

Case No. 11-3190

In the
United States Court of Appeals
for the Seventh Circuit

FLAVA WORKS, INC.,

PLAINTIFF-APPELLEE,

v.

**MARQUES RONDALE GUNTER, DOING BUSINESS AS MYVIDSTER.COM AND
SALSAINDY, LLC,**

DEFENDANTS-APPELLANTS.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
THE HONORABLE JUDGE JOHN F. GRADY, PRESIDING

**BRIEF OF AMICUS CURIAE
MOTION PICTURE ASSOCIATION OF AMERICA
IN SUPPORT OF PLAINTIFF-APPELLEE**

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Seventh Circuit Rule 26.1, the Motion Picture Association of America, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock. The only law firm appearing for the Motion Picture Association of America is Mitchell Silberberg & Knupp LLP.

Dated: April 4, 2012

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32

I hereby certify that pursuant to Federal Rule of Appellate Procedure 29(d) and 32(a)(7)(B) & (C) and Seventh Circuit Rule 32, the enclosed brief is proportionately spaced, has a typeface of 12-point Times New Roman including footnotes, and contains approximately 6,994 words. Counsel relies on the word count of the computer program used to prepare this brief.

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TABLE OF CONTENTS

	Page(s)
CIRCUIT RULE 26.1 DISCLOSURE STATEMENT.....	i
CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32.....	ii
CONSENT	1
INTEREST OF <i>AMICUS</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. FLAVA ESTABLISHED LIKELIHOOD OF SUCCESS.....	6
A. Direct Infringement.....	6
1. Operators of Third-Party Websites	6
2. Posters of Infringing Embedded Links	7
B. Knowledge of Infringement.....	13
C. Material Contribution.....	14
II. myVidster Failed to Establish Reasonable Implementation of a Repeat Infringer Policy.....	19
CONCLUSION.....	22

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>ALS Scan v. RemarQ Communities, Inc.</i> , 239 F.3d 619 (4th Cir. 2001)	5, 21
<i>Arista Records LLC v. Usenet.com, Inc.</i> , 633 F. Supp. 2d 124 (S.D.N.Y. 2009)	21
<i>Columbia Pictures Indus., Inc. v. Redd Horne. Inc.</i> , 749 F.2d 154 (3rd Cir. 1984)	10
<i>Columbia Pictures Indus. v. Fung</i> , 96 U.S.P.Q.2D (BNA) 1620 (C.D. Cal. 2009)	5, 21
<i>David v. Showtime/The Movie Channel, Inc.</i> , 697 F. Supp. 752 (S.D.N.Y. 1988)	9, 10
<i>Flava Works, Inc. v. Gunter</i> , No. 10 C 6517, 2011 U.S. Dist. LEXIS 50067 (N.D. Ill. May 10, 2011)	12, 18
<i>Flava Works, Inc. v. Gunter</i> , No. 10 C 6517, 2011 U.S. Dist. LEXIS 82955 (N.D. Ill. July 27, 2011)	passim
<i>Flava Works, Inc. v. Gunter</i> , No. 10 C 6517, 2011 U.S. Dist. LEXIS 98451 (N.D. Ill. Sept. 10, 2011).....	10
<i>Fonovisa Inc. v. Cherry Auction, Inc.</i> , 76 F.3d 259 (9th Cir. 1996)	13
<i>Gershwin Publ'g Corp. v. Columbia Artists Mgt., Inc.</i> , 443 F.2d 1159 (2d Cir. 1971)	6
<i>Global-Tech Appliances, Inc. v. SEB S.A.</i> , 131 S. Ct. 2060 (2011).....	14
<i>In re Aimster Copyright Litig.</i> , 252 F. Supp. 2d 634 (N.D. Ill. 2002)	19
<i>In re Aimster Copyright Litig.</i> , 334 F.3d 643 (7th Cir. 2003), <i>cert. denied</i> , 540 U.S. 1107 (2004).....	5, 14, 19
<i>Katz v. Napster</i> , No. 01-4275-MHP (N.D. Cal. July 9, 2001).....	17, 18

TABLE OF AUTHORITIES
(Continued)

	Page(s)
<i>Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.</i> , 545 U.S. 913 (2005).....	passim
<i>Midway Mfg. Co. v. Artic Int'l, Inc.</i> , 704 F.2d 1009 (7th Cir. 1983)	6
<i>Monotype Imaging, Inc. v. Bitstream Inc.</i> , 376 F. Supp. 2d 877 (N.D. Ill. 2005)	6
<i>Nat'l Football League v. PrimeTime 24 Joint Venture</i> , 211 F.3d 10 (2d Cir. 2000)	3, 9
<i>Perfect 10, Inc. v. Amazon.com, Inc.</i> , 508 F.3d 1146 (9th Cir. 2007)	passim
<i>Perfect 10, Inc. v. CCBill LLC</i> , 488 F.3d 1102 (9th Cir. 2007)	20
<i>Perfect 10, Inc. v. Cybernet Ventures</i> , 213 F. Supp. 2d 1146 (C.D. Cal. 2001)	21
<i>Perfect 10, Inc. v. Visa Int'l Serv. Ass'n</i> , 494 F.3d 788 (9th Cir. 2007)	15, 17
<i>Religious Technology Center v. Netcom Online Communications</i> , 907 F. Supp. 1361 (N.D. Cal. 1995)	15, 16
<i>Screen Gems - Columbia Music, Inc. v. Marc-Fi Records, Inc.</i> , 256 F. Supp. 399 (S.D.N.Y. 1966)	16
<i>Slaney v. Int'l Amateur Athletic Fed'n</i> , 244 F.3d 580 (7th Cir. 2001)	7
<i>U.S. v. ASCAP, In re Application of America Online, Inc.</i> , 485 F. Supp. 2d 438 (S.D.N.Y. 2007), aff'd 627 F.3d 64 (2d Cir. 2010).....	9
<i>UMG Recordings, Inc. v. Bertelsmann AG</i> , 222 F.R.D. 408 (N.D. Cal. 2004).....	18
<i>UMG Recordings, Inc. v. Shelter Capital Partners LLC</i> , 667 F.3d 1022 (9th Cir. 2011)	17

TABLE OF AUTHORITIES (Continued)

	Page(s)
<i>UMG Recordings, Inc. v. Veoh Networks Inc.</i> , No. CV 07-5744 AHM, 2009 U.S. Dist. LEXIS 14955 (C.D. Cal. Feb. 2, 2009), <i>aff'd sub nom</i> , 667 F.3d 1022 (9th Cir. 2011).....	17
<i>Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.</i> , 192 F. Supp. 2d 321 (D.N.J. 2002), <i>aff'd on other grounds</i> , 342 F.3d 191 (3d Cir. 2003)	6
<i>Warner Bros. Entm't, Inc. v. WTV Sys.</i> , 99 U.S.P.Q. 2d(BNA) 1663 (C.D. Cal. 2011)	6
<i>WGN Continental Broad. Co. v. United Video, Inc.</i> , 693 F.2d 622 (7th Cir. 1982)	9

Statutes

17 U.S.C.	
§101	passim
§106	10
§106(1).....	7, 10
§106(4).....	3
§106(3).....	7
§106(5).....	3, 10
§202	4, 11
§512(i)(1)(A)	19
§512(c)(1)(A)-(C)	21
§512(c)	5
§512(d).....	5
§512(d)(1)-(3)	21
Digital Millennium Copyright Act (“DMCA”)	passim

Other Authorities

II Paul Goldstein, GOLDSTEIN ON COPYRIGHT §7.7.2 (3d ed. 2011)	7
Andres Sawicki, Comment, <i>Repeat Infringement in the Digital Millennium Copyright Act</i> , 73 U. CHI. L. REV. 1455 (2006)	21, 22
Benjamin H. Glatstein, Comment, <i>Tertiary Copyright Liability</i> , 71 U. CHI. L. REV. 1605 (2004)	15

TABLE OF AUTHORITIES
(Continued)

	Page(s)
H.R. Rep. No. 105-551, pt. 2 (1998).....	22
H.R. Rep. No. 94-1476 (1976).....	8, 9, 12
S. Rep. No. 105-190 (1998).....	19
Terms of Service, http://www.youtube.com/t/terms	12
William Landes & Douglas Lichtman, <i>Indirect Liability for Copyright Infringement: An Economic Perspective</i> , 16 HARV. J.L. & TECH. 395 (2003).....	18
William M. Landes & Richard A. Posner, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003).....	12, 13
YouTube Help, http://support.google.com/youtube/bin/answer.py?hl=en&answer=74648	12

CONSENT

All parties consented to *Amicus* filing this brief. No party's counsel authored any part of this brief. No person other than *Amicus* contributed money intended to fund this brief.

INTEREST OF AMICUS

The Motion Picture Association of America, Inc. (“MPAA”) is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. MPAA member companies include Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. These companies and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets.

Like other copyright owners, MPAA’s members publicly perform, display, and distribute their works in digital form through legitimate online services. Widespread online infringement like that occurring on Appellant’s myVidster.com service impairs the ability of copyright owners to recoup their investments in such forms of dissemination and thereby harms consumers, who are deprived of access to new legitimate offerings of expressive content. *Amicus* has a strong interest in this case and the proper application of copyright law (in particular, the doctrines of primary and secondary infringement) and the Digital Millennium Copyright Act (“DMCA”) safe-harbor provisions.

Contrary to the assertions of myVidster and *amici* Google and Facebook, search engines and social networking sites are not the only businesses that desire certainty in a challenging online marketplace. MPAA member companies and other producers of creative works also need a predictable legal landscape in which to operate. Reversing the district court’s ruling would enable businesses to benefit from infringing public performances and displays of audiovisual

works without paying for licenses or incurring any cost to offset the cost of producing content. Such a ruling would undermine incentives for disseminating creative works in digital formats and would encourage infringers to seek to profit from the works of others. This Court should affirm. The district court’s ruling helps preserve the crucial balance essential for copyright law’s success in the digital age.

SUMMARY OF ARGUMENT

myVidster operates a website on which users created “embedded” links to infringing audiovisual content, copies of which were stored on third-party computers.¹ These embedded links allowed other users to press “play” and instantly and seamlessly view infringing content without ever leaving myVidster.com. myVidster therefore served as an unlicensed on-demand, internet-video service that generated advertising and other revenues by attracting an audience for infringing content.²

¹ Embedded links – sometimes also called inline links – are a way for a website to show content on its site that is actually stored on another site. When a user clicks on an embedded link on a webpage, the user’s internet browser software simultaneously connects to a second computer server that retrieves the content behind the link. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1156 (9th Cir. 2007). The user never leaves the original webpage and continues to see its content (such as ads, branding, and user interface); in addition, the original webpage opens a “frame” on the webpage through which the linked-to content can be viewed. “Thus, while the user’s window appears to be filled with a single integrated presentation, it is actually displaying content from at least two distinct locations.” *Id.* From the user’s perspective, however, there is no difference between an embedded stream and the remainder of the screen. *Id.* at 1161 (“in-line linking and framing may cause some computer users to believe they are viewing a single [...] webpage”).

² Although there is nothing inherently insidious about embedded links, this technique is very commonly used to operate infringing internet video sites, in MPAA’s extensive experience fighting digital theft of copyrighted works. By embedding links to infringing content found elsewhere on the internet, pirate sites can offer extensive libraries of popular copyrighted content without any hosting costs to store content, bandwidth costs to deliver the content, and of course licensing costs to legitimately acquire the content. Further, because the pirate sites are framing the content on their own websites, their users never need to leave their sites, so the pirate sites can profit from advertising to these users, selling them subscriptions, or soliciting donations.

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The district court held that Appellee Flava Works, Inc. (“Flava”) would likely succeed on its claim that myVidster was secondarily liable for the direct infringement occurring on its website. Secondary liability exists, *inter alia*, where a person knowingly and materially contributes to or induces direct infringement. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 930 (2005). These elements were present here and the district court should be affirmed.

There were at least two types of direct infringement. First, under 17 U.S.C. §106(4) and (5), the third-party hosts of infringing content directly infringed Flava’s performance and display rights by streaming and showing videos and images to the public. Although the district court did not rest its decision on this ground, the record supports a finding of direct infringement on this basis.

Second, posters of embedded links on myVidster were direct infringers. One who participates in a process by which infringing content is transmitted or otherwise communicated to the public directly infringes the performance and display rights. *Nat'l Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10, 12-13 (2d Cir. 2000). Unquestionably, myVidster users who posted links to infringing videos and images participated in the process by which those videos were streamed and shown to the public.

Amazon.com does not absolve the link posters. There, the Ninth Circuit adopted a novel “server test” created by the district court and held that Google’s embedded links to infringing still images did not directly infringe the display right because Google had no copies of the images on its own servers. 508 F.3d at 1161. This holding conflicts with the language and

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MPAA asks the Court to affirm the principle that pirate websites cannot evade liability for offering infringing content by simply framing the content instead of hosting it themselves.

legislative history of the Copyright Act, which affords copyright owners a broad and technologically neutral display right. Moreover, putting aside *Amazon.com*'s error, that case considered only the display right, while the instant case primarily involves the public performance right.³ This distinction is crucial, because the Ninth Circuit's holding relied on language in the Copyright Act's definition of "display" that does not appear in the definition of "perform." "To 'display' a work means to *show a copy* of it." 17 U.S.C. §101 (emphasis added). The word "copy" refers to the tangible medium in which the intangible work is embodied. *Id.* §202. In contrast, section 101's definition of "to perform" does not use the word "copy," but instead speaks of performing the intangible "work." So, even assuming that *Amazon.com*'s novel "server test" applied to the display right (and it should not), the statutory language clearly precludes application of that test to the separate performance right. myVidster users who posted embedded links to video streams directly infringed the performance right even though they did not necessarily possess a copy of the infringed work.

As to the knowledge element necessary to establish secondary liability, the district court correctly found that myVidster knew of the direct infringement. Flava notified myVidster of the infringing links as well as "tags" consisting of Flava's trademarks and frequently used by myVidster's customers to mark videos owned by Flava. Rather than discouraging infringement, however, myVidster advertised the availability of infringing material, including mainstream motion pictures; and willfully blinded itself to infringements by failing to take steps, like filtering, to identify re-postings of the same infringing links that Flava had already identified. The district court also correctly concluded that myVidster materially contributed to the direct

³ The district court (*Flava Works, Inc. v. Gunter*, No. 10 C 6517, 2011 U.S. Dist. LEXIS 82955, *21 (N.D. Ill. July 27, 2011)) and Flava in its brief often use the word "displays" to refer to conduct that, in many instances, constituted performances of works.

infringement by failing to disable or block embedded links to infringing video streams. *See Amazon.com*, 508 F.3d at 1172 (failure to “take simple measures to prevent further damage” to copyrighted works constitutes material contribution).⁴

Finally, myVidster’s conduct did not fall within 17 U.S.C. §§512(c)&(d), which afford safe-harbors for providing digital storage space and information location tools, respectively. “The common element of [these DMCA] safe harbors is that the service provider must do what it can reasonably be asked to do to prevent the use of its service by ‘repeat infringers.’” *In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003), *cert. denied*, 540 U.S. 1107 (2004). Thus, the safe harbors only apply to “innocent” service providers. *ALS Scan v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001). By advertising infringing material, refusing to terminate any of its users’ accounts, and failing to identify and stop infringers who repeatedly embedded links to unauthorized video streams and displays, myVidster did not qualify for safe-harbor protection. *Aimster*, 334 F.3d at 655 (safe harbor inapplicable where service “disabled itself from doing anything to prevent infringement”); *Columbia Pictures Indus. v. Fung*, 96 U.S.P.Q.2D (BNA) 1620, 1638-39 (C.D. Cal. 2009) (DMCA is inapplicable to “promoting infringement” because “the statutory safe harbors are based on passive good faith conduct aimed at operating a legitimate internet business”).

MPAA urges affirmance.

⁴ The record also supports a finding that myVidster unlawfully induced users to post infringing links by highlighting the presence of infringing material on the service and refusing to discourage or prevent infringement. *See Grokster*, 545 U.S. at 939 (targeting market for infringement and refusing to filter infringing content is evidence of inducement).

ARGUMENT

I. FLAVA ESTABLISHED LIKELIHOOD OF SUCCESS.

“[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.” *Gershwin Publ’g Corp. v. Columbia Artists Mgt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). *See also Midway Mfg. Co. v. Artic Int’l, Inc.*, 704 F.2d 1009, 1013 (7th Cir. 1983) (citing *Gershwin*). A copyright owner’s ability to hold a secondary infringer accountable serves an important function in copyright law. “When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability” *Grokster*, 545 U.S. at 930. The elements of contributory infringement are direct infringement, knowledge, and material contribution. *Monotype Imaging, Inc. v. Bitstream Inc.*, 376 F. Supp. 2d 877, 883 (N.D. Ill. 2005).

A. *Direct Infringement*

1. Operators of Third-Party Websites

The majority of the content viewed on myVidster was hosted on third-party servers. *Gunter*, 2011 U.S. Dist. LEXIS 82955, *5. Displays and streams from those servers constituted direct infringement. *See Warner Bros. Entm’t, Inc. v. WTV Sys.*, 99 U.S.P.Q. 2d(BNA) 1663, 1668 (C.D. Cal. 2011) (streaming works to internet users violated performance right); *Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*, 192 F. Supp. 2d 321, 332 (D.N.J. 2002) (streaming works “to individual computers” infringed performance right), *aff’d on other grounds*, 342 F.3d 191 (3d Cir. 2003). Although the district court did not rest its holding on

these obvious instances of direct infringement, this Court may affirm for any reason justified by the record. *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 597 (7th Cir. 2001).⁵

2. Posters of Infringing Embedded Links

The Copyright Act's language and legislative history show that Congress intended to afford copyright owners broad performance and display rights. *See* II Paul Goldstein, GOLDSTEIN ON COPYRIGHT §7.7.2 (3d ed. 2011) ("In defining 'perform' broadly to encompass every conceivable aspect of performance, Congress adhered to a central copyright principle: all who derive value from using a copyrighted work should pay for that use..."). Congress therefore drafted the Copyright Act to ensure that those rights would be technologically neutral – that infringers could not use novel techniques or technologies to evade liability for infringing those rights.

The Act's definitions of "perform" and "display" evidence this intent: "To 'perform' a work means to recite, render, play, dance, or act it, either directly or *by means of any device or process* or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." 17 U.S.C. §101 (emphasis added). "To 'display' a work means to show a copy of it, either directly or by means of a film, slide, television image, or *any other device or process* or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially." *Id.* (emphasis added).

⁵ myVidster also knowingly and materially contributed to its users' uploading of copies of videos onto myVidster servers and the subsequent making available for download of those copies. *Gunter*, 2011 U.S. Dist. LEXIS 82955, **21, 25-6. As the district court held, myVidster is secondarily liable for these direct infringements of the reproduction right (17 U.S.C. §106(1)) and the distribution right (*id.* §106(3)).

The definition of what it means to perform or display a work “publicly” also reflects Congress’ desire to afford copyright owners broad and technologically neutral performance and display rights:

To perform or display a work ‘publicly’ means – (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) *to transmit or otherwise communicate a performance or display* of the work to a place specified by clause (1) or to the public, *by means of any device or process*, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Id. (emphasis added).⁶

The legislative history confirms that Congress enacted the Copyright Act with these important objectives in mind. “A performance may be accomplished ‘either directly or by means of any device or process,’ including *all* kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, *any* type of electronic retrieval system, and *any* other techniques and systems not yet in use or even invented.” H.R. Rep. No. 94-1476, 64 (1976) (emphasis added). Similarly, “[i]n addition to the direct showings of a copy of a work, ‘display’ would include the projection of an image on a screen or other surface by any method, the transmission of an image *by electronic or other means*, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with *any sort* of information storage and retrieval system.”). *Id.* (emphasis added). The House Report further states:

The definition of ‘transmit’ – to communicate a performance or display ‘by means of any device or process whereby images or sounds are received beyond the place from which they are sent’ –

⁶ The Act’s definition of “transmit” is to the same effect. “To ‘transmit’ a performance or display is to communicate it *by any device or process* whereby images or sounds are received beyond the place from which they are sent.” 17 U.S.C. §101 (emphasis added).

is broad enough to include *all conceivable forms and combinations* of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them.

Id. (emphasis added). Thus, irrespective of the technology used, any act by which a still image from an audiovisual work is communicated to an audience constitutes a public display; any act by which an audiovisual work is communicated in sequence to an audience constitutes a public performance.

The courts have effectuated Congress' mandate that the performance and display rights be construed broadly. "Congress intended the definitions of 'public' and 'performance' to encompass each step in the process by which a protected work wends its way to its audience." *PrimeTime* 24, 211 F.3d at 12-13, quoting *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752, 758-59 (S.D.N.Y. 1988). This Court has so held. *See WGN Continental Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 625 (7th Cir. 1982) ("[T]he Copyright Act defines 'perform or display . . . publicly' broadly enough to encompass indirect transmission to the ultimate public[.]").

This reasoning applies equally to embedding links on a webpage, a process analogous to retransmissions of television broadcasts. *See U.S. v. ASCAP, In re Application of America Online, Inc.*, 485 F. Supp. 2d 438, 446 (S.D.N.Y. 2007) ("[T]he broadcasting of television signals is closely analogous to the streaming of music over the internet."), *aff'd* 627 F.3d 64 (2d Cir. 2010).⁷ It follows that those who posted infringing embedded links on myVidster

⁷ Google and Facebook argue that affirming the district court's holding would result in widespread liability for posters of various types of links, including traditional hyperlinks. Google Brief ("GB") at 14-15. However, the district court found infringement based on embedded linking that allowed users to press "play" and immediately view video streams, and thus, only embedded links are at issue on this appeal. Other forms of linking may or may not raise separate issues as to liability for direct infringement, and any future case involving such

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participated in a step in the process of the unlawful performances and displays, and therefore directly infringed the display and performance rights. That embedded links are a new technique to show copyrighted works cannot, consistent with the statutory language and Congressional intent, deprive copyright owners like Flava of their exclusive rights. *See David*, 697 F. Supp. at 759 (“[I]t would strain logic to conclude that Congress would have intended the degree of copyright protection to turn on the mere method by which [works] are transmitted to the public.”).

Citing *Amazon.com*, 508 F.3d at 1161, myVidster, along with its *amici*, argue that only the person on whose server the copy resides can directly infringe the display or performance rights and that posters of embedded links on myVidster.com did not directly infringe because they did not possess such copies. MyVidster Brief 11-19; GB 15-16.⁸ However, in adopting the novel “server test” created by the district court in *Amazon.com*, the Ninth Circuit misconstrued the scope of the display right. “To ‘display’ a work means to show a copy of it...” 17 U.S.C. §101. The display right is therefore implicated by an act that *shows* a copy, not the act of *making* or *possessing* a copy. *Amazon.com* would essentially make infringement of the reproduction right (17 U.S.C. §106(1)) a precondition for proving infringement of the discrete section 106(5) display right. However, “[t]he rights granted by section 106 are separate and distinct, and are severable from one another.” *Columbia Pictures Indus., Inc. v. Redd Horne. Inc.*, 749 F.2d 154, 156-7 (3rd Cir. 1984). *Amazon.com* is inconsistent with Congress’ mandate to construe the

(...continued)

linking would be decided on its facts. Of course, a service provider that fails to remove any type of link that it knows to be infringing or that otherwise fails to take simple measures to prevent further damage would clearly be liable as a contributory infringer. *See Section I(C), infra.*

⁸ The district court correctly rejected both *Amazon.com*’s reasoning and applicability to the present case. *Flava Works, Inc. v. Gunter*, No. 10 C 6517, 2011 U.S. Dist. LEXIS 98451, *10 (N.D. Ill. Sept. 10, 2011).

display right broadly and in a way that is technologically neutral. MPAA urges the Court to reject *Amazon.com*'s erroneous reasoning and not extend it to the performance right, which the Ninth Circuit did not consider.

In applying the server test to the facts before it, moreover the Ninth Circuit relied on language in the definition of “to display” that is absent from the definition of “to perform.” Thus, even if the Ninth Circuit’s analysis of the display right had been correct, it would have no bearing on the scope of the performance right.

As stated above: “To display a work means to show a *copy* of it...” 17 U.S.C. §101 (emphasis added). A “copy” is the tangible medium in which the intangible copyrighted work is fixed. 17 U.S.C. §202 (“Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.”). In holding that only the person who possessed a tangible copy of the work could violate the display right, *Amazon.com* specifically focused on the word “copy” in the section 101 definition of “display,” stating that, “based on the plain language of the statute, a person displays a photographic image by using a computer to fill a screen with a *copy* of the photographic image fixed in the computer’s memory.” 508 F.3d at 1160 (emphasis added). The Ninth Circuit then concluded:

Because Google’s computers do not store the photographic images, Google does not have a copy of the images for purposes of the Copyright Act. In other words, Google does not have any “*material objects . . . in which a work is fixed . . . and from which the work can be perceived, reproduced, or otherwise communicated*” and thus cannot communicate a copy.

Id. at 1159-60 (emphasis added).

Unlike the definition of “to display,” the definition of “to perform” does not contain the word “copy.”

To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

17 U.S.C. §101. This definition does not require the performer to render or play a tangible *copy*.

Rather, the use of the word “work” means that a performance occurs when the intangible expressive work is rendered or played. *See* William M. Landes & Richard A. Posner, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 1 (2003) (an expressive work has “an existence separable from a unique physical embodiment”). Therefore, *Amazon.com*’s reasoning cannot apply to the performance right. Indeed, merely singing a song in public or simultaneously broadcasting sounds and images of a person singing a song constitutes a public performance even if the performer does not possess a copy of the work. H.R. Rep. No. 94-1476, 64. Thus, myVidster users who embedded links to infringing video streams directly infringed the performance right. *Amazon.com* is not to the contrary.⁹

Contrary to *Amici*’s assertions (GB 17), rejecting the Ninth Circuit’s “server test” would neither stop Google’s subsidiary, YouTube.com, from authorizing third parties to embed YouTube videos nor otherwise inhibit it from proliferating authorized, noninfringing videos on the internet. Under YouTube’s terms of service, uploaders of content to YouTube’s servers agree to license others to embed videos. *See* Terms of Service, <http://www.youtube.com/t/terms>. Uploaders also have the option of disabling embedding. *See* YouTube Help, <http://support.google.com/youtube/bin/answer.py?hl=en&answer=74648>. So, while embedding

⁹ In an early opinion on myVidster’s motion to dismiss, the district court held that myVidster itself did not directly infringe Flava’s copyrights by hosting embedded links and content on its own servers. *See Flava Works, Inc. v. Gunter*, No. 10 C 6517, 2011 U.S. Dist. LEXIS 50067, **6-7 (N.D. Ill. May 10, 2011). While *Amicus* disagrees with that holding, it does not address the merits of that decision because Flava has not appealed it.

such a YouTube video would constitute a public performance, that performance would be authorized and lawful, so long as the video uploader possessed the rights to the content at issue.

Properly construing the performance right to apply to the act of embedding links will in fact foster access to works. Services like Hulu.com provide access to authorized streams of audiovisual content, but may choose not to allow commercial services to aggregate and frame videos by embedding links on separate websites. If providing unauthorized embedded links to Hulu videos was not direct infringement, then copyright owners would have no recourse against such services under a direct or secondary liability theory. And such services divert advertising revenue from the legitimate service to themselves, thereby preventing recoupment of investments and ultimately limiting the available viewing options for consumers. If such unlawful public performances could not be stopped, copyright owners would not receive a fair return from licensing and investing in legitimate, free, online streaming. *See* Landes & Posner, ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW at 40 (“The problem of recoupment is magnified [] by the fact that … many publishing costs … are incurred before it is even known what the demand for the work will be.”).

B. Knowledge of Infringement

Given the massive and often anonymous infringement on the internet, the ability of copyright holders to hold gateways like myVidster liable for secondary infringement is crucial in preventing piracy. *See Grokster*, 545 U.S. at 930 (calling secondary liability “the only practical alternative”). myVidster had actual knowledge because it received notifications of infringement from Flava regarding specific infringements as well as video titles that contained Flava’s trademarks. *See Fonovisa Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261 (9th Cir. 1996) (letter to swap meet owner regarding continued infringing sales created actual knowledge). myVidster also reviewed the objectionable content on the website, as evidenced by its advertisements

promoting the availability of infringing videos, including mainstream movies (e.g., *Hancock* and *Star Trek*). *Gunter*, 2011 U.S. Dist. LEXIS 82995, **21-23, 26-7 n.10.

Operators of websites containing or linking to infringing content are deemed to have knowledge when they turn a blind-eye to infringement. As this Court stated in *Aimster*:

One who, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings is held to have a criminal intent because a deliberate effort to avoid guilty knowledge is all that the law requires to establish a guilty state of mind.

334 F.3d at 651.

myVidster willfully blinded itself to acts of infringement by failing to investigate users whom Flava identified as repeat infringers; by ignoring “tags” used by users to describe works and which were indicative of infringement; and by refusing to use easy-to-implement technological means to prevent those users’ further infringing acts, as admitted by defendant’s operator. *Id.* **28-9. *Cf. Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2069 (2011) (“[P]ersons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts.”).

C. Material Contribution

myVidster materially contributed to direct infringement in two ways. First, as the district court found, myVidster enabled its users to embed links to infringing content. *See Aimster*, 334 F.3d at 648 (“[T]he ability of a service provider to prevent its customers from infringing is a factor to be considered in determining whether the provider is a contributory infringer.”). Second, myVidster failed to disable or block links that it knew provided access to infringing video streams from third-party servers, thereby facilitating the availability of the infringing streams and delivering infringing streams to myVidster users. “[A] computer system operator

can be held contributorily liable if it ‘has actual knowledge that specific infringing material is available using its system,’ and can ‘take simple measures to prevent further damage’ to copyrighted works, yet continues to provide access to infringing works.” *Amazon.com*, 508 F.3d at 1172 (citations omitted).

Amici Google and Facebook incorrectly contend (GB 18) that myVidster is not a contributory infringer because, they claim, myVidster’s users did not engage in direct infringement, and instead at most were secondary infringers. *Amici* go on to argue that myVidster cannot be “tertiarily” liable for the direct infringement of the third parties whose servers hosted the infringing copies that myVidster users embedded links to. *Amici* state: “One cannot be liable for contributing to contributory infringement; one must contribute to direct infringement in order to be liable.” *Id.* In so arguing, *Amici* would focus on where a party is placed in the process of the infringement and not on that party’s material contribution thereto. Such a position misunderstands the law.

Amici first assume that the link posters were only secondary, rather than direct infringers. As discussed above, that is a false premise. But even assuming that those who posted links to myVidster were secondary infringers, liability for contributory infringement turns not on the number of entities involved or even whether the contributory infringer has direct contact with the direct infringer, but on the materiality of the defendant’s contribution to the direct infringement.

Perfect 10, Inc. v. Visa Int’l Serv. Ass’n, 494 F.3d 788, 796 (9th Cir. 2007); *see* Benjamin H. Glatstein, Comment, *Tertiary Copyright Liability*, 71 U. CHI. L. REV. 1605, 1635 (2004) (“Liability for copyright infringement extends to tertiary parties under existing law.”).

In the oft-cited *Netcom* case, the court refused to dismiss a claim of contributory infringement against an online service provider who was two steps removed from the direct

infringement. *Religious Technology Center v. Netcom Online Communications*, 907 F. Supp. 1361, 1374 (N.D. Cal. 1995). There, Erlich, the primary infringer, posted copies of the plaintiff's literary works to an online bulletin-board service. *Id.* at 1365-66. Erlich gained access to the service through a second party, support.com, which in turn gained its access to the internet through defendant Netcom. *Id.* After receiving notice that infringing content resided on its server, Netcom allegedly failed to take the content down. The court held that Netcom could be held liable as a contributory infringer: "If plaintiffs can prove the knowledge element, Netcom will be liable for contributory infringement since its failure to simply cancel Erlich's infringing message and thereby stop an infringing copy from being distributed worldwide constitutes substantial participation in Erlich's public distribution of the message." *Id.* at 1374. The lack of a direct relationship between the defendant and the direct infringer gave the court no pause.

In reaching its conclusion, the *Netcom* court relied on *Screen Gems - Columbia Music, Inc. v. Marc-Fi Records, Inc.*, 256 F. Supp. 399, 404 (S.D.N.Y. 1966), where radio broadcasters were held secondarily liable despite being two steps removed from direct infringement. There, a manufacturer of infringing phonorecords hired an advertising agency to purchase advertising space on the broadcasters' stations. The defendants argued that they were not liable due to their "remote [] relationship to the actual infringer," but the court concluded that the plaintiff had provided adequate allegations "to permit the trier of the fact, despite these defendants' denials, to conclude that they had either actual or constructive knowledge of the infringement, but nevertheless proceeded to assist and participate therein by advertising the wares over their stations without making adequate investigation." *Id.* at 403. Such conduct would lead to

liability because it would materially contribute to the direct infringement, regardless of any distance between the parties involved.

The cases on which Google and Facebook rely are not to the contrary. In *Perfect 10 v. Visa*, the plaintiff sued credit card companies that were processing payments for infringing websites. 494 F.3d at 804. The court concluded that the defendants could not be held liable as contributory infringers because the companies at issue “in no way assist[ed] or enable[d] Internet users to locate infringing material, and they d[id] not distribute it.” *Id.* at 797. The court distinguished *Amazon.com* and other cases: “The search engines in *Amazon.com* provided links to specific infringing images, and the services in *Napster* and *Grokster* allowed users to locate and obtain infringing material.” *Id.* at 796. myVidster hosted embedded links to specific infringing material and could simply and effectively disable those links. In other words, it assisted its users in their efforts to locate infringing videos and did nothing to deter their success. Not only is *Visa* inapposite, but its reasoning actually supports affirmance in this case. *Id.*

UMG Recordings, Inc. v. Veoh Networks Inc., No. CV 07-5744 AHM (AJWx), 2009 U.S. Dist. LEXIS 14955, **12-14 (C.D. Cal. Feb. 2, 2009), *aff’d sub nom, UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022 (9th Cir. 2011) is similar. That case involved claims against investors in an infringing online service. The courts concluded that the investors at issue could not “individually control” the infringing service and thus did not play significant enough roles to qualify as material contributors. *Shelter Capital*, 667 F.3d at 1046-47.

Such reasoning resulted in a denial of contributory liability in *Katz v. Napster*, No. 01-4275-MHP (N.D. Cal. July 9, 2001), another case involving claims against investors relied on by

Amici, as well.¹⁰ See *UMG Recordings, Inc. v. Bertelsmann AG*, 222 F.R.D. 408, 412 (N.D. Cal. 2004) (distinguishing *Katz*: “Rather than alleging that defendants merely supplied Napster with necessary funding … – or accusing defendants of contributory and vicarious infringement in purely conclusory fashion – plaintiffs have specifically accused defendants of assuming control over Napster’s operations and directing the infringing activities … .”). No similar dispute regarding myVidster’s control over the service exists here. myVidster could have easily taken simple measures to prevent further damage from the infringing links and could have prevented such infringement in the future by reviewing content labeled with Flava’s trademarks and implementing other filtering techniques. Its failure to do so constituted material contribution.¹¹

This conclusion does not imperil legitimate businesses that comply with the requirements of the DMCA safe harbors. The DMCA carefully balances the interests of copyright owners and service providers by limiting liability for those services that comply with the safe harbor requirements and would otherwise be liable. Without potential liability, service providers could simply ignore the safe harbor requirements (e.g., responding to takedown notices or implementing a repeat infringer policy). See William Landes & Douglas Lichtman, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J.L. & TECH. 395, 406 (2003) (“[Because of the DMCA,] Internet service providers and other firms associated with the

¹⁰ *Katz* is available at:

[http://blog.mpaa.org/BlogOS/file.axd?file=2012%2f4%2fKatz+v++Napster+\(4552379\).pdf](http://blog.mpaa.org/BlogOS/file.axd?file=2012%2f4%2fKatz+v++Napster+(4552379).pdf).

¹¹ myVidster also induced copyright infringement by encouraging users to post embedded links; advertising the availability of infringing content through its service; and refusing to implement filtering technology. See *Grokster*, 545 U.S. at 939 (“unlawful objective” can be imputed from, *inter alia*, a service providers’ failure “to develop filtering tools or other mechanisms to diminish the infringing activity using their software”). Although the district court ruled on myVidster’s motion to dismiss that Flava failed to adequately plead inducement (2011 U.S. Dist. LEXIS 50067, **17-18), the record supports a finding that myVidster induced copyright infringement and is not entitled to the safe harbor on that basis. See *infra* note 14.

Internet know that they are immune from indirect liability as long as they follow the guidelines explicitly set forth.”).

II. MYVIDSTER FAILED TO ESTABLISH REASONABLE IMPLEMENTATION OF A REPEAT INFRINGER POLICY.

The DMCA “[wa]s an attempt to deal with special problems created by the digital revolution.” *Aimster*, 334 F.3d at 655. Congress created specific safe harbors for online service providers who cooperate with copyright owners and “do what [they] can reasonably be asked to do to prevent the use of [their] service[s] by ‘repeat infringers.’” *Id.*, quoting 17 U.S.C. §512(i)(1)(A). To obtain safe-harbor protection, a service must prove, *inter alia*, it has reasonably implemented a policy to terminate repeat infringers. *See In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 657 (N.D. Ill. 2002) (“Liability protection under the DMCA is an affirmative defense and, as such, Defendants bear the burden of establishing its applicability.”).

Section 512(i)(1)(A) states:

The limitations on liability established by this section shall apply to a service provider only if the service provider … has adopted and reasonably implemented, and informs 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 … .

A service provider’s repeat infringer policy must pose a “realistic threat” that repeat infringers will have their access terminated. S. Rep. No. 105-190, 61 (1998) (persons who “abuse their access to the Internet through disrespect for the intellectual property rights of others should know there is a realistic threat of losing [] access”).

As the district court held, myVidster’s so-called repeat infringer policy posed no realistic threat to infringers. *Gunter*, 2011 U.S. Dist. LEXIS 82995, at *31 (Gunter’s “understanding of the term ‘infringer’ does not encompass the law of copyright; he operates his site under the

mistaken view that an ‘infringer’ is limited to a person who posts content that is hosted on a password-protected or private website.”). Moreover, myVidster admittedly had no intention of actually terminating any infringers’ accounts. *Id.* at *32 (“It would be very easy for Gunter to determine whether a particular myVidster user had posted, on two or more occasions, a video that infringes one of plaintiff’s copyrights. He refuses to do so, and he refuses to acknowledge his duty to terminate the accounts of such users.”).

myVidster also failed to qualify for safe-harbor for additional reasons. After receiving repeated notices about the infringing embedded videos on its service, myVidster ignored the wrongful conduct instead of attempting to rid its service of bad actors. myVidster initially refused to remove specific infringing links. *Id.* at *23 (“Gunter’s initial response was to evade responsibility. Instead of addressing whether he would take down the videos appearing on myVidster, Gunter told [Flava]: “I . . . would like to inform you that the videos listed are not hosted by myVidster. What you are seeing are video embeds.”). Then, when myVidster finally agreed to take some limited action to remove infringing material, it declined even to block users from reposting embedded links to infringing streams. *Id.* at *29 (“He has not implemented any mechanism to prevent the same infringing video from being re-posted to myVidster, even though he acknowledged that implementation would not be difficult.”). These failures, combined with myVidster’s promotion of its service as a source for infringing links by, for example, advertising the availability of streams of popular motion pictures like *Hancock* and *Star Trek* that were clearly protected by copyright (*id.* at *27),¹² establish that myVidster was not innocent and that

¹² See *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007) (“[A defendant’s] actions towards copyright holders who are not a party to the litigation are relevant in determining whether [the defendant] reasonably implemented [its] repeat infringer policy.”).

the DMCA safe harbors did not apply.¹³ *See ALS Scan*, 239 F.3d at 625 (safe harbors apply only to “innocent” service).¹⁴

myVidster and *amici* the Electronic Frontier Foundation (“EFF) and Public Knowledge (“PK”) nonetheless contend that myVidster deserves safe-harbor protection. myVidster Brief 20-23; EFF Brief 11-15. They insist that myVidster had no obligation to terminate the accounts of any of its users. This approach flouts the plain language of the DMCA and its legislative history and would render the statute’s instruction to terminate repeat infringers’ access a nullity. *See* Andres Sawicki, Comment, *Repeat Infringement in the Digital Millennium Copyright Act*, 73 U. CHI. L. REV. 1455, 1466 (2006) (“[A] threat that is never carried out is not sufficiently credible to have the intended effect. ... Copyright holders would rightly be reluctant to accept an ISP’s promise to issue empty threats”). *Amici*’s position also contravenes the policy choices Congress codified in the DMCA, which was designed to incentivize investments in authorized, digital dissemination of copyrighted works. *See Perfect 10, Inc. v. Cybernet Ventures*, 213 F. Supp. 2d 1146, 1177, 1178 (C.D. Cal. 2001) (“[O]nline service providers are meant to have strong incentives to work with copyright holders. The possible loss of the safe harbor provides that incentive [Courts should] maintain the ‘strong incentives’ for service providers to

¹³ myVidster should also have lost any otherwise applicable safe harbor because it possessed knowledge of infringement without responding appropriately and received a direct financial benefit from infringement that it had a right and ability to control, although the district court did not directly so hold. *See* 17 U.S.C. §512(c)(1)(A)-(C) and §512(d)(1)-(3).

¹⁴ Defendants cannot claim safe-harbor protection while simultaneously encouraging infringement. *E.g., Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 132-33 (S.D.N.Y. 2009) (a defendant who “encouraged or fostered [] infringement [] would be ineligible for the DMCA’s safe harbor provisions”); *Fung*, 96 U.S.P.Q.2D (BNA) at 1638-39 (“Inducement liability is based on active bad faith conduct aimed at promoting infringement; the statutory safe harbors are based on passive good faith conduct aimed at operating a legitimate internet business.”).

prevent their services from becoming safe havens or conduits for known repeat copyright infringers, at the very least.”).¹⁵

Taking steps to thwart illegal conduct does not, as EFF and PK contend, undermine technological progress or free speech. On the contrary, such steps facilitate those laudable objectives. As the House Commerce Committee explained,

The debate on this legislation highlighted two important priorities: promoting the continued growth and development of electronic commerce; and protecting intellectual property rights. These goals are mutually supportive. A thriving electronic marketplace provides new and powerful ways for the creators of intellectual property to make their works available to legitimate consumers in the digital environment. And a plentiful supply of intellectual property – whether in the form of software, music, movies, literature, or other works – drives the demand for a more flexible and efficient electronic marketplace.

H.R. Rep. No. 105-551, pt. 2, 23 (1998). This Court should maintain this carefully engineered balance by affirming the district court’s ruling.

CONCLUSION

Amicus respectfully asks this Court to affirm the ruling below and thereby strike, as Congress intended, the balance between preserving copyright protection in the digital age and

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¹⁵ myVidster’s argument (myVidster Brief 21) that a person cannot qualify as a repeat infringer until a court has declared the person an infringer multiple times conflicts with the DMCA’s overall objective of reducing the role of courts in policing day-to-day instances of online infringement by facilitating cooperation between service providers and copyright owners. *See* Sawicki, 73 U. CHI L. REV. at 1484 (calling this interpretation “almost surely inappropriate”).

simultaneously encouraging investment in legitimate online services rather than in illegitimate services that, like myVidster, seek profits from infringement.

Dated: April 4, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on Aril 4, 2012, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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