

# 10-3270-CV

# 10-3342-CV

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IN THE

## United States Court of Appeals

FOR THE SECOND CIRCUIT

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

*Plaintiffs-Appellants,*

v.

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

*Defendants-Appellees.*

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*(Additional Caption on the Reverse)*

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

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### **BRIEF OF AMICI CURIAE INTELLECTUAL PROPERTY AND INTERNET LAW PROFESSORS IN SUPPORT OF DEFENDANTS-APPELLEES AND URGING AFFIRMANCE**

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

*Plaintiffs-Appellants,*

*and*

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

*Plaintiffs,*

v.

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

*Defendants-Appellees.*

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## STATEMENT OF INTEREST

*Amici curiae* submit this brief pursuant to Federal Rule of Appellate Procedure 29(a). All parties have consented to the filing of this brief.

*Amici curiae* are law professors who teach and write about copyright law and Internet law at law schools, colleges, and universities throughout the United States. We have no personal stake in the outcome of this case; our interest is in seeing that copyright law is applied in a manner most likely to fulfill its constitutional mandate “to promote the Progress of Science,” taking into account both the protections afforded to, and the obligations imposed upon, copyright holders and users of copyrighted works.<sup>1</sup>

## SUMMARY OF ARGUMENT

Section 512 of the Copyright Act represents a remarkably successful legislative achievement, one that has helped to promote unprecedented growth and diversity in user expression on the Internet while simultaneously providing copyright holders with efficient and effective procedures for remedying infringements of their protected content. Appellants and their *amici* would have

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<sup>1</sup> Pursuant to Local Rule 29.1 of the United States Court of Appeals for the Second Circuit, *amici* hereby certify that no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money intended to fund the preparation or submission of the brief; and no person other than *amici* contributed money intended to fund the preparation or submission of the brief.

this Court disrupt the fundamental balance embodied in the statutory provisions, through a combination of inappropriately restrictive interpretations of the statute’s protections for service providers and inappropriately broad interpretations of the preconditions for obtaining those protections. The lower court’s holding that item- and location-specific information is required before a service provider can be deemed to have become “aware of facts and circumstances from which infringing activity is apparent” finds strong support in the statutory text, structure, and purpose. Appellants’ attempts to distort the safe harbor provisions to *create* liability for service providers that have “generalized awareness” of infringing content would render meaningless many of the statute’s carefully wrought protections for ensuring an equitable balance among copyright holders, service providers, and ordinary Internet users, and they should be rejected by this Court (as they have been rejected by others).

## **ARGUMENT**

### **I. The Court Should Reject Appellants’ Attempts to Distort the Balance That Congress Successfully Crafted in the Section 512(c) Safe Harbor**

In the “Online Copyright Infringement Liability Limitation Act” (Title II of the Digital Millennium Copyright Act (the “DMCA”), now codified at 17 U.S.C. § 512), Congress attempted to strike a balance among the rights and obligations of three separate constituencies, each holding substantial, and often conflicting,

interests in regard to the distribution of copyright-protected works on the Internet:

- (1) copyright holders, fearing massive infringement of their protected works;<sup>2</sup>
- (2) online service providers, concerned with uncertain and potentially astronomical liability under ordinary principles of direct and secondary copyright liability;<sup>3</sup> and
- (3) Internet users, seeking to partake of and participate in a growing Internet containing content “as diverse as human thought,”<sup>4</sup> a rich array of entertainment, information, goods, services, and ideas that was becoming, as the United States Supreme Court described it at the time, “a unique and wholly new medium of worldwide human communication.”<sup>5</sup>

Over the last decade, the scheme that Congress implemented in the DMCA, as interpreted by federal courts in a number of significant and high-profile cases (including this one), has been resoundingly, and perhaps even remarkably, successful at forging an equitable balance among these conflicting interests.

Website operators and other providers of innovative online services have a clear and straightforward set of ground rules to follow, allowing them to conform their

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<sup>2</sup> See S. REP. NO. 105-190, at 8 (1998).

<sup>3</sup> See *id.* at 7 (“[W]ithout clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet.”).

<sup>4</sup> *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997) (internal quotation marks and citations omitted).

<sup>5</sup> *Id.* at 850 (internal quotation marks and citation omitted).

operations to the law and, thereby, avoid the specter of potentially crushing liability. At the same time, copyright holders, through the notice-and-takedown process spelled out in 17 U.S.C. § 512(c), have simple and cost-effective means to curtail large numbers of unauthorized and infringing uses of their protected expression.

The benefits that Internet users—i.e., the public—have reaped from this compromise are profound. Along with its companion provision in federal law, 47 U.S.C. § 230,<sup>6</sup> which similarly provides service providers with a safe harbor from claims arising from their users’ activities, the DMCA has fueled extraordinary and unprecedented growth in innovative Internet services based entirely on user expression. This explosion of *participatory* online services and applications (often referred to as “user-generated content,” or “Web 2.0”) has, in turn, fueled the growth and evolution of the Internet itself as a truly global communications platform, one that has become, as the daily news headlines continue to remind us, a

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<sup>6</sup> 47 U.S.C. § 230(c)(1) protects “provider[s] . . . [of] interactive computer service(s)” against claims arising from “any information provided by another information content provider,” and has been applied to immunize service providers against a wide range of federal and state law claims. *See, e.g., Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008); *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). By its express terms, however, § 230 does not encompass any intellectual property claims, *see* 47 U.S.C. § 230(e)(2)—precisely the gap that Congress filled in 1998 with Title II of the DMCA.

powerful tool for grassroots democratic movements around the world.<sup>7</sup> Thousands of Internet businesses, many of which are now household names across the globe—e.g., Facebook, Twitter, YouTube, Blogger, craigslist, Myspace, Tumblr, Flickr, and many, many others—have emerged over the past decade sharing one common characteristic: they provide virtually no content of their own (copyrightable or otherwise), but rely instead entirely on their users to make the sites valuable, engaging, and attractive for other users. Internet users have responded in truly breathtaking numbers.<sup>8</sup>

It is difficult, if not impossible, to imagine this development in the absence of strong DMCA safe harbors. It is no coincidence, we believe, that all of the

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<sup>7</sup> See, e.g., Jennifer Preston, *While Facebook Plays a Star Role in the Revolts, Its Executives Stay Offstage*, N.Y. Times, Feb. 15, 2011, at A10 (describing role of Facebook and other “social media” websites, including YouTube, in the recent uprising in Egypt).

<sup>8</sup> Google has estimated that users upload over 35 hours of video to YouTube each minute, “creating and uploading more video content each month than the combined output of all three major U.S. television networks for the past 60 years,” and that the YouTube audience views approximately two *billion* videos each day. See Google Comments Submitted to the Department of Commerce “Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy,” Docket No. 100910448-0448-01 (hereinafter “Google Comments”), available at <http://www.ntia.doc.gov/comments/100910448-0448-01/comment.cfm?e=6BDC88CD-BD11-4506-9196-220C54FBBB87>. Estimates for other Google-owned sites are similarly immense. For example, users upload 250,000 words to Blogger, and more than 3,000 photos to Flickr, every minute of every day. And of course there are dozens, if not hundreds or thousands, of other, non-Google-affiliated sites offering similar user-oriented uploading capabilities.

service providers listed in the preceding paragraph are based here in the United States, where Congress had the foresight in the early days of the Internet to understand that unlimited or uncertain service provider liability for third-party conduct would have drastic, negative consequences for the realization of the Internet's full economic and cultural potential.<sup>9</sup> Without the limitations on liability provided by the DMCA's safe harbors, the legal exposure for a service provider relying upon vast numbers of users freely exchanging content with one another would be entirely unmanageable;<sup>10</sup> a business built on such a foundation could hardly have attracted financing in any rational marketplace, given the astronomical scope of the potential liability.

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<sup>9</sup> See S. REP. NO. 105-190, at 36 (1998) (noting that the "liability of online service providers and Internet access providers for copyright infringements that take place in the online environment has been a controversial issue," and that Title II of the DMCA was designed to "provide[ ] greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities").

<sup>10</sup> A copyright holder is entitled to "an award of statutory damages for all infringements . . . [of] any one work, . . . in a sum of not less than \$750 or more than \$30,000 as the court considers just," which can be increased at the court's discretion to \$150,000 in cases involving "willful infringement." See 17 U.S.C. § 504(c)(1), (2). At the scale and volume at which YouTube and many other user-generated content websites are operating, *see supra* note 8, the potential infringement liability for even a day's worth of activity can mount into the millions or billions of dollars.

At the same time, the DMCA safe harbors provide copyright holders with a direct, efficient, and effective remedy against infringing conduct on the massive scale made possible by participatory media platforms. Through the notice-and-takedown procedures set forth in § 512(c), hundreds of thousands, or perhaps millions, of infringing works have been quickly removed from circulation on the Internet through a process that avoids costly and time-consuming adjudication while simultaneously providing due consideration of the interests of all parties involved.<sup>11</sup>

This is, we believe, a significant and substantial legislative achievement. There may be no better illustration of the manner in which the Copyright Act can satisfy the constitutional command to “promote the Progress of Science”<sup>12</sup>—

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<sup>11</sup> See *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 524 (S.D.N.Y. 2010) (noting that “the present case shows that the DMCA notification regime works efficiently: when Viacom over a period of months accumulated some 100,000 videos and then sent one mass take-down notice on February 2, 2007, by the next business day YouTube had removed virtually all of them”). While it is impossible to accurately ascertain the total number of successful § 512(c) takedown notices that have been issued since enactment of the DMCA, Google Inc., the operator of several popular user-generated content sites (including Appellees’), has estimated that it disabled access to approximately three million URLs during 2010. See Google Comments.

<sup>12</sup> U.S. Const. art. I, § 8, cl. 8.

serving the “ultimate aim [of] . . . stimulat[ing] artistic creativity for the general public good”<sup>13</sup>—than the balance that Congress struck in Title II of the DMCA.

Appellants and their *amici* put forward several arguments directed to questions regarding the scope of the § 512(c) safe harbor that are contrary to both the letter and the spirit of the DMCA. In the aggregate, these arguments threaten to distort the DMCA’s careful balance through a combination of inappropriately restrictive interpretations of the statute’s protections for service providers and inappropriately broad interpretations of the preconditions for obtaining those protections.

## **II. The District Court Correctly Rejected Appellants’ Attempts to Invoke the “Red Flag” Exception on the Basis of Defendants’ Generalized Knowledge of Infringement**

The heart of the disagreement in this case involves the meaning of the so-called “red flag” provision in § 512(c) regarding a service provider’s “aware[ness] of facts or circumstances from which infringing activity is apparent.”<sup>14</sup> There is, as the district court noted, no serious question that YouTube was “generally aware” of infringing activity on its site.<sup>15</sup> The “critical question” in the case is whether such “general awareness that there are infringements” is sufficient to trigger the

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<sup>13</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

<sup>14</sup> 17 U.S.C. § 512(c)(1)(A)(ii).

<sup>15</sup> *See Viacom*, 718 F. Supp. 2d at 518.

statutory red flag, or, alternatively, whether a service provider must have “knowledge of *specific and identifiable infringements* of individual items.”<sup>16</sup> The court—correctly, in our view—held the latter.<sup>17</sup>

Careful analysis of the statutory text and structure strongly supports the district court’s holding that item- and location-specific knowledge are required for a service provider to be “aware of facts and circumstances from which infringing activity is apparent.”<sup>18</sup> The “red flag” language in § 512(c)(1)(A)(ii) does not, as Appellants and their *amici* would have it, either *create liability* for service providers that become aware of facts and circumstances from which infringing activity is apparent,<sup>19</sup> or make such service providers *ineligible for the statutory safe harbor*.<sup>20</sup> Instead, it says simply that *if* a service provider becomes aware of

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<sup>16</sup> *Id.* at 519 (emphasis added).

<sup>17</sup> *Id.* at 523.

<sup>18</sup> 17 U.S.C. § 512(c)(1)(A)(ii).

<sup>19</sup> *See, e.g.*, Brief of *Amici Curiae* Intellectual Property Law Professors in Support of Plaintiffs-Appellants and Urging Reversal (Boyden et al.) at 22 (arguing that “even general knowledge might suffice to create liability for a reasonable ISP”).

<sup>20</sup> *See id.* at 17 (“The ‘red flags’ provision therefore *removes ISP immunity under Section 512(c)* when the ISP is aware of facts or circumstances from which a reasonable person would conclude that infringing activity is occurring.”) (emphasis added); Brief for Plaintiffs-Appellants (The Football Association Premier League Limited et al.) (Redacted Public Version) at 31 (arguing that § 512(c)(1)(A)(i) and (ii) “confirm that Congress *rendered disqualifying* a service provider’s ‘knowledge’ or ‘aware[ness]’ of ‘infringing activity’ on a website . . . Congress *denied immunity* where ‘infringing activity would have been apparent to a

facts or circumstances from which infringing activity is apparent, it remains eligible for the safe harbor, provided that “upon obtaining such . . . awareness, *[it] acts expeditiously to remove, or disable access to, the [infringing] material.*”<sup>21</sup>

Awareness of apparent infringing activity, like “actual knowledge” of infringing activity, triggers a duty: A service provider wishing to invoke the safe harbor in either circumstance must “expeditiously remove, or disable access to,” the infringing content.

“Generalized knowledge” of infringing activity cannot constitute a red flag under § 512(c)(1)(A)(ii), because if it did the statute would be asking the impossible. A service provider cannot “remove or disable access to the [infringing] material” when it has only *generalized* knowledge that such material exists somewhere among the possibly hundreds of thousands, or millions, of files

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reasonable person operating under the same or similar circumstances”) (emphases added); *id.* at 36 (“Congress’s intent that red flag knowledge *would disqualify service providers from the safe harbor* is incompatible with the court’s ‘item-specific’ requirement.”) (emphasis added); Brief of *Amici Curiae* Intellectual Property Law Professors in Support of Plaintiffs-Appellants and Urging Reversal (Boyden et al.) at 15 (“Under Section 512(c)(1)(A)(ii), an ISP *loses its immunity* if it is ‘aware of facts or circumstances from which infringing activity is apparent.’”) (emphasis added).

<sup>21</sup> 17 U.S.C. § 512(c)(1)(A)(iii) (emphasis added).

stored on its system.<sup>22</sup> The service provider’s only recourse, in such circumstances, would presumably be to shut its entire system down—precisely the outcome that Congress sought to avoid by crafting a mechanism in § 512 by means of which service providers could continue to operate and thrive in spite of their users’ infringing propensities.

Recognizing the incongruity of interpreting the statute to impose an impossible condition on a service provider’s invocation of the safe harbor, Appellants’ *amici* argue that the “red flag” imposes a different duty on service providers: to use available filtering technology in order to invoke the safe harbor.<sup>23</sup>

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<sup>22</sup> *Accord Viacom*, 718 F. Supp. 2d at 524 (a “statistical estimate of the chance any particular posting is infringing . . . is not a ‘red flag’ marking any particular work”); *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1108 (C.D. Cal. 2009) (holding that “if investigation of ‘facts and circumstances’ is required to identify material as infringing, then those facts and circumstances are not ‘red flags’”); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1108-09 (W.D. Wash. 2004).

<sup>23</sup> *See* Brief of *Amici Curiae* Intellectual Property Law Professors in Support of Plaintiffs-Appellants and Urging Reversal (Boyden et al.) at 7 (“[G]iven the improved accuracy and efficacy of filters and other technological tools, it is now possible that an ISP might know something less than the specific address of an infringing file, and yet still be able to easily and precisely remove infringing content. *The ‘red flags’ test should remove immunity from those ISPs that refuse to take action in such circumstances.*”) (emphasis added); *see also* Opening Brief for Plaintiffs-Appellants (Viacom et al.) at 31 (“Only website owners have the ability to deploy automatic filters and to identify and block clips as they are

This suggestion, however, flies in the face of Congress’s very clear and very specific limitations on the affirmative actions service providers are required to take to qualify for safe harbor. Section § 512(m) expressly provides that

*nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on . . . a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of [§ 512(i)].*<sup>24</sup>

The only stated exception to this “no-obligation-to-monitor” principle refers to the service provider’s obligation under § 512(i) to “accommodate” and to “not interfere” with “standard technical measures,”<sup>25</sup> defined as “technical measures that are *used by copyright owners* to identify or protect copyrighted works”<sup>26</sup> that

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loaded.”); *id.* at 45 (“[M]ost tellingly, YouTube had the ability to forestall virtually all infringing activity during the upload process through the use of commercially available fingerprint filtering technology . . .”). We strongly disagree with both the legal argument that § 512(c) imposes a duty on service providers to deploy any such fingerprint filtering technology and, *see infra* at 16, with the factual assertion that the “improved accuracy and efficacy of filters and other technological tools” allow service providers to “easily and precisely remove infringing content” without item- or location-specific information.

<sup>24</sup> 17 U.S.C. § 512(m).

<sup>25</sup> *Id.* § 512(i)(1)(B).

<sup>26</sup> *Id.* § 512(i)(2) (emphasis added).

“do not impose substantial costs on service providers or substantial burdens on their systems or networks.”<sup>27</sup>

Appellants’ suggestion that § 512(c) somehow obligates service providers to implement and deploy matching or filtering technology to detect infringing activity is directly contrary to the express terms of § 512(i) and (m). Read together, § 512(m) and § 512(i) clearly establish that Congress intended for the burden of actively monitoring online services for infringing content to fall on the holders of the rights in that content—not on service providers. The statute contemplates an Internet on which *copyright holders* develop and deploy protective technical measures, which service providers must “accommodate” if they wish to invoke § 512(c) or any other DMCA safe harbor.<sup>28</sup> Service providers are not required to deploy any particular technical measures *of their own*, nor are they required to

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<sup>27</sup> *Id.* § 512(i)(2)(C).

<sup>28</sup> The overall structure of the DMCA also reflects this congressional plan. Title I of the DMCA (the “WIPO Treaties Implementation Act”) contains a number of provisions, now codified at 17 U.S.C. §§ 1201 and 1202, to assist *copyright holders* in deploying technical protective measures, making it unlawful both to “circumvent a technological measure that effectively controls access to a work protected under this title,” and to “traffic in” devices primarily designed to enable such circumvention. 17 U.S.C. § 1201(a). Title II built upon this foundation; if and when such technologies were deployed by copyright holders, Title II gave service providers substantial incentives not to interfere with or disrupt the effective function of these tools.

make “discriminating judgments about potential copyright infringement,”<sup>29</sup> in order to qualify for any of the safe harbors. The enforcement role that Congress established for service providers seeking safe harbor under the DMCA was deliberately limited so as not to overburden providers with operational responsibilities collateral to those entailed in the operation of their services. The DMCA safe harbors and the complementary provisions of § 512 establish a coherent statutory framework pursuant to which primary responsibility for enforcing copyrights online resides with copyright holders.<sup>30</sup>

The district court’s holding is consistent not only with the express language of the statute, but also with the internal structure of § 512(c), whose interlocking provisions make consistent reference to *copyright holders’* identification and location of specific infringing content. Even after receiving notification of infringement from the copyright holder, a service provider can still invoke the safe

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<sup>29</sup> H.R. REP. NO. 105-551 (II), at 58 (1998).

<sup>30</sup> *Accord Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007) (“The DMCA notification procedures place the burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of the copyright. We decline to shift a substantial burden from the copyright owner to the provider; . . . .”); *Perfect 10, Inc. v. Google, Inc.*, No. 94-0484, 2010 U.S. Dist. LEXIS 75071, at \*12 (C.D. Cal. July 26, 2010); *UMG Recordings, Inc.*, 665 F. Supp. 2d at 1108; *Corbis Corp.*, 351 F. Supp. 2d at 1101 (service providers “need not make difficult judgments as to whether conduct is or is not infringing”) (internal quotation marks and citation omitted).

harbor *without* having removed or disabled access to the infringing content, if the notification “fails to comply substantially”<sup>31</sup> with the requirements set forth in § 512(c)(3)(A), requirements that include “[i]dentification of the copyrighted work claimed to have been infringed,”<sup>32</sup> “[i]dentification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled,”<sup>33</sup> and “information reasonably sufficient to permit the service provider to locate the material.”<sup>34</sup> Any notice that does not provide this item-specific and location-specific information “shall not be considered . . . in determining whether a service provider . . . is aware of facts or circumstances from which infringing activity is apparent.”<sup>35</sup> It would be curious indeed for Congress to have permitted service providers to invoke the safe harbor even after they had been notified of the existence of infringing material on their system (when the notice failed to provide precise item- and location-specific information) while simultaneously denying them safe harbor when they had merely “generalized knowledge of infringing activity.”

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<sup>31</sup> 17 U.S.C. § 512(c)(3)(B)(i).

<sup>32</sup> *Id.* § 512(c)(3)(A)(ii).

<sup>33</sup> *Id.* § 512(c)(3)(A)(iii).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* § 512(c)(3)(B)(i).

Finally, § 512 implements an intricate scheme for protecting *users' rights in their own expression* that would be disrupted and overturned by Appellants' problematically expansive reading of the "red flag" provision. In particular, § 512(f) and (g) highlight Congress's deep concerns about the implications of the notice-and-takedown system for ordinary Internet users, who could easily find themselves caught between overly assertive copyright holders on the one hand and overly risk-averse service providers on the other.

Section 512(g) protects service providers against claims arising from their "good faith disabling of access to, or removal of, material or activity claimed to be infringing."<sup>36</sup> In the case of removals pursuant to the notice-and-takedown procedures, this protection applies *only* if the service provider has both provided notice of the removal to the users responsible for posting the material<sup>37</sup> and afforded those users an opportunity to provide a "counter notification" stating their "good faith belief that the material was removed or disabled as a result of mistake or misidentification."<sup>38</sup> If the service provider receives such a counter notification, it can invoke the safe harbor only if it (a) "promptly provides . . . a copy of the

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<sup>36</sup> *Id.* § 512(g)(1).

<sup>37</sup> *Id.* § 512(g)(2)(A).

<sup>38</sup> *Id.* § 512(g)(3)(C).

counter notification” to “the person who provided the [takedown] notification”<sup>39</sup> (i.e., the copyright holder who initiated the takedown), and (b) “replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice,”<sup>40</sup> unless, in that intervening period, the copyright holder has informed the service provider that it has “filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider’s system or network.”<sup>41</sup> Finally, § 512(g) provides that service providers that *replace* infringing material in compliance with the counter notice are, like those that *remove* infringing material in compliance with the original takedown notice, not liable for any claims arising from that action.<sup>42</sup>

Section 512(f), for its part, helps to ensure that all of the information being provided as part of this complex notice-and-counter-notice scheme is accurate and reliable. It imposes liability on anyone who “knowingly materially misrepresents . . . that material or activity is infringing” (in the copyright holder’s takedown

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<sup>39</sup> *Id.* § 512(g)(2)(B).

<sup>40</sup> *Id.* § 512(g)(2)(C).

<sup>41</sup> *Id.*

<sup>42</sup> *See id.* § 512(g)(4) ( a service provider’s compliance with the notification and counter-notification procedures set forth in § 512(g)(2) “shall not subject the service provider to liability for copyright infringement with respect to the material identified in the [takedown] notice provided under [§ 512(c)(1)(C)]”).

notice) or that “material or activity was removed or disabled by mistake or misidentification” (in the user’s counter notice).<sup>43</sup>

The scheme is carefully wrought and finely balanced. It contemplates a world in which copyright holders initiate infringement remediation through § 512(c)(1)(C) takedown notices, knowing that they will be responsible for any material misrepresentations contained therein.<sup>44</sup> Service providers, relying on the information provided in the takedown notice, may remove the identified material and inform the users responsible for uploading the material that they have done so. If the service provider receives a counter notice from a user (who is likewise subject to the § 512(f) prohibition on material misrepresentations) informing the service provider that the user has a good faith belief that the material is *not* infringing, the service provider replaces the material in question and informs the copyright holder that it has done so. If the copyright holder chooses to file suit to protect its rights, the service provider will, once again, remove the disputed material.

The goal Congress was pursuing in § 512(f) and (g) is clear: Infringing material should be rapidly and permanently removed, but *non*-infringing material

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<sup>43</sup> *Id.* § 512(f) .

<sup>44</sup> *See Lenz v. Universal Music Grp.*, 572 F. Supp. 2d 1150, 1154-55 (N.D. Cal. 2008).

should remain available and accessible. Users and copyright holders are charged with acting in good faith in declaring works to be in one category or the other. If service providers respond to notices and counter notices within the parameters laid out by the statute, they are effectively insulated from having to adjudicate what are, in the end, disputes between copyright holders and users. By carrying out their duties, service providers can be assured of protection against claims that they are infringing copyright (when they replace material that has been removed) and against claims that they are violating the contractual rights of their users (when they remove material at the direction of copyright holders).

Appellants' attempt to introduce a novel form of "red flag infringement liability" into this scheme for protecting users' rights is disruptive and destructive to Congress's purposes. This intricately fashioned notice-and-counter-notice system is predicated on and presupposes the identification by copyright holders of specific infringing content on the service provider's system. If service providers remove material based on only their "general awareness" that material on their system is infringing, nothing requires them to inform the affected users that they have done so, and those users will have no practical or legal recourse when risk-averse service providers err on the side of over-removal. Without notice, counter notice, and counter-counter notice forming the basis for service providers' actions

with respect to the removal of user-uploaded content, the well-wrought protections that Congress provided for users against possible overreaching by copyright holders would be rendered entirely ineffective.

### **III. The District Court’s Decision Below Is Fully Consistent with the Principle That the “Least Cost Avoider” Should Be Responsible for Mitigating Infringement**

Appellants’ *amici* assert that their overbroad interpretation of the “red flag” provision is sound policy inasmuch as it imposes infringement liability on service providers in those circumstances in which the service providers are the “least cost avoiders,” or the “most efficient risk bearers,” with respect to copyright infringing activity on their sites.<sup>45</sup>

This principle of “efficient harm avoidance,” they assert, supports the denial of the statutory safe harbor in this case: “ISPs often will be the least cost avoiders for preventing or limiting harm from copyright infringement over the Internet,”<sup>46</sup> and “[t]he undisputed facts in this case make clear that YouTube (and its new owner, Google)—not individual copyright owners—were in the best position to avoid or limit harm from massive copyright infringements and to meet the

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<sup>45</sup> See Brief of *Amici Curiae* Stuart N. Brotman, Ronald A. Cass, and Raymond T. Nimmer in Support of Plaintiffs-Appellants at 3.

<sup>46</sup> *Id.* at 13.

requisites for liability. Indeed, YouTube was *uniquely* positioned to limit harm from infringement.”<sup>47</sup>

Appellants’ claim that service providers are, in general, better positioned than copyright holders when it comes to enforcing copyrights online is demonstrably false; copyright holders, and only copyright holders, have access to critical information about whether any particular use of their copyright-protected material is infringing. This is precisely why Congress constructed the notice-and-takedown system as carefully as it did. It is the copyright holder, not the service provider, who is “uniquely positioned” to determine whether infringement is taking place, and it is therefore the copyright holder, not the service provider, who is uniquely positioned to identify and limit the harm from infringement.<sup>48</sup>

To see why this is so, consider first the ease with which copyright attaches to works of authorship under the Copyright Act. The instant that “original works of authorship” are “fixed in any tangible medium of expression,” copyright “subsists” in them.<sup>49</sup> Nothing other than fixation is required for copyright protection to attach

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<sup>47</sup> *Id.* at 18.

<sup>48</sup> *Cf. Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 98-107 (2d Cir.) (rejecting attempt by *trademark* owners to impose liability on service providers based on their “generalized knowledge” of infringements), *cert. denied*, 131 S. Ct. 647 (2010).

<sup>49</sup> 17 U.S.C. § 102(a).

to an original work; there is no requirement that the author register the copyright or provide notice of copyright on publicly distributed copies of the work.<sup>50</sup>

Originality, in turn, means “little more than a prohibition of actual copying,”<sup>51</sup> requiring only “independent creation plus a modicum of creativity.”<sup>52</sup>

As a consequence of this generous standard, the vast majority of the millions of user-uploaded videos at a site like YouTube are copyright-protected works. Indeed, YouTube’s admission (as quoted in Appellants’ brief)<sup>53</sup> that over 70% of the most-viewed videos on YouTube “has copyrighted material” is almost certainly *too low*; with the exception of video clips of works that have fallen into the public domain through the passage of time and the expiration of their copyrights, *virtually every video posted to YouTube*—every home video of performing cats or singing children or dancing college students, every rock band performance, every clip of Lionel Messi’s latest exploits on the soccer field, every clip of portions of yesterday’s “Daily Show with Jon Stewart”—contains copyright-protected expression.

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<sup>50</sup> See 17 U.S.C. § 302(a) (“Copyright in a work created on or after January 1, 1978, subsists from its creation . . . .”); *id.* § 101 (“A work is ‘created’ when it is fixed in a copy or phonorecord for the first time; . . . .”).

<sup>51</sup> *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 103 (2d Cir. 1951).

<sup>52</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

<sup>53</sup> See Opening Brief for Plaintiffs-Appellants (Viacom et al.) at 23-24.

At the same time, of course, a substantial portion of that material is not *infringing*, for the simple reason that its use has been authorized by the copyright holder(s). This is the case not only for the immense quantity of “amateur content” posted to YouTube<sup>54</sup>—where the creator of the video is likely to be both the holder of the copyright in the work and the person responsible for its distribution on YouTube—but for much of the commercially developed content available on YouTube as well. As this case amply demonstrates, many motion picture studios, record labels, television production companies, cable programming providers, and the like upload large quantities of their own copyright-protected content onto YouTube for promotional or other purposes.<sup>55</sup> One of the plaintiffs in this very action (Viacom), in fact, so actively uploaded (through its marketing department) copyright-protected content to YouTube that (a) its own legal department sent numerous takedown notices to YouTube demanding removal of the ostensibly infringing content, (b) its account privileges were suspended by YouTube on the

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<sup>54</sup> Appellants acknowledge that most *author-posted* content on YouTube is not infringing. See Opening Brief for Plaintiffs-Appellants (Viacom et al.) at 56 (describing the “perfectly legal” event that occurs “when a user uploads videos he or she created”).

<sup>55</sup> See YouTube’s Memorandum of Law in Support of Defendant’s Motion for Summary Judgment at 39-44 (describing the enormous quantity of content uploaded to YouTube by commercial content providers, including many of the plaintiffs in this action, as part of their marketing efforts).

grounds that it was a “repeat infringer,” and (c) it was forced—twice—to amend its Complaint in this action to remove from the list of allegedly infringing user uploads references to works that *it* had uploaded.<sup>56</sup>

Appellants argue that this is of “no moment,” because “YouTube indisputably was aware that *most* of Viacom’s works on YouTube were infringing.”<sup>57</sup> But that is incorrect; it is of great moment, because it so perfectly illustrates the inefficiency of the scheme Appellants are proposing, and because it so clearly demonstrates how service providers are *not* the “least cost avoiders” when it comes to detecting infringement. Even assuming *arguendo* that YouTube was aware that “most of Viacom’s works on YouTube were infringing,” YouTube could not possibly determine *which uses of which works* were infringing and which were not, because it did not have, and could not obtain without an investigation that is virtually impossible under the circumstances (and one that is expressly *not* required by the DMCA),<sup>58</sup> the information necessary to determine whether or not

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<sup>56</sup> *See id.* at 42 (referring to Viacom’s takedown notices identifying content that Viacom itself had uploaded); *see also* “Notice of Dismissal of Specified Clips With Prejudice” (Case No. 1:07-CV-02103-LLS, Feb. 26, 2010) (referring to the hundreds of video clips that Viacom had initially identified as “infringing” but which were subsequently withdrawn from the list of works in suit).

<sup>57</sup> Opening Brief for Plaintiffs-Appellants (Viacom et al.) at 25 n.2 (emphasis added).

<sup>58</sup> *See* 17 U.S.C. § 512(m).

the copyright holder had authorized any particular use. It is the copyright holder, and only the copyright holder—i.e., Viacom—who has this information, or can obtain it at reasonable cost,<sup>59</sup> and it is therefore the copyright holder, not the service provider, who is “*uniquely* positioned to limit harm from infringement.”<sup>60</sup>

Furthermore, many *unauthorized* uses of copyright-protected works are also not infringing, because they are covered by one or more of the exceptions or defenses provided in the Copyright Act, most notably the defense that the user is making “fair use” of the protected expression.<sup>61</sup> The fair use inquiry is notoriously fact- and context-dependent,<sup>62</sup> and here again it is the copyright holder, not the

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<sup>59</sup> The notion that YouTube is the “least cost avoider” here because it can somehow readily distinguish between authorized and unauthorized uses of Viacom’s copyright-protected content is manifestly absurd given that Viacom itself, *see supra* note 56, had such substantial difficulties doing so.

<sup>60</sup> However effective various filtering and matching technologies may be at identifying the presence of identical copies of specific works, these technologies *cannot* determine whether any particular use of a copyright-protected work has, or has not been, authorized by the copyright holder, or whether it is covered by some other defense (e.g., fair use).

<sup>61</sup> The Register of Copyrights noted in a recent rulemaking proceeding the extent to which many videos posted to video-sharing sites (like YouTube) are “likely to qualify as non-infringing uses under established judicial precedents.” Recommendation of the Register of Copyrights, Rulemaking 2008-8 “Exemptions from Prohibition on Circumvention of Copyright Protection Systems” at 52 n.180-82 (June 11, 2010).

<sup>62</sup> *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985); *Sony Corp. of*

service provider, who possesses (or can obtain) the facts necessary to make the determination of whether the use is or is not infringing. The fair use doctrine requires an assessment, inter alia, of both “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,”<sup>63</sup> and the “effect of the use upon the potential market for or value of the copyrighted work.”<sup>64</sup> As to the former, the service provider does not possess, and cannot reasonably be expected to obtain, any information whatsoever about the “copyrighted work as a whole” from which any particular use may have been excerpted, and therefore cannot determine how large (or small) a portion of that work has been used in any specific case. Such information is obviously more readily available to the copyright holder(s) involved. As to the latter, the complex and subtle analysis of existing and potential markets for the copyright-protected works involved, including consideration of both “traditional” and “likely to be developed” market(s) for licensed derivatives,<sup>65</sup> again requires item-specific information that

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*Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447 (1984); *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1258 (2d Cir. 1986).

<sup>63</sup> 17 U.S.C. § 107(3).

<sup>64</sup> *Id.* § 107(4).

<sup>65</sup> *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 926, 930 (2d Cir. 1994) (requiring analysis of “impact [of defendant’s use] on potential licensing revenues for traditional, reasonable, or likely to be developed markets”); see *Campbell*, 510 U.S. at 590, 591-93 (fair use inquiry “must take account not only of harm to the

the service provider does not have and cannot reasonably be expected to obtain for each of the copyright-protected works involved.

Given this information imbalance, it is clearly the copyright holder who is in a far better position than the service provider to determine whether any particular use of a specific copyright-protected work is infringing, non-infringing because authorized, or non-infringing because it is a “fair use” of the underlying work. In light of both the sheer quantity of copyright-protected material at issue and the impossibility, from the service providers’ standpoint, of determining which uploads infringe and which do not, the argument that service providers are the “least cost avoiders” of infringement in regard to material that users upload to services like YouTube is unsustainable. In the district court’s words:

“The DMCA notification procedures place the burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of copyright. . . .” That makes sense, as the infringing works in suit may be a small portion of millions of works posted by others on the service’s platform, whose provider cannot by inspection determine whether the use has been licensed by the [copyright] owner, or whether

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original but also of harm to the market for derivative works,” which includes those markets that “creators of original works would in general develop or license others to develop”).

its posting is a “fair use” of the material, or even whether its copyright owner or licensee objects to its posting.<sup>66</sup>

Moreover, even if it were not the case that service providers are significantly less well-situated than copyright holders to bear the costs of online copyright enforcement, Congress spoke directly to the cost allocation question when it enacted the DMCA: § 512(m) expressly requires that § 512 *not* be interpreted to condition safe harbor for service providers on their assuming the costs of “monitoring . . . or affirmatively seeking facts indicating infringing activity.”<sup>67</sup> If Appellants gainsay the wisdom of that cost allocation, their “least cost avoider” argument should be directed to Congress, not the courts.

### CONCLUSION

Appellants in this case advocate an interpretation of the safe harbor provision in § 512(c) of the DMCA that would eviscerate the protections Congress afforded both to Internet service providers that store material at the direction of their users and those users themselves. Appellants’ self-serving reading of the statute distorts its text, structure, and legislative history in an effort to readjust the balance of competing interests that Congress so clearly and carefully struck when it enacted the statute more than a decade ago (and which courts have effectively

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<sup>66</sup> *Viacom*, 718 F. Supp. 2d at 523-24 (citation omitted).

<sup>67</sup> 17 U.S.C. § 512(m).

implemented in the years since the statute's enactment). If Appellants' distorted reading of the DMCA prevails, tomorrow's Internet will almost assuredly be less innovative, less dynamic, and less participatory than today's, as developers of new, user-driven services and applications—and the people who invest in them—reassess the risks and costs of doing business online.

DATED: April 7, 2011

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## CERTIFICATE OF COMPLIANCE

The undersigned counsel for *amici curiae* Intellectual Property and Internet Law Professors certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,794 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman font.

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**CERTIFICATE OF SERVICE**

**When All Case Participants Are Registered for the  
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I hereby certify that on this 7th day of April, 2011, a true and correct copy of the foregoing BRIEF OF AMICI CURIAE INTELLECTUAL PROPERTY AND INTERNET LAW PROFESSORS IN SUPPORT OF DEFENDANTS- APPELLEES AND URGING AFFIRMANCE was served on all counsel of record in this appeal via CM/ECF pursuant to Second Circuit Rule 25.1(h)(1)-(2).

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