CASE NO. 09-56777

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UMG RECORDINGS, INC.; UNIVERSAL MUSIC CORP.; SONGS OF UNIVERSAL, INC.; UNIVERSAL-POLYGRAM INTERNATIONAL PUBLISHING, INC.; RONDOR MUSIC INTERNATIONAL, INC.; UNIVERSAL MUSIC-MGB NA LLC; UNIVERSAL MUSIC- Z TUNES LLC; UNIVERSAL MUSIC –MGB MUSIC PUBLISHING LTD.,

PLAINTIFFS-APPELLANTS,

v.

VEOH NETWORKS, INC.

DEFENDANTS-APPELLEES.

On Appeal From The United States District Court
For The Central District of California, Western Division – Los Angeles
District Court Case No. 07-5744
Honorable A. Howard Matz, District Judge

BRIEF OF AMICI CURIAE ELECTRONIC FRONTIER FOUNDATION, INTERNET ARCHIVE, AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF RESEARCH LIBRARIES, ASSOCIATION OF COLLEGE AND RESEARCH LIBRARIES, COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION, PUBLIC KNOWLEDGE, CENTER FOR DEMOCRACY AND TECHNOLOGY AND NETCOALITION IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amici Curiae the Electronic Frontier Foundation, the Internet Archive, the American Library Association (which includes the Association of College and Research Libraries), the Association of Research Libraries, the Computer and Communications Industry Association, Public Knowledge, Center for Democracy and Technology and NetCoalition (collectively, "*amici*") state that none of *amici* have a parent corporation and that no publicly held corporation owns 10% or more of the stock of any of *amici*.

STATEMENTS OF INTEREST

Amici submit this brief pursuant to FED. R. APP. P. 29(a) and (b), and the accompanying motion for leave to file this brief *amicus curiae*.

The Electronic Frontier Foundation ("EFF") is a nonprofit civil liberties organization that has worked for over twenty years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 14,000 dues-paying members have a strong interest in helping the courts and policy-makers ensure that copyright law serves public interest.

The Internet Archive is a 501(c)(3) non-profit founded in 1996 to build an Internet library. Its purposes include offering permanent access for researchers, historians, scholars, people with disabilities, and the general public to historical collections that exist in digital format. The Archive's collections include digital audio, video, software and texts contributed by individuals, including more than 200,000 digital audio recordings and 60,000 live concert recordings. Accordingly, the Archive has a direct interest in the proper application of copyright law to Internet intermediaries.

The American Library Association ("ALA"), established in 1876, is a nonprofit professional organization of more than 65,000 librarians, library trustees, and other friends of libraries dedicated to providing and improving library services and promoting the public interest in a free and open information society.

The Association of College and Research Libraries ("ACRL"), the largest division of the ALA, is a professional association of academic and research librarians and other interested individuals. It is dedicated to enhancing the ability of academic library and information professionals to serve the information needs of the higher education community and to improve learning, teaching, and research.

The Association of Research Libraries ("ARL") is a nonprofit organization of 125 research libraries in North America. ARL's members include university libraries, public libraries, and government and national libraries. ARL influences the changing environment of scholarly communication and the public policies that affect research libraries and the diverse communities they serve.

The Computer & Communications Industry Association ("CCIA") is a non-profit trade association dedicated to open markets, open systems and open networks. CCIA represents companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. More information on CCIA members is available online at http://www.ccianet.org/members.

Public Knowledge is a non-profit public interest organization devoted to protecting citizens' rights in the emerging digital information culture and focused on the intersection of intellectual property and technology. Public Knowledge seeks to guard the rights of consumers, innovators, and creators at all layers of our culture through legislative, administrative, grassroots, and legal efforts, including regular participation in copyright and other intellectual property cases that threaten consumers, trade, and innovation.

The Center for Democracy & Technology ("CDT") is a nonprofit public interest group that seeks to promote free expression, privacy, individual liberty, and technological innovation on the open, decentralized Internet. CDT advocates balanced copyright policies that provide appropriate protections to creators without curtailing the openness and innovation that have been vital to realizing the democratizing potential of new digital media.

NetCoalition is an industry association that serves as the public policy voice for some of the world's most innovative Internet companies on legislative and administrative proposals affecting the online realm. NetCoalition's members include Amazon.com, Bloomberg LP, eBay, IAC, Google, Wikipedia, and Yahoo!.

INTRODUCTION

Over the last decade, the Internet has grown into an extraordinary platform for free speech and creative expression. Never before have so many citizens been able to reach an audience across so many mediums at such low cost. All of this activity depends upon a thriving marketplace of innovative online service providers—including both nonprofits like Wikipedia and the Internet Archive and commercial ventures like Veoh, YouTube, MySpace, Facebook, Blogger, and Flickr—providing inexpensive (or free) public platforms for expression. Because changes to the legal climate for these service providers can have profound consequences for free expression online, proper interpretation of copyright laws as applied to online service providers is a matter of crucial public interest.

Appellants here (collectively "UMG") assert that "this case poses the question of whether different rules apply in the internet realm." Appellant's Brief at 4, *UMG Recordings, Inc. v. Veoh Networks, Inc.*, No. 09-56777 (9th Cir. June 17, 2010) [hereinafter "UMG Br."]. The answer, simply put, is yes. Congress deliberately created "different rules" for online service providers in Title II of the Digital Millennium Copyright Act ("DMCA"), codified in § 512 of the Copyright Act.[1] In order to stimulate the growth of the Internet and electronic commerce, Congress created a set of statutory "safe harbors" that helped service providers predict and manage their legal exposure to copyright infringement liability. This effort proved to be a huge success, encouraging not only the growth of the Internet generally, but the growth of innovative platforms for free expression in particular.

In this appeal, UMG and its supporting *amici* attempt to thwart Congress's intent and turn back the clock on the DMCA. They seek to reinstate a climate of

[1] All statutory references are to Title 17 of the United States Code unless otherwise noted.

legal uncertainty that would harm both innovative online services and the free expression they foster. In effect, UMG seeks to re-write the § 512(c) safe harbor so as to (1) exclude virtually every online service provider that hosts material on behalf of Internet users and makes it accessible; (2) replace § 512(c)'s detailed "notice-and-takedown" regime with courtroom battles over general knowledge of infringements; and (3) eliminate the safe harbors with respect to vicarious liability.

Endorsement of UMG's views by any court would gravely threaten the profusion of online services that have benefited the public. Moreover, UMG's radical reinterpretation of § 512 is not necessary to protect the interests of copyright owners. The "notice-and-takedown" regime created by § 512 has given copyright owners a streamlined process for removing infringing content, while also encouraging voluntary cooperation between content owners and service providers to police infringement.

In the interests of protecting the free expression of the millions of Internet users who are *not* committing copyright infringement, *amici* urge the Court to affirm the district court ruling and reject UMG's effort to undermine the § 512(c) safe harbor.

ARGUMENT

I. Congress Intended Section 512 to Reduce Legal Uncertainty for Service Providers

A. Congress's Intent Generally

Congress intended the DMCA to "facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education . . . ." S. REP. NO. 105-190, at 1-2 (1998).[2] "[B]y

[2] Much of the DMCA's legislative history has been compiled by the Home Recording Rights Coalition at http://hrrc.org/index.php?id=20&subid=3 (last visited July 21, 2010).

limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand." *Id.* at 8.

In order to accomplish these goals, Congress created a set of "safe harbors" designed to "provide '*greater certainty* to service providers concerning their legal exposure for infringements that may occur in the course of their activities.'" *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (*quoting* S. REP. NO. 105-190, at 20 (1998)) (emphasis added). Congress focused on creating a more predictable legal environment because it recognized that:

> [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. In the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability. For example, service providers must make innumerable electronic copies by simply transmitting information over the Internet. Certain electronic copies are made to speed up the delivery of information to users. Other electronic copies are made in order to host World Wide Web sites. Many service providers engage in directing users to sites in response to inquiries by users or they volunteer sites that users may find attractive. Some of these sites might contain infringing material. In short, by limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.

S. REP. NO. 105-190, at 8.

Thus, Congress correctly understood that the application of ambiguous copyright doctrines to new Internet technologies would put service providers in an impossible position. Service providers necessarily must make, manipulate, and transmit multiple copies of content at several stages of their technical processes. These multiple copies might arguably infringe one or more of the display, performance, distribution, reproduction, or other rights in copyrighted content.

During the Senate hearings preceding the DMCA, Roy Neel, President and Chief Executive of the United States Telecom Association stated the problem as follows:

> We have no way of knowing what those trillions of bits of information are flowing over our networks. We simply cannot do it, and to be held liable for those transmissions is simply nonsense and it will tie us up in court, create more litigation and more work for lawyers, but won't do anything to advance the construction and deployment of the Internet, nor will it protect copyright owners to any significant degree.

Copyright Infringement Liability of Online and Internet Service Providers: Hearing Before the Committee on the Judiciary United States Senate on S. 1146, 105th Cong. 29 (1997);[3] *see also* S. REP. NO. 105-190, at 30. In fact, by the time Congress took up the issue in 1997, online service providers had already been embroiled in copyright litigation over the activities of their users.[4] Thus, Congress enacted safe harbors for secondary liability that were "absolutely necessary to the immediate survival of ISPs." *CoStar Group Inc. v. LoopNet, Inc.*, 373 F.3d 544, 555 (4th Cir. 2004), *aff'd*, 373 F.3d 544 (4th Cir. 2004).

B. Section 512's Structure

The structure of § 512 reflects Congress's desire to provide service providers with predictable rules in place of the murky, judge-made standards that characterize copyright's secondary liability doctrines. *See* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12B.01[A][1] (2005) (describing conflicting jurisprudence prior to 1998). The statute creates four safe harbors with detailed provisions setting out "rules of the road" for service providers. If their activities fall within one of the safe harbors, service providers may "opt in" to this

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[3] Transcripts of the Sept. 4, 1997 hearings are available at: http://www.eric.ed.gov/ERICWebPortal/recordDetail?accno=ED418703.

[4] *See, e.g.*, Jeffrey R. Kuester & Daniel R. McClure, *SPA v. ISPs: Contributory Copyright Infringement in Cyberspace*, INTELLECTUAL PROPERTY TODAY, Feb. 1997, at 8 (describing lawsuits by the Software Publishers Ass'n against online service providers).

alternate, more definite, set of rules by meeting specific statutory prerequisites.[5] Thus, for example,

> Section 512 does not require use of the notice and takedown procedure. A service provider wishing to benefit from the limitation of liability under subsection (c) [must do so] . . . On the other hand, the service provider is free to refuse to "takedown" the material or site, even after receiving a notification of claimed infringement from the copyright owner; in such a situation, the service provider's liability, if any, will be decided without reference to 512(c).

S. REP. NO. 105-190, at 45. Put another way, if the service provider chooses to comply with § 512 procedures, ordinary copyright liability rules will not apply, and vice versa. The statute also clarifies the limits of a service provider's obligations—for example, by making it clear that a service provider need not monitor its service or affirmatively seek facts indicating infringing activity in order to enjoy the safe harbor. *See* 17 U.S.C. § 512 (m)(1).

In return, copyright owners were given several new remedies against infringers. The first of these is an expedited, extrajudicial "notice-and-takedown" procedure for obtaining redress against alleged infringement. § 512(c)(1)(C). Second, copyright owners were given the power to issue pre-complaint subpoenas to service providers like Veoh in order to identify and locate infringing Internet users. § 512(h).

This level of statutory detail stands in stark contrast to the ambiguous judge-made legal standards that would otherwise govern the activities of service providers. *Compare Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170-75 (9th Cir. 2007) (discussing secondary liability principles applicable to online service providers) *with Perfect 10, Inc. v. VISA Int'l Serv. Ass'n*, 494 F.3d 788,

[5] These statutory prerequisites include (1) registering a Copyright Agent,§ 512(c)(2); (2) implementing a notice-and-takedown policy, § 512(c)(1)(C); (3) accommodating standard technical measures, § 512(i)(1)(B); and (4) adopting a policy of terminating repeat infringers, § 512(i)(1)(A).

811-22 (9th Cir. 2007) (Kozinski, J., dissenting) (pointing out contradictions in secondary liability standards as applied to service providers).

Congress's desire to reduce legal uncertainty for service providers is also amply demonstrated in the legislative history—both in testimony before Congress regarding the legislation that would become the DMCA,[6] and in the legislative committee reports that accompanied the DMCA.[7]

In short, the statutory language, structure, and legislative history all indicate that Congress intended § 512 to reduce the legal uncertainty that service providers would otherwise face in order to foster the growth of the Internet.

II. Reducing Legal Uncertainties for Service Providers Is Critical to Free Expression Online.

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

> One of the things we do here is to say: "If you are an on-line service provider, if you are responsible for the production of all of this out to the public, you will not be held automatically responsible if someone

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[6] *See WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing Before the H. Subcomm. on Courts and Intellectual Property on H.R. 2281 and H.R. 2280*, 105th Cong. 123, 102 (1997) (statement of Representative Boucher about providing "stability in the law" and giving "the Internet service providers the assurances they need" to invest in the Internet).

[7] *See* H.R. REP. NO. 105-796, at 72 (1998) (Conf. Rep.) (Section 512 "provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities"); H.R. REP. NO. 105-551, Part II, at 49-50 (1998) (same); S. REP. NO. 105-190, at 20 (1998) (same); H.R. REP. NO. 105-551, Part I, at 11 (1998) ("[w]hile several judicially created doctrines currently address the question of when liability is appropriate, providers have sought greater certainty through legislation as to how these doctrines will apply in the digital environment").

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

144 CONG. REC. H7092 (daily ed. Aug. 4, 1998) (floor statement of Rep. Barney Frank);[8] *see also* 144 CONG. REC. H10618 (daily ed. Oct. 12, 1998).[9] Thus, with § 512(c), Congress enacted special copyright rules for service providers that host expressive material on behalf of their users.

Those rules have been wildly successful at accomplishing Congress's purpose. In the twelve years since Congress enacted the DMCA, the Internet has revolutionized the creation and dissemination of speech. With the help of online service providers like Wikipedia, the Internet Archive, Google, YouTube, Blogger, Twitter, Facebook, MySpace, Flickr, and many others, individuals with little technical knowledge or money can today find, create, reproduce, disseminate, and respond to content, interacting with a global audience.[10] Interactive platforms like video hosting services, bulletin boards, and social networking sites have become vital to democratic participation and the ability of Internet users to forge

[8] *Available at* http://hrrc.org/File/2281HouseDebateAug4.pdf.

[9] *Available at* http://hrrc.org/File/HR2281StearnsOct12.pdf.

[10] Contrary to the assertions of UMG's supporting *amici*, *see* Brief of Amici Curiae The Recording Industry Association of America et al., *UMG Recordings, Inc. v. Veoh Networks, Inc.*, No. 09-56777 (9th Cir. Apr. 27, 2010) [hereinafter "RIAA Br."] at 7, these online service providers are fundamentally different from "traditional broadcasting companies." Traditional broadcasters create, select and disseminate speech; Veoh gives users the tools to do those things themselves.

communities, access information, and discuss issues of public and private concern.

Without the predictability provided by § 512(c), however, the Internet would be a much less hospitable place for free expression and creativity. First, if an intermediary faces the possibility of potentially unlimited legal liability for content hosted, transmitted, or disseminated through its services by a small minority of users, it will feel compelled to scrutinize and limit all user activities. This is likely to lead to over-blocking, sacrificing lawful content in an effort to limit potential litigation.

The strong incentive to over-block can cause particular harm to free speech where, as here, intermediaries often are not able to easily determine if the content is unlawful on its face. *See generally* NIMMER, *supra*, at § 12B.04[A][1]. Because the cost to intermediaries to investigate each allegation of infringement will almost always be greater that the cost of simply removing the content, intermediaries have little financial incentive to challenge removal demands. This, in turn, will encourage abuse on the part of the governments or private litigants seeking to take down materials for censorial, rather than infringement, reasons. *See, e.g.*, *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004) ("[n]o reasonable copyright holder could have believed that the portions of the email archive discussing possible technical problems with Diebold's voting machines were protected by copyright . . . Diebold knew—and indeed it specifically intended—that its letters . . . would result in prevention of publication of that content.").

Second, if intermediaries face potentially huge legal liability for the unlawful activities of a tiny minority of users, they may simply decide that it is impossible to offer some of online services, even where those services are used predominantly for lawful purposes. For example, users post more than twenty-four hours of video to YouTube *every minute*, the vast majority of which are noninfringing and perfectly lawful.[11] If liability concerns arising from a minority of these videos compelled a service provider like YouTube or Veoh to pre-approve all user contributions, the service simply could not continue to operate as an open forum for user expression. The same is true of the countless online forums and blogs where users post hundreds or thousands of comments every hour. In the absence of the DMCA safe harbors, fear of liability would likely lead service providers to adopt the same "clearance culture" that characterizes "traditional" television, radio, and other mass media outlets—where even entirely law-abiding creators cannot find an audience without first running a gauntlet of lawyers and insurers.

Thus, turning back the clock and stripping service providers of the legal clarity provided by § 512 would be catastrophic for free speech online.

III. UMG's Arguments Contradict the Language, Structure and Purpose of § 512(c), Increasing Legal Uncertainty at Every Turn.

UMG's dangerous view of § 512(c) flies in the face of Congress's intent to reduce legal uncertainty for online service providers. First, UMG and its *amici* misread the scope of the § 512(c) safe harbor in a manner that would exclude the very online services that Congress intended to shelter. Second, UMG asserts an incorrect interpretation of the "actual knowledge" and "red flag" provisions of § 512(c) that would render the detailed notice-and-takedown provisions enacted by Congress superfluous. Third, UMG and its *amici* urge this Court to read the "control and benefit" disqualifier set out in § 512(c)(1)(B) so as to strip service providers of any protection from vicarious liability claims. UMG and its *amici* are wrong on all counts.

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[11] *See Viacom Int'l, Inc. v. YouTube Inc.*, Nos. 07-2103, 07-3592, 2010 WL 2532404, at *3 (S.D.N.Y June 23, 2010).

A. UMG and Its *Amici* Misread the Scope of Section 512(c).

Section 512(c) provides that "[a] service provider shall not be liable for monetary relief, or . . . for injunctive or other equitable relief, for infringement of copyright *by reason of the storage at the direction of a user* of material that resides on a system or network controlled or operated by or for the service provider . . ." 17 U.S.C. § 512(c)(1) (emphasis added). The accompanying legislative history demonstrates that Congress intended this provision to shelter online platforms that host *and provide access* to content uploaded by users: "Examples of such storage include providing server space for a user's web site, for a chatroom, or other forum in which material may be posted at the direction of users." S. REP. NO. 105-190, at 43.

Ignoring these authorities, UMG and its *amici* attempt to re-write § 512(c) to apply only to infringements of the reproduction right (not the distribution or public performance rights) that occur at the moment a user uploads material to the service provider's system (not when others access that content). (UMG Br. at 32-33); (RIAA Br. at 22-26). In rejecting this argument, the district court correctly observed: "It is very difficult to see how the DMCA could achieve [its] goals if service providers otherwise eligible for limited liability under § 512(c) were exposed to liability for providing access to works stored at the direction of users." *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 620 F. Supp. 2d 1081, 1090 (C.D. Cal. 2008); *see also Viacom Int'l, Inc. v. YouTube Inc.*, Nos. 07-2103, 07-3592, 2010 WL 2532404, at *12 (S.D.N.Y June 23, 2010) .

Moreover, in suggesting that modern "user generated content" sites are different in kind from their 1998 ancestors, UMG and its *amici* willfully misunderstand how these technologies actually work. UMG contends that § 512(c) should be read to reach only the initial act of data storage, and none of the subsequent acts necessary in order to make data accessible to other Internet users.

(UMG Br. at 35-37.) But the web hosting services, chatrooms, and online forums that Congress mentioned in the legislative history cited above were storing materials uploaded by users *in order to make those materials accessible to other Internet users*. The technological processes involved in delivering these services required those service providers to make, transmit, and "download" multiple copies of those stored materials.

Consider the service of "providing server space for a user's web site." (UMG Br. at 42) (quoting S. REP. NO. 105-190, at 43). The purpose of hosting a website for a subscriber is both to store subscribers' uploaded materials which comprise the web site, and to allow others to access those materials on the web site. Both in 1998 and now, the uploaded materials that comprise a web site can include many different kinds of content. "Content may be any number of things – family photos, poems, personal opinions, text of any kind, *even sound clips and movies*." PRESTON GRALLA, HOW THE INTERNET WORKS 132 (2d ed. 1999) (emphasis added) [hereinafter "HOW THE INTERNET WORKS"]. The subscriber uploads this content to computers ("web servers") maintained by the web hosting service. *Id*. at 132-33. This results in a reproduction on the web hosting provider's computers, an activity that UMG concedes is covered by § 512(c). (UMG Br. at 37.)

But that initial reproduction is just the beginning of the story. When another Internet user wants to access the website, by clicking a link or typing the URL of the web site into her web browser, all the relevant content is transmitted to the user's desktop computer, where a copy is made by her web browser software in order to assemble the various material for viewing and listening. HOW THE INTERNET WORKS, *supra*, at 157. It is only after making a copy on the "client side"—which UMG misleadingly characterizes as a "download"—that a web browser software is able to render that content. Thus, in order to carry out their function of making websites available to Internet users, web hosting services routinely transmit and "download" web pages to Internet users.

These activities define web hosting—if the service only stored information for a single user, it would be more aptly described as an online back-up service, rather than a web hosting service. This was all true in 1998, and it is true today.

When Congress passed the DMCA in 1998, the category of service providers in the business of "providing server space for a user's web site, for a chatroom, or other forum" already included those that made multimedia files (including music and video) accessible on behalf of users. For example, one of the longest lived Internet online forums is the Usenet newsgroup system, which by the late 1990s had become "the world's biggest electronic discussion forum." HOW THE INTERNET WORKS, *supra*, at 105. By the late 1990s, Usenet posts already included "files such as pictures and multimedia." *Id*. Geocities is another example of a free Web hosting service dating back to 1995 that allowed millions of users to create their own web sites, including audio and video files.[12]

Thus, services that hosted content for users were already automatically modifying uploaded content in order to make it more readily accessible. For example, Geocities automatically added a "watermark" to its users' content,[13] which is analogous to Veoh's transcoding acts. (UMG Br. at 10, 15, 33.) Other services were automatically making smaller "thumbnail" versions of uploaded image files. *See* Paul Graham, *Viaweb's First Business Plan*,

[12] *See* Wikipedia, GeoCities, http://en.wikipedia.org/wiki/GeoCities; *Beverly Hills Internet, Builder of Web Communities, Changes Name to GeoCities,* BUSINESS WIRE, Dec. 14, 1995, *available at* http://findarticles.com/p/articles/mi_m0EIN/is1995Dec14/ai17862424/?tag=content;col1.

[13] *See* Jim Hu, *GeoCitizens fume over watermark,* CNET NEWS, June 23, 1998, *available at* http://news.cnet.com/GeoCitizens-fume-over-watermark/2100-1023_3-212596.html.

http://paulgraham.com/vwplan.html (1995 business plan of e-commerce site Viaweb describing automatic creation of "thumbnails").

UMG contends that Congress could never have contemplated that the beneficiaries of § 512(c) would feature user-generated content on a site operated by the service provider (as distinct from simply hosting the websites of third parties). UMG is wrong. Yahoo! had already launched its Yahoo! Message Boards, where users posted materials onto a website operated and branded by Yahoo!.[14] Similarly, Compuserve had been sued by music publishers as early as 1993 for user uploaded music files that appeared on AOL's online bulletin boards.[15]

These were the kinds of online services Congress meant when it referenced "providing server space for a user's web site, for a chatroom, or other forum in which material may be posted at the direction of users." S. REP. NO. 105-190, at 43; H.R. REP. NO. 105-551, Part II, at 53. All of these services relied not only on automated copying of materials supplied by users, but also the automated transmission and downloading of those materials in order to make those materials accessible to other Internet users. Accordingly, in light of the online services already extant in 1998, it is plain that § 512(c) was intended to reach far more than just the initial reproduction resulting from the act of uploading.

Today's "user generated content" sites are simply more advanced variants built on the very same hosting activities that service providers were already providing in 1998. Thanks in part to the availability of the § 512(c) safe harbor, there has been strong growth in this segment of the Internet. Today's services host

[14] Courtney Macavinta, *Yahoo Message Board Users Sued*, CNET NEWS, Sept. 9, 1998, *available at* http://news.cnet.com/2100-1023-215292.html.

[15] See Joseph V. Meyers III, Note, *Speaking Frankly about Copyright Infringement on Computer Bulletin Boards: Lessons to be Learned from Frank Music, Netcom, and the White Paper*, 49 VAND. L. REV. 439, 478-81 (1996).

not just simple text and images on websites, in chatrooms, and in discussion forums, but now also offer myriad platforms for speech and commerce, including web stores (e.g., Amazon zShops):[16] e-commerce listings (e.g., eBay):[17] blogs (e.g., Blogger); photographs (e.g., Flickr); documents (e.g., Scribd); video (e.g., Veoh, YouTube); and audio (e.g., SoundCloud) on behalf of tens of millions of Internet users. For example, *amicus* Internet Archive hosts text, audio, and video content that users contribute to its online library. Without the legal certainty provided by § 512(c), these activities would be difficult for a small nonprofit to manage.

If UMG's cramped interpretation of the scope of Section 512(c) were adopted, modern Internet enterprises that provide storage "in the cloud" for the benefit of users for a vast array of different kinds of information would be stripped of safe harbor protection. This reading is inconsistent with the statutory language and Congress's goal of providing the legal predictability necessary to foster economic growth and free expression on the Internet—including *new* online services.

B. **UMG's Interpretation of the Knowledge Disqualifier Would Also Increase Legal Uncertainties Facing Online Service Providers**

UMG's arguments regarding the "knowledge disqualifier" set forth in § 512(c)(1)(A)) also cannot be squared with the language, structure, and purpose of the statute.

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[16] At least one court has held that Amazon's zShops.com platform falls within the scope of the § 512(c) safe harbor. *See Corbis Corp. v. Amazon.com, Inc.,* 351 F. Supp. 2d 1090 (W.D. Wash. 2004), rev'd on other grounds, *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612 (9th Cir. 2010).

[17] Courts have held that eBay and similar e-commerce listing services fall within the scope of the § 512(c) safe harbor. *See CoStar Group, Inc. v. LoopNet, Inc.*, 164 F. Supp. 2d 688 (D. Md. 2001), *aff'd*, 373 F.3d 544 (4th Cir. 2004) (user-generated real estate listings); *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001) (eBay listings).

Section 512(c)(1)(A) provides that a service provider enjoys the safe harbor only so long as it:

> "(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
> (ii) in the absence of such actual knowledge, is not aware of facts and circumstances from which infringing activity is apparent [referred to in the legislative history as "red flags"]; or
> (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material . . ."

17 U.S.C. § 512 (c)(1)(A).

Congress also enacted an "exclusionary rule" that clarifies the proper application of the knowledge provisions above: any allegations of infringement received from a copyright owner that fail to comply substantially with the detailed notice requirements set out in § 512(c)(3)(A) "shall not be considered . . . in determining whether a service provider has actual knowledge or is aware of facts and circumstances from which infringing activity is apparent." 17 U.S.C. § 512(c)(3)(B)(i); *see also* H.R. REP. NO. 105-551, Part II, at 56 (explaining this provision).

Thus, where the knowledge provisions of § 512(c)(1)(A) are concerned, the statutory scheme makes a distinction based on the *source* of the knowledge evidence. If the information *comes from the copyright owner*, it must substantially comply with the notice requirements of § 512(c)(3)(A), e.g., by including information reasonably sufficient to permit the service provider to locate the infringing material. *See* 17 U.S.C. § 512(c)(3)(B). Upon receiving a compliant takedown notice, a service provider must respond "expeditiously" or forfeit the safe harbor. 17 U.S.C. § 512(c)(1)(C). Thus, the "actual knowledge" and "red flag" provisions effectively do not apply to infringement notices received *from copyright owners*—those notices either fail to substantially comply with §

512(c)(3)(A), in which case they are a nullity, or they meet those requirements, in which case the service provider must respond expeditiously. In short, there is no category of knowledge evidence received from copyright owners that reaches the "actual knowledge" or "red flag" provisions.

Consequently, the "actual knowledge" and "red flag" provisions in the statute apply only where knowledge evidence *comes from sources independent of the copyright owner*. Although likely to be unusual, such sources can be imagined—Professor David Nimmer dissects a number of different hypothetical circumstances in his exhaustive analysis of the "red flag" requirement. *See* David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. COPYRIGHT SOC'Y 401, 436-37, 445 (1999) [hereinafter "*Puzzles*"] (discussing red flag knowledge where a subscriber contacts the service provider and signals infringing intentions and where a senior executive of a service provider chooses to investigate an unauthorized music site).[18] At the same time, however, when a service provider learns about potentially infringing activity from sources other than the copyright owner, the statutory scheme does not require a service provider "to make discriminating judgments about potential copyright infringement." S. REP. NO. 105-190, at 49. Thus, "the 'flag' must be brightly red indeed — and be waving blatantly in the provider's face — to serve the statutory goal of making 'infringing activity . . . apparent.'" NIMMER, *supra*, at § 12B.04[A][1].

In this case, it is undisputed that Veoh responded expeditiously to all infringement notices from UMG's representatives that met the requirements of § 512(c)(3)(A). *See UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1107 (C.D. Cal. 2009) [hereinafter "*Veoh*"]. The only other evidence UMG provided to Veoh directly was a list of UMG's recording artists. *Id.* at 1109-1110.

[18] *Available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_ id=208876.

That noncompliant "notice" is an example of evidence barred by § 512(c)(3)(B)'s exclusionary rule. Addressing a similar circumstance, Prof. Nimmer rejects the notion that an infringement notice from a copyright owner in the form of CD-ROM with "the song titles comprising its repertoire" could support a finding of actual or red flag knowledge: "[Section 512(c)] sets forth at great length the requisites for a valid notification of claimed infringement. Those detailed provisions could not be more at odds with the blunderbuss approach of the CD-ROM postulated in this scenario." *Puzzles, supra*, at 447.

With respect to knowledge evidence provided by third parties to Veoh, UMG points only to evidence that Veoh had general knowledge that infringing music videos were sometimes posted by users, and that Veoh could have done more to discover such evidence if it had taken steps to monitor and investigate the activities of its users. *See* (UMG Br. at 57-64.)

These contentions are foreclosed by the "no monitoring" provision in § 512(m). In the words of Prof. Nimmer: "Congress included language in the statute explicitly disclaiming a monitoring obligation. That feature became a *leitmotif* throughout the hearings, so often was it repeated." *Puzzles*, *supra*, at 451; *accord* S. REP. NO. 105-190, at 44. Accordingly, UMG cannot rely on Veoh's failure to affirmatively monitor its service as evidence of "red flag" knowledge—any obligation by the service provider to act arises only *after* actual or red flag knowledge is obtained, and that obligation is limited to acting "expeditiously to remove, or disable access to, the material." 17 U.S.C. § 512(c)(1)(C).

Nor can general awareness that some users may be infringing copyrights strip a service provider of the § 512(c) safe harbor. The statute uses actual and "red flag" knowledge to trigger a duty to remove infringing material—something that would be impossible without particularized knowledge regarding what should be removed. As the one court recently noted,

> [The DMCA's] establishment of a safe harbor is clear and practical: if a service provider knows (from notices from the owner, or a "red flag") of specific instances of infringement, the provider must promptly remove the infringing material. If not, the burden is on the owner to identify the: (sic) infringement. General knowledge that infringement is "ubiquitous" does not impose of duty on the service provider to monitor or search its service for infringements.

Viacom Int'l, 2010 WL 2532404, at *11. If generalized knowledge of infringement were enough to trigger this duty, it would impose on the service provider an obligation to monitor its system and somehow determine whether material provided by users infringed anyone's copyrights. As noted above, Congress expressly refused to condition eligibility for § 512(c) on such an obligation. *See* Jonathan Band & Matthew Schruers, *Safe Harbors Against the Liability Hurricane: the Communications Decency Act and the Digital Millennium Copyright Act*, 20 CARDOZO ARTS & ENT. L.J. 295, 317-18 (2002) ("knowledge" should not be interpreted to mandate monitoring, citing § 512(m)).

In addition, if general knowledge of infringement on a service provider's system were enough to trigger the knowledge disqualifier, then the detailed "notice-and-takedown" provisions at the heart of § 512(c) would be rendered superfluous. UMG should not be rewarded for eschewing Veoh's notice-and-takedown procedures and then attempting to justify secondary liability through evidence that "major media outlets wrote stories about the widespread infringement" and that "content owners refused to work with Veoh." (UMG Br. at 20.) Put simply, Congress did not intend that a *New York Times* article could supplant the statutory notice-and-takedown regime.

For these reasons, the district court correctly rejected the notion that "general awareness of infringement, without more, is enough to preclude application of section 512(c)." *Veoh*, 665 F. Supp. 2d at 1111; *see also Perfect 10,* *Inc. v. CCBill, LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007); *Corbis Corp. v. Amazon.com Inc.,* 351 F. Supp. 2d 1090, 1108-09 (W.D. Wash. 2004), *rev'd on other grounds*, *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612 (9th Cir. 2010) .

C. UMG's Interpretation of the Control and Benefit Disqualifier Would Make Section 512(c) Inapplicable to Vicarious Liability Claims.

UMG's view of the statutory "control and benefit disqualifier" fares no better when measured against § 512(c)'s language and purpose. The "control and benefit disqualifier" provides that a service provider enjoys the safe harbor only so long as it: "does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity . . ." 17 U.S.C. § 512(c)(1)(B).

UMG's interpretation of this provision amounts to the contention that § 512(c) protections do not apply to vicarious liability claims, and that a successful claim ejects the service provider from the safe harbor. (UMG Br. at 67-68.) This interpretation, however, directly contradicts the stated intention of Congress: "Section 512(c) limits the liability of qualifying service providers for claims of direct, *vicarious* and contributory infringement . . ." H.R. REP. NO. 105-551, Part II, at 53 (emphasis added); *see also* Band & Schruers, *supra*, at 318 (rejecting conflation of vicarious liability standards under common law and 512(c)). Not surprisingly, UMG's view also has been rejected by multiple courts. *See Veoh*, 665 F.Supp.2d at 1112-16 (collecting and discussing cases).

But UMG's conception of the "control and benefit" disqualifier should be rejected for a more fundamental reason: it would radically increase the legal uncertainties facing online service providers. If the DMCA safe harbors have no application to vicarious liability claims, as UMG contends, then service providers would be left to guess what judge-made[19] vicarious liability principles might demand. Reiterating a theme that appears throughout its brief, UMG argues that those principles obligate service providers to monitor their services for infringement using "automated filtering technology." (UMG Br. at 69.) Moreover, UMG insists that "suspicions or awareness of infringement trigger a duty to investigate." (UMG Br. at 75.) UMG fails to explain how a service provider is to determine whether it has done *enough* monitoring and investigating to satisfy this undefined obligation. As discussed above, Congress enacted the § 512 safe harbors precisely to protect service providers from this high-risk approach to copyright infringement liability.

IV. Section 512 Encourages Voluntary Policing by Service Providers.

UMG contends that Section 512 will encourage service providers to "eschew licenses from content companies and avoid implementing effective measures on their websites that can stop or limit infringement." (UMG Br. at 27.) Not so. Service providers have strong market incentives to voluntarily develop better technologies to detect and prevent copyright infringements on their web sites. While the § 512 safe harbors provide an important baseline of legal protections and "rules of the road" for fledgling service providers, they do not give service providers consistent access to big-budget entertainment content. Accordingly, online service providers have significant business incentives to police for copyright infringement as part of voluntary commercial arrangements with major content owners.

This is exactly what has happened. For its part, Veoh has voluntarily deployed a variety of anti-infringement technologies (albeit not on UMG's

[19] Vicarious liability is solely a judge-made doctrine. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984).

preferred timetable). *See Veoh*, 665 F. Supp. 2d at 1111-1112 (describing voluntary use of Audible Magic fingerprinting technology); *Io Group, Inc. v. Veoh Network, Inc.*, 586 F. Supp. 2d 1132, 1143 (N.D. Cal. 2008) (describing voluntarily implemented "hash," or digital "fingerprint," technology). And the industry leader in online video hosting, YouTube, has been a pioneer in developing and implementing infringement detection tools. *See* Rob Hof, *YouTube Intros Video I.D. System; Will Studios Go Along?*, BUSINESS WEEK, Oct. 15, 2007.[20]

Section 512(c) has been crucial to enabling these voluntary efforts between copyright owners and service providers. Because Congress made it clear in § 512(m) that service providers have no legal obligation to monitor their services, service providers have been free to experiment with content identification and monitoring tools without fear that such experimentation might lead to secondary liability. In fact, this measured approach is only possible because § 512(m) relieves service providers from having to embrace simultaneously every tool proposed by every copyright owner. See BILL ROSENBLATT, GIANT STEPS, CONTENT IDENTIFICATION TECHNOLOGIES 4-7 (2008) (comparing myriad filtering technologies available).[21] Ironically, the legal regime urged by UMG and its *amici*—one in which rightsholders could unilaterally choose filtering tools and impose those tools on service providers by judicial fiat—would likely slow the development and deployment of content identification technologies.

CONCLUSION

Reintroducing legal uncertainty would thwart Congress's clear purpose and

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[20] *Available at* http://www.businessweek.com/the_thread/techbeat/archives/2007/10/youtube_intros.html.

[21] *Available at* http://www.giantstepsmts.com/Content%20ID%20Whitepaper.pdf.

undermine the continued growth of the Internet as a platform for expression. *Amici* urge this Court to reject UMG's effort to strip online service providers like Veoh of the safe harbor protections that Congress intended to afford them and affirm the district court's decision.

Dated: July 23, 2010

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**CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)**

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C) that the attached Brief of Amici Curiae Electronic Frontier Foundation, Internet Archive, American Library Association, Association Of Research Libraries, Association Of College And Research Libraries, Computer And Communications Industry Association, Public Knowledge, Center For Democracy And Technology And Netcoalition In Support Of Appellees And Affirmance comports with Fed. R. App. P. 32(a)(5), in that it is proportionally spaced and has a typeface of 14 points, and with Fed. R. App. P. 32(a)(7)(B) and 29(d), in that it contains 6,991 words (based on Microsoft Word 2004, the word processing system used to prepare the brief), exclusive of the tables, certificates, Appendix, and cover.

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