeat Infringement in the Digital Millennium Copyright Act*, 73 U. CHI. L. REV. 1455, 1462-63 (2006) (highlighting § 512(i)’s failure to answer important

questions facing service providers attempting to implement repeat infringer policies). This absence can have drastic consequences for legitimate users and protected speech.

B. The Lower Court's Order Runs Contrary to the Weight of Authority

Where Congress failed to create consistent and predictable legal framework, the courts have stepped in, defining the contours of a repeat infringer policy that meets the standards set forth in § 512. *See, e.g., Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007); *Cybernet*, 213 F. Supp. 2d 1146; *Ellison*, 357 F.3d 1072; *CoStar Group Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688 (D. Md. 2001); *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634 (N.D. Ill. 2002). Unfortunately, the opinion below is out of step with those precedents and therefore creates *more* instability and uncertainty where we would all benefit from *less*. *See*, 3-12B *Nimmer on Copyright* § 12B.10[E][3] (“Manifestly, it is impossible for a provider to have any confidence in its policy to terminate repeat infringers if every district and circuit court across the country can conjure up new and unanticipated (not to mention potentially conflicting) standards that those providers must have met, at the risk of losing ant protection under the statute.”).

Thus far, courts have been careful to limit the burdens on service providers. First, it is clear that the requirements under § 512(i) are “much less stringent (and less technical)” than those governing single takedowns under § 512(c). *Ellison*, 189 F. Supp. 2d at 1066. Second, courts have emphasized that § 512(i) does *not* create any duty on the part of service providers to police their sites or otherwise make determinations on claims of copyright infringement. *See, e.g., id.* at 1066 (“subsection (i) does not require [a party] to actually terminate repeat infringers, or even to investigate infringement in order to determine if [that party’s] users are behind it”); *Cybernet*, 213 F. Supp. 2d at 1176-77 (“The service provider need not act or address difficult infringement issues. *See* H.R.REP. 105-190 (II), at 61. It may not require the service provider to actively monitor for copyright infringement. *Id.*”); *CCBill*, 488 F. 3d at 1113 (“The DMCA

notification procedures place the burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting the infringement—squarely on the owners of the copyright. We decline to shift a substantial burden from the copyright owner to the provider ...”).

The court’s order below, however, just does that: by creating a duty to police for certain content, it goes far beyond the mandate of the DMCA. Order, *Flava Works, Inc. v. Gunter*, No. 10 C 6517, 2011 WL 3205399 (N.D. Ill. July 27, 2011), ECF No. 90 (“Order”) at ¶ 1. In addition, by requiring that Appellants automatically filter files with certain names, the Court is requiring them to filter content that might be completely legitimate: either because the work is not owned by Flava Works, the use is licensed, or the work is used in a way that is legally permissible under the doctrine of fair use.² In fact, file names are often chosen to drive traffic, even if they do not accurately explain the underlying work. *Cf.*, *CCBill*, 488 F.3d at 1114 (“When a website traffics in pictures that are titillating by nature, describing photographs as ‘illegal’ or ‘stolen’ may be an attempt to increase their salacious appeal, rather than an admission that the photographs are actually illegal or stolen.”).

Moreover, the DMCA does not require that service providers actually terminate repeat infringers. *Ellison*, 189 F.Supp.2d at 1066. In fact, the Ninth Circuit has held that a service provider complies with § 512(i) if “it has a working notification system, a procedure for dealing with DMCA-compliant notifications, and if it does not actively prevent copyright owners from collecting information needed to issue such notifications.” *CCBill*, 488 F.3d at 1109. Furthermore, the policy need not use the term “repeat infringer” so long as users “who are found

² Moreover, the Order does not account for the exception for (and replacement of) works that might trigger the required filter if it is later determined that the upload or download was legally permissible.

to repeatedly violate copyright rights of other may have their access to all services terminated.” *CoStar*, 164 F. Supp. 2d at 703; *In re Aimster*, 252 F. Supp. 2d at 658 -59.

Going well beyond the § 512(i) requirements, the district court ordered Appellants to suspend the accounts of John Does 1-26 along with any “users who on two or more occasions have posted content that infringes on one or more of plaintiff’s copyrights.” Order at ¶ 5. Appellants arguably do not have a duty to suspend any accounts, let alone those of individuals who may not have had an opportunity contest the claims of infringement. *See, e.g.*, 17 U.S.C. § 512(g).

Amici are concerned that the Order, as currently written, attempts to expand the ambit of § 512(i) by removing works, and more troubling, terminating accounts, of subscribers who may lack knowledge that their postings infringe. *See*, Brief of Defendants-Appellants, at 19. Users that in fact lack that knowledge are not those whom Congress intended to target when it passed § 512(i), but they may indeed be targeted by the Order below. Order at ¶ 5. Congress has specifically acknowledged “that there are different degrees on on-line infringement, from the inadvertent and noncommercial, to the willful and commercial.” S. REP. NO. 105-190, at 61. Congress implemented § 512(i) to reach those who “abuse their access to the Internet through disrespect for the intellectual property rights of others” by making sure they “know there is a realistic threat of losing [] access.” *Id.* Gunter’s repeat infringer policy—which includes investigating users who provide access to videos obtained from password-protected sites—at least meets the standard that Congress envisioned. *Flava Works*, 2011 WL 3205399 at *5. Even if Appellants’ repeat infringer policy does not meet the § 512(i) standard, then the site would lose its safe harbor and potentially be on the hook for some sort of direct or secondary liability—

in other words, amenable to damages—rendering the draconian and potentially unconstitutional prior restraints at issue here unnecessary.

C. The Threat of Improperly Terminating a User’s Account is a Serious Affront to Free Expression

One of Congress’ principal motivations for establishing clear rules regarding intermediary liability for the acts of users was to foster the development of the Internet as a platform for free expression. In the words of Rep. Barney Frank:

One of the things we do here is to say: “If you are an on-line service provider, if you are responsible for the production of all of this out to the public, you will not be held automatically responsible if someone misuses the electronic airway you provide to steal other people’s property.”

....

We have hit a balance which fully protects intellectual property, which is essential to the creative life of America, to the quality of our life, because if we do not protect the creators, there will be less creation. But at the same time we have done this in a way that will not give to the people in the business of running the online service entities and running Internet, it will not give them either an incentive or an excuse to censor.

144 CONG. REC. H7092 (daily ed. Aug. 4, 1998) (floor statement of Rep. Barney Frank); *see also* 144 CONG. REC. H10618 (daily ed. Oct. 12, 1998).

Termination of an entire account—as opposed to removal of a single work—is especially dangerous for free speech, particularly given that rights holders can abuse the system to have unpopular or timely and political speech removed. Providers should be encouraged to construct repeat infringer policies that fairly balance the interests of providers, customers, and content owners.

Consider, for example, what happened when animal-rights advocates Showing Animals Respect and Kindness (“SHARK”) videotaped rodeos in order to expose animal abuse, injuries,

and deaths.³ SHARK posted more than two dozen such videos; in response, the Professional Rodeo Cowboys Association (“PRCA”) filed baseless DMCA takedown demands for 13 of the videos. YouTube promptly removed the videos and, following its policy, canceled SHARK's entire YouTube account, removing all of SHARK's uploaded videos from the site and leaving SHARK unable to post new videos. SHARK counter-noticed and the account was restored—but not before SHARK had been silenced for weeks in the middle of the end-of-year fundraising season.⁴

This problem may be acutely felt during political campaign season, where timing is crucial. *See generally, Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (Sept. 2010);⁵ *see also, Arizona Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1008 (9th Cir. 2003) (“Restricting spontaneous political expression places a severe burden on political speech because, as the Supreme Court has observed, ‘timing is of the essence in politics ... and when an event occurs, it is often necessary to have one’s voice heard promptly, if it is to be considered at all.’”) (*citing Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969)). For example, during the 2008 election in Illinois, Progress Illinois, an organization that “provides online news and commentary on issues important to Illinois working families and the progressive movement at large,” had its YouTube account suspended after Fox Television issued DMCA takedown notifications for three of

³ *See* <http://www.citmedialaw.org/threats/professional-rodeo-cowboys-association-v-shark> (last visited Nov. 29, 2011).

⁴ *Amicus* EFF represented SHARK in the matter. *See*, <https://www.eff.org/deeplinks/2011/01/dmca-copyright-policies-staying-safe-harbors-while> (last visited Nov. 29, 2011).

⁵ *Available at* <http://www.cdt.org/report/campaign-takedown-troubles-how-meritless-copyright-claims-threaten-online-political-speech> (last visited Nov. 29, 2011).

Progress Illinois' ads.⁶ The ads were core political speech that used clips from Fox; in other words, they were classic examples of fair use.⁷ Not until nearly a month later, after Progress Illinois found legal counsel and threatened legal action against Fox, did its account get reinstated. The loss of its platform to share its message in the height of the campaign season impermissibly harmed not just Progress Illinois, but voters across the state as well.

Just a few weeks ago, some apparent pranksters submitted false DMCA notices to YouTube regarding videos of many famous artists, including Justin Bieber, Lady Gaga, and Rihanna.⁸ YouTube suspended Justin Bieber's account as a result. Not surprisingly, Justin Bieber's account was eventually restored, but not all speakers have Justin Bieber's resources. Accused of copyright infringement, many will hesitate to fight back, fearful of the consequences if they are wrong in believing their speech to be legal. Thus, aggressive account termination policies, and their efficient implementation, often have the undesired effect of squelching protected speech. Because of this, due care need be taken when implementing such policies and overbroad terms like those required by the court below should be avoided at all costs. To the extent the district court's order creates obligations beyond those found in the DMCA, it should either be remanded to comply with existing law or clarified that it applies only to the factual scenario here.

IV. CONCLUSION

By implementing the wrong standard for injunctive relief and further confusing the law surrounding 17 U.S.C. § 512(i), the district court order promises to chill innovation and harm the

⁶ See <http://www.citmedialaw.org/threats/fox-television-wfld-tv-v-progress-illinois> (last visited Nov. 29, 2011).

⁷ Two of the three ads can be found at <http://www.youtube.com/watch?v=cHVDFZDHCq8> and <http://www.youtube.com/watch?v=konL35ur0Bo> (both last visited Nov. 29, 2011).

⁸ See http://www.huffingtonpost.com/2011/09/02/justin-bieber-youtube-prank_n_946909.html? (last visited Nov. 29, 2011).

public interest. Accordingly, *Amici* respectfully request this Court reverse or remand for further proceedings and order the district court to comply with the Supreme Court's *eBay* ruling and clarify its treatment of § 512(i).

Dated: November 30, 2011

Respectfully submitted,

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Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of Amici Curiae complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,771 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Circuit Rule 32(b) and the type-style requirements of Fed. R. App. P. 32(a)(6) this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011, the word processing system used to prepare the brief, in 12 point font in Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on December 13, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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