

10-3270-cv

United States Court of Appeals
FOR THE SECOND CIRCUIT

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

v.

YOUTUBE, INC., YOUTUBE, LLC, GOOGLE, INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF *AMICI CURIAE* STUART N. BROTMAN,
RONALD A. CASS, AND RAYMOND T. NIMMER
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
Carey R. Ramos
Lynn B. Bayard
Darren W. Johnson
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Counsel of Record for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
A. LEGAL RULES SUPPORT EFFICIENT SECONDARY LIABILITY FOR COPYRIGHT INFRINGEMENT	4
1. Legal Responsibility Should Rest with the Party Best Able to Avoid or Limit Harm	4
2. Copyright Law Also Places Legal Responsibility on the Party Best Able to Avoid or Limit Harm.....	8
3. The DMCA Also Is Consistent with Broader Principles of Legal Responsibility	13
B. APPLICABLE LEGAL TESTS AND UNDERLYING PRINCIPLES OF LAW SUPPORT LIABILITY OF YOUTUBE AND GOOGLE FOR COPYRIGHT INFRINGEMENT	18
CONCLUSION	25

TABLE OF AUTHORITIES

CASES	<u>Page(s)</u>
<i>In re Aimster Copyright Litig.</i> , 334 F.3d 643 (7th Cir. 2003)	11, 16
<i>Basic Books v. Kinko’s Graphics Corp.</i> , 758 F. Supp. 1522 (S.D.N.Y. 1991).....	8
<i>Columbia Pictures Indus., Inc. v. Fung</i> , No. CV 06-5578, 2009 WL 6355911 (C.D. Cal. Dec. 21, 2009).....	14
<i>Fonovisa, Inc. v. Cherry Auction, Inc.</i> , 76 F.3d 259 (9th Cir. 1996)	12, 20
<i>Kalem Co. v. Harper Brothers</i> , 222 U.S. 55 (1911)	9, 10
<i>Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.</i> , 545 U.S. 913 (2005)	<i>passim</i>
<i>Meyer v. Holley</i> , 537 U.S. 280 (2003)	9
<i>Perfect 10, Inc. v. CCBill LLC</i> , 488 F.3d 1102 (9th Cir. 2007)	16
<i>Polygram Int’l Publ’g, Inc. v. Nevada/TIG, Inc.</i> , 855 F. Supp. 1314 (D. Mass. 1994)	13
<i>Shapiro, Bernstein & Co. v. H.L. Green Co.</i> , 316 F.2d 304 (2d Cir. 1963)	11
<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984)	9, 10
<i>Tiffany (NJ) Inc. v. eBay Inc.</i> , 600 F.3d 93 (2d Cir. 2010)	22
<i>UMG Recordings, Inc. v. Veoh Networks, Inc.</i> , 665 F. Supp. 2d 1099 (C.D. Cal. 2009).....	17

United States v. Carroll Towing Inc.,
159 F.2d 169 (2d Cir. 1947)4

STATUTES

17 U.S.C. § 1079
 17 U.S.C. § 512(c)..... 13, 14
 17 U.S.C. § 512(i)17
 17 U.S.C. § 512(m).....17

OTHER AUTHORITIES

Ronald A. Cass & Keith N. Hylton, *Economics of Intellectual Property Law: Property Rights in the World of Ideas* (Harv. Univ. Press forthcoming 2011)9
 Lawrence A. Cunningham, *Traditional Versus Economic Analysis: Evidence from Cardozo and Posner Torts Opinions*, 62 Fla. L. Rev. 667 (2010).....5
 Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. Legal F. 2078
 Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973).....5
 Richard A. Epstein, *The Many Faces of Fault in Contract Law: Or How to Do Economics Right, Without Really Trying*, 107 Mich. L. Rev. 1461 (2009).....6
 Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case*, 82 Colum. L. Rev. 1600 (1982).....9
 H.R. Rep. No. 105-551(I) (1998)..... 13
 H.R. Rep. No. 105-551(II) (1998)..... 13
 William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* (Harv. Univ. Press 1987)4, 5, 6
 William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Belknap Press 2003)9

Richard A. Posner, <i>A Theory of Negligence</i> , 1 J. Legal Stud. 29 (1972)	4
Steven Shavell, <i>Economic Analysis of Accident Law</i> (Harv. Univ. Press 1987)	6
Alan Q. Sykes, <i>The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines</i> , 101 Harv. L. Rev. 563 (1988).....	7

INTEREST OF THE *AMICI CURIAE*¹

Amici are professors and scholars who teach and write in the fields of intellectual property law, torts, media law, and related areas of law and economics. Each is personally concerned with the status and development of the law and believes that the questions raised by this case are of the highest importance. Their individual qualifications are as follows:

Stuart N. Brotman is Lecturer on Law at Harvard Law School, where he teaches Entertainment and Media Law. Under appointment by the Library of Congress, he served as an inaugural member of the Copyright Arbitration Royalty Panel. He is the author of numerous works on legal and policy issues related to entertainment and information media and technologies.

Ronald A. Cass is Dean Emeritus of Boston University School of Law, where he served as Dean and Melville Madison Bigelow Professor of Law from 1990-2004, and also is a senior fellow at the International Centre for Economic Research. A law professor since 1976, he has taught and written about

¹ The parties have consented to the filing of this brief. The views expressed herein are those of the individual *amici*, and do not necessarily represent the views of any group or organization with which any of them may be affiliated. *Amici* represent none of the parties in this action, and write solely to offer their perspective on the important legal and economic issues at stake in this dispute. This brief was not written in whole or in part by counsel for a party. No person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief. *Amici* and their counsel were not compensated for work on this brief.

intellectual property law, law and economics, tort liability and immunity, criminal law, and other subjects, and lectures on intellectual property law and economics at the faculties of law and applied economics of the Université d'Aix-Marseille.

Raymond T. Nimmer is Dean and Leonard Childs Professor of Law at the University of Houston Law Center and co-director of the Houston Intellectual Property and Information Law Institute. He was the Fulbright Distinguished Chair of International Commercial Law at Universidade Católica in Lisbon, and he teaches and writes in the areas of intellectual property law, information law, commercial law, and technology law.

SUMMARY OF ARGUMENT

The central issues in this case are the legal tests for contributory and vicarious liability for copyright infringement from the use of Internet sites – in this instance, the YouTube site – to reproduce and disseminate large amounts of copyrighted material without authorization from copyright owners. In interpreting the legal provisions respecting responsibility for infringement in these circumstances, the court should keep in mind the principle that legal responsibility generally rests on the party best able to prevent, limit, or eliminate harm. This principle, sometimes described as finding the “least cost avoider” or “most efficient risk bearer,” has been a fundamental consideration shaping many legal rules, including rules of copyright law. It has special importance where one party is uniquely situated to limit or prevent harm.

This principle supports liability for copyright infringement in this case under both contributory and vicarious responsibility doctrines. That result is consistent with decisions of the Supreme Court of the United States and the principal court of appeals decision directly on point. It is consistent with the law both before and after passage of the Digital Millennium Copyright Act. A contrary result would be at odds with the structure of copyright law and, more broadly, with well-accepted legal doctrines. For that reason, the decision below should be reversed.

ARGUMENT

A. LEGAL RULES SUPPORT EFFICIENT SECONDARY LIABILITY FOR COPYRIGHT INFRINGEMENT

1. Legal Responsibility Should Rest with the Party Best Able to Avoid or Limit Harm

One of the most basic principles underlying liability rules is that legal responsibility for harm should fall on those who most cost-effectively can limit or eliminate harm. This notion has long roots in law, and the shape of common law generally conforms to this principle. Perhaps the clearest articulation of this principle is Learned Hand's famous formula for determining when there is liability for negligently caused harm: "if the probability be called P ; the injury L ; and the burden [of adequate precautions to avoid the injury], B ; liability depends upon whether B is less than L multiplied by P ; i.e., whether $B < PL$." See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

Although Judge Hand's formulaic encapsulation of the principle is lauded as a foundation stone of efficiency in the law,² the *Carroll Towing* court did not break new ground; it merely clarified the basis for a long-accepted legal rule.³ The understanding that the party who is the "least cost avoider" or the "efficient risk bearer" is legally responsible for unintended harm has guided the law both before and after *Carroll Towing*. Tort rules largely are organized

² See Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29 (1972).

³ See William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 85-88 (Harv. Univ. Press 1987).

around that principle, and so are rules for enforcement of contracts and property rights, including intellectual property rights.

For example, the concept of “due care” that historically has been central to tests for negligence in tort law incorporates much the same set of evaluations as an efficiency-based approach to liability. The core question for evaluating whether someone has exercised due care is whether the precautions taken were all that reasonably should have been taken. Reasonableness in this context turns mainly on the cost-effectiveness of the precautions. Individuals are not required to take precautions that cost more than the value of the harms the precautions can be expected to prevent, nor are they required to take precautions when another individual can prevent the same harm at far less cost. Despite the different language, the traditional due care inquiry is essentially the same as the economic inquiry Judge Hand formalized.⁴

The principle of efficient harm-avoidance, the goal set out in *Carroll Towing*, also represents a broad consensus among legal scholars. Even scholars who prefer different fault-based rules or strict liability rules over the Hand formula or related negligence-based rules embrace legal tests designed to produce efficient risk-bearing.⁵ Moreover, scholars from both sides of this

⁴ See, e.g., *id.* at 86-107.

⁵ See, e.g., Lawrence A. Cunningham, *Traditional Versus Economic Analysis: Evidence from Cardozo and Posner Torts Opinions*, 62 Fla. L.

divide especially endorse liability for any party that is uniquely well positioned to avoid harm, finding liability rules for those settings much easier than cases in which both parties must act to achieve the efficient risk-reducing outcome.⁶

These principles of efficient harm-avoidance are particularly important in situations where the expense of identifying and pursuing those directly responsible for the harm makes direct deterrence impracticable. In those instances, the prospect of secondary liability creates an incentive for the party able to prevent the harm at the lowest cost to take steps to do so. Without the motivation of avoiding secondary liability, the least cost avoider would have little reason, from an economic perspective, to make efforts to minimize the harm. Thus, the law holds people liable for their contributions to legal infractions under civil law of contributory liability when there is reason to know that products or services they provide will be used in ways that violate the law or that harm others and there is a relatively simple (cost-effective) way for the sellers to prevent the harm.

Similarly, the law commonly makes individuals and enterprises vicariously responsible for the conduct of others when they can efficiently

Rev. 667 (2010); Richard A. Epstein, *The Many Faces of Fault in Contract Law: Or How to Do Economics Right, Without Really Trying*, 107 Mich. L. Rev. 1461 (2009); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973).

⁶ See Landes & Posner, *supra* note 3, at 90-92; Steven Shavell, *Economic Analysis of Accident Law* 17-18 (Harv. Univ. Press 1987).

control that conduct (and have a right to do so), even if they have not contributed to it. This is the case in many continuing relationships, especially where the party has a financial stake in the conduct, as is the case with employers and employees.⁷ Often, the vicariously liable enterprise is the only one that can efficiently take measures to prevent harms from occurring or limit their impact or the only entity that, as a practical matter, is likely to face legal incentives consistent with deterring harm.

Where the underlying law applicable to direct responsibility does not require intentional wrongdoing, the law of secondary responsibility follows suit. As a rule, it does not require actual knowledge that a specific buyer will misuse a product or service when there is enough information to signal the likelihood of misuse by a given class of buyers and there are relatively simple means for identifying who falls into the suspect class. Anything that raises the probability that the seller is turning a blind eye to the infraction – or, worse, has reason to be sympathetic to it – makes legal culpability or liability more likely.⁸

That the harm caused in this case was the result of activities that took place over the Internet should make no difference. The principles of efficient

⁷ See, e.g., Alan Q. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 Harv. L. Rev. 563 (1988).

⁸ The same point can be seen in a more general framework in other areas of law. See, e.g., Sykes, *supra* note 7.

harm-avoidance have equal application to conduct using ancient and modern technologies and have been applied for generations in similar form, whether the harm is transmitted in person or over the Internet.⁹

2. Copyright Law Also Places Legal Responsibility on the Party Best Able to Avoid or Limit Harm

The basic principles of copyright law, including rules of secondary liability for infringement, are similar. Given that the number of potential users of works is large and generally quite difficult for copyright owners to monitor, copyright law's requirement that those who want to reproduce copyrighted works are responsible for obtaining permission, or liable if they do not, *see, e.g., Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991), follows least cost avoider principles. Those principles would not, and the law does not, make everyone liable for infringement in all settings; particular rules address situations in which the person engaged in copying may not be the best positioned to limit harm. So, for example, special rules on "fair use" – *e.g.*, use of minor parts of a larger work for educational or similar purposes and not for commercial purposes – are designed to allow copying that has unusual public worth and limited effect on the ability of authors to protect

⁹ *See generally* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. Legal F. 207; *see also, e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

the value of their creative work.¹⁰ Such special rules fit together with the core of copyright liability in endeavoring to make the person responsible who can avoid harm at the lowest cost.¹¹

As in other areas of law where the courts have held that a statute that is silent on the issue will be construed to incorporate ordinarily applicable background rules, such as rules respecting contributory and vicarious liability, *e.g.*, *Meyer v. Holley*, 537 U.S. 280, 285 (2003), copyright law long has been interpreted to incorporate secondary liability for infringement. *See, e.g.*, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (“[T]hese doctrines of secondary liability emerged from common law principles and are well established in the law.” (citations omitted)).

In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the Supreme Court accepted secondary liability under copyright law for individuals or entities whose actions encouraged or facilitated infringement, in keeping with the Court’s earlier decision in *Kalem Co. v. Harper Brothers*, 222

¹⁰ *See, e.g.*, Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 Colum. L. Rev. 1600 (1982). The fair use doctrine is codified at 17 U.S.C. § 107.

¹¹ *See* Ronald A. Cass & Keith N. Hylton, *Economics of Intellectual Property Law: Property Rights in the World of Ideas* ch. 6 (Harv. Univ. Press forthcoming 2011); William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 85-123 (Belknap Press 2003).

U.S. 55 (1911).¹² However, the Court decided that secondary liability did not attach based on the mere sale of a “staple article of commerce” that was primarily used for purposes that did not infringe copyrights. *Sony*, 464 U.S. at 442. In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), the Supreme Court made clear that even where substantial non-infringing uses exist, liability can be found if a business endeavors to promote its product or service for uses that infringe copyright and profits from those uses, especially where possible cost-effective means for limiting infringement are available and are not employed. *Id.* at 939-40.

¹² *Kalem* involved liability for producing an unauthorized dramatization of the book *Ben-Hur*. The defendant had not actually performed or exhibited the film as required for direct liability under the 1909 Copyright Act. Justice Holmes, writing for the Court, said:

In some cases where an ordinary article of commerce is sold, nice questions may arise as to the point at which the seller becomes an accomplice in a subsequent illegal use by the buyer. It has been held that mere indifferent supposition or knowledge on the part of the seller that the buyer of spirituous liquor in contemplating such unlawful use is not enough to connect him with the possible unlawful consequences, but that if the sale was made with a view to the illegal resale, the price could not be recovered. But no such niceties are involved here. The defendant not only expected but invoked by advertisement the use of its films for dramatic reproduction of the story. That was the most conspicuous purpose for which they could be used, and the one for which especially they were made.

222 U.S. at 62-63 (citations omitted).

The approach to contributory liability implemented in *Sony* and *Grokster* is in keeping with the least cost avoidance principles embraced throughout the law. For products that are used primarily for legitimate purposes and for which there is no evident cost-effective means for a seller to prevent illegitimate uses, liability does not attach merely because it is foreseeable that some purchasers will use the product to infringe copyright. Where, however, there is obvious benefit to the seller from widespread use of a product for infringement (in particular where the seller profits financially), and where there are potential cost-effective means for limiting the amount or duration of infringements, the seller will be held liable for contributing to the infringement. In those circumstances, the fact that the business's personnel were unaware of a specific copyright violation will not insulate it against liability in the absence of reasonable efforts to prevent infringement. *See Grokster*, 545 U.S. at 936; *In re Aimster Copyright Litig.*, 334 F.3d 643, 645-46 (7th Cir. 2003) (“Recognizing the impracticability or futility of a copyright owner’s suing a multitude of individual infringers, the law allows a copyright holder to sue a contributor to the infringement instead, in effect as an aider and abettor.” (citation omitted)).

Similarly, vicarious liability for infringement attaches when an entity has the right to control someone else’s conduct and a cost-effective means for doing that. This Court, in *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304

(2d Cir. 1963), found vicarious liability for a business that leased space to someone selling phonograph records (many of which turned out to be infringing) and profited from the infringing sales in an arrangement that gave the lessor more control than an ordinary landlord renting space for a standard fee. Rightly, the Court did not require knowledge of specific infringements to find liability. *Id.* at 307-08. The imposition of secondary liability in these circumstances gives the party best equipped to deter infringement the incentive to take steps toward this goal. *See id.* at 308 (vicarious liability would “simply encourage” the lessor to control its lessee’s actions, “thus placing responsibility where it can and should be effectively exercised”).

The same considerations supported findings of both contributory and vicarious liability for a swap meet operator who had the right and ability to monitor vendors’ sales of infringing sound recordings and had general knowledge that there were substantial infringing sales at the meet but did not take appropriate steps to monitor the vendors and terminate permission for sales by offending vendors. *See Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261-64 (9th Cir. 1996). There was not an immediate financial reward to the swap meet operator from the sales, but the court deemed it sufficient that “the sale of pirated recordings at the Cherry Auction swap meet [was] a ‘draw’ for customers.” *Id.* at 263-64. In these circumstances, vicarious liability meets the

legal test and creates incentives for efficient efforts to enforce legal requirements. *See also Polygram Int'l Publ'g, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1325 (D. Mass. 1994) (vicarious liability “has the added benefit of creating a greater incentive for the enterprise to police its operations carefully to avoid unnecessary losses”).

3. The DMCA Also Is Consistent with Broader Principles of Legal Responsibility

The Digital Millennium Copyright Act (“DMCA”), in particular its “safe harbor” provision respecting Internet Service Providers (“ISPs”), 17 U.S.C. § 512(c), also accords with efficient liability concepts. The DMCA was designed to balance interests in commercial growth of Internet resources with interests in protection of intellectual property. *See, e.g.*, H.R. Rep. No. 105-551(II), at 23 (1998).

As explained more fully below with specific reference to the facts of this case, ISPs often will be the least cost avoiders for preventing or limiting harm from copyright infringement over the Internet. Contrary to the interpretation of the district court below, the DMCA does not absolve them of liability that would otherwise attach. Instead of supplanting generally applicable law, the DMCA serves to clarify the circumstances that would prevent liability under a traditional, economics-based approach. *See, e.g.*, H.R. Rep. No. 105-551(I), at 11 (1998) (the DMCA “codifies the core of current case law dealing with the

liability of on-line service providers”); *Columbia Pictures Indus., Inc. v. Fung*, No. CV 06-5578, 2009 WL 6355911, at *15 (C.D. Cal. Dec. 21, 2009) (“In many ways, the Digital Millennium Copyright Act is simply a restatement of the legal standards establishing secondary copyright infringement – in many cases, if a defendant *is* liable for secondary infringement, the defendant *is not* entitled to Digital Millennium Copyright Act immunity; if a defendant *is not* liable for secondary infringement, the defendant *is* entitled to Digital Millennium Copyright Act immunity.”).

For that reason, the safe harbor provisions are narrowly drawn in ways that are consistent with the basic principles of copyright law and least cost avoidance. The denial of insulation against liability to ISPs that are “aware of facts or circumstances from which infringing activity is apparent” (the “red flag” knowledge provision) in particular puts responsibility on the party best able to prevent infringement and to limit harm. 17 U.S.C. § 512(c)(1)(A)(ii).

Likewise, far from insulating ISPs unless they have direct information about specific infringements, the DMCA only gives entities safe harbor if they meet a number of *cumulative* criteria. Failure on any one of these denies the entity safe harbor. There is no safe harbor if there is actual knowledge of infringement or awareness of facts or circumstances from which such infringing activity is apparent. 17 U.S.C. § 512(c)(1)(A)(i), (ii). There is no safe harbor if

the ISP profits from the infringing activity in cases in which the ISP “has the right and ability to control” the activity, 17 U.S.C. § 512(c)(1)(B), or if the ISP fails to take down infringing material when it becomes aware of it, 17 U.S.C. § 512(c)(1)(A)(iii). This is the case regardless of whether the copyright owner has requested that infringing works be removed. That provision is separate from the requirement that, in order to come within safe harbor protection, an ISP must promptly take down specific infringing material when notified about it. 17 U.S.C. § 512(c)(1)(C), (c)(3).

By its terms, the DMCA contemplates liability for ISPs not only for direct infringement but also when they have actual knowledge of infringement and do not take appropriate actions, when they have constructive knowledge similar to that required in other contributory infringement contexts, or when they have the right and ability to reduce infringements from conduct that they reasonably can control. In this regard, the DMCA plainly spells out conditions that are special applications of least cost avoiding approaches. A more expansive safe harbor – such as one that would follow from a construction of the Act as excepting from protection only those ISPs with knowledge of specific infringements or of information clearly pointing to specific infringements by identified material – would contradict the sense of the law as written and also would be opposed to basic principles of liability.

The decision in *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), which deals with both the DMCA and underlying copyright law, expressly treats the DMCA as sharpening the application of underlying copyright law in particular settings, not as undercutting it:

The [DMCA] does not abolish contributory infringement. The common element of its safe harbors is that the service provider must do what it can reasonably be asked to do to prevent the use of its service by “repeat infringers.” 17 U.S.C. 512(i)(1)(A).

334 F.3d at 655. Although Judge Posner and the court found the defendant qualified as an ISP within the meaning of the DMCA, he concluded that the principles articulated in *Sony* and other cases meant that contributory liability should attach where the ISP could have taken cost-effective steps to prevent infringement, knew there was substantial likelihood of infringing uses, and, in the court’s words, “blinded itself” to specific information about infringement in hopes of avoiding liability. *Id.* at 651-53. As Judge Posner pithily explained: “Willful blindness is knowledge, in copyright law (where indeed it may be enough that the defendant *should* have known of the direct infringement), as it is in the law generally.” *Id.* at 650 (citations omitted).

As in many areas of law, not all cases are consistent in their interpretation of the DMCA. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007), took a more expansive view of the DMCA safe harbor in finding companies providing web-based payment services and connectivity

services not liable for copyright infringement by customers, and *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099 (C.D. Cal. 2009), held that an ISP came within the DMCA's safe harbor despite significant indications that substantial amounts of infringing material were being posted. The district court in *Veoh* read *CCBill* as establishing the proposition that "if investigation of 'facts and circumstances' is required to identify material as infringing, then those facts and circumstances are not 'red flags.'" *Id.* at 1108.

Putting aside factual differences between *Veoh* and this case, *amici* believe that *Veoh* used the wrong standard in interpreting the applicable scope of the DMCA and of liability under copyright law. While there may be no general monitoring requirement imposed under the law,¹³ an entity that is aware it is facilitating substantial amounts of infringement and ignores cost-effective means for limiting those infringements generally will be deemed a contributory infringer, not within the DMCA's safe harbor. *Veoh's* approach is inconsistent with the clear holding of *Aimster*, with secondary liability determinations such as *Sony*, *Grokster*, and *H.L. Green*, and with other areas of the law.

¹³ *Amici* take no position here on the proper interpretation of 17 U.S.C. §§ 512(i), (m).

B. APPLICABLE LEGAL TESTS AND UNDERLYING PRINCIPLES OF LAW SUPPORT LIABILITY OF YOUTUBE AND GOOGLE FOR COPYRIGHT INFRINGEMENT

The 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 requisites for liability. Indeed, YouTube was *uniquely* positioned to limit harm from infringement. Several reasons support that conclusion.

First, the mechanism that is best able to identify infringing material posted on the Internet is a process known as “filtering” – using automated computer programs to screen material that is being uploaded to a particular Internet site to identify copyrighted material – and it was available to YouTube. Filtering by Internet site owners is relatively inexpensive, easy to use, and effective in detecting a very substantial proportion of copyright violations.

Filtering typically utilizes a computer program to compare “fingerprints” of copyrighted files to fingerprints of files uploaded by users, automatically determining whether the files match the identified copyrighted material. While different specific techniques for screening material can be described as filtering, for purposes of this case the differences among them are not relevant. What is relevant – and undisputed – is that YouTube knew of and had access to the processes available for filtering, and even had a license to use one

prominent filtering system, but did not utilize any kind of filtering to screen out copyrighted content during the period which is the subject of Viacom's motion.¹⁴

Second, a web site owner such as YouTube has the unique ability to review and filter out only new postings. Although it may need to be applied to a large amount of material at a popular Internet site such as YouTube, filtering new postings has a huge advantage over alternatives available to others, in part because once the existing database of files is scanned, a web site owner can filter effectively by screening only material being added to its site. Having already scanned the backlog of files on its site, YouTube now can filter files uploaded to its site in real time. By contrast, individual copyright owners seeking to identify violations of their copyrights would constantly have to search through *all* of the publicly available material on the Internet, which would entail a massively greater investment. That is akin to the difference between looking for all of a particular type of fish in an aquarium and looking for all of the same type of fish in all the world's oceans, or between a swap meet operator checking for copyright violations among vendors at his own site

¹⁴ Viacom's Statement of Undisputed Facts in Support of Its Motion for Partial Summary Judgment on Liability and Inapplicability of the Digital Millennium Copyright Act Safe Harbor Defense ("SUF") ¶¶ 112-14, 269.

versus a copyright owner attempting to police all swap meets everywhere. *Cf. Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996).

Third, alternatives to filtering are likely to be far more costly and not nearly as effective. Apart from the difference between screening new postings versus looking for violations across the entire web site, there are technical barriers that prevent effective screening of YouTube's site (and similar sites) by anyone other than the site owner. YouTube's terms of service prevent people outside YouTube-Google from what is referred to as "crawling the site" – going systematically through material posted on YouTube in the manner necessary to look for copyright violations.¹⁵ YouTube is also uniquely able to screen material because portions of the site that may contain copyright violations are insulated from outside screening by technical measures. These measures include requirements for passwords or for specific combinations of numbers and/or letters that sometimes must be received and replicated to permit access. (All of us have encountered times when we are asked to read and insert such combinations, often presented in forms that are difficult enough to read if you are the intended recipient.)

Finally, no one apart from the site owner is positioned to prevent or limit harm from copyright violations to the same degree. The site owner alone can

¹⁵ See YouTube Terms of Service, <http://www.youtube.com/t/terms> (last visited Dec. 9, 2010).

screen material before it is available to the public for viewing, that is, before harm from its posting is realized. Further, even when violations can be identified from outside the site, material that is taken down can be posted again if there is no filter. Repeated postings can effectively deprive much copyrighted material of substantial value, especially material that has time-limited value (value tied to events of relatively transient interest, as is the case with most comedy related to news or current events, such as “The Daily Show with Jon Stewart” and similar shows). Moreover, when the site owner has the responsibility for filtering material on its site, it has incentives to implement technologies on its site that promote efficient screening as well as otherwise efficient use of the site. For example, web site owners can assure that material on the site uses standardized file formats, which facilitates filtering. If copyright owners alone bear responsibility in these settings, there is less incentive for site owners to adopt common, readily searchable formats, even where that is the efficient technology.

In short, only the site owner can efficiently and effectively address copyright violations: only the site owner can limit and avoid infringing material by reviewing and filtering new material before it is posted, using technical measures that function well at low cost, and focusing its filtering efforts on new uploads rather than constantly searching all of the material posted on the site.

In this context, the site owner is clearly the least cost avoider, the one best able to prevent or reduce harm.

Amici note that in several ways this case presents a very different situation than that addressed by this Court in *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010). As an initial matter, trademark law adopts a narrower standard for contributory liability than copyright law. *See id.* at 108-09. Moreover, unlike the counterfeit jewelry and other tangible goods sold through eBay in *Tiffany*, the infringing content posted on YouTube is more efficiently detected by YouTube rather than the intellectual property owner. This Court said in *Tiffany* that “[b]ecause eBay never saw or inspected the merchandise in the listings, its ability to determine whether a particular listing was for counterfeit goods was limited.” *Id.* at 98 (internal quotation marks omitted). YouTube, however, can readily determine copyright status, not only through filtering but often simply by observing that material being posted is obviously copyrighted work – such as a full-length motion picture or current television program – that is unlikely to be posted for free viewing.

YouTube also lacks any other economic incentive to deter infringement, since YouTube users – unlike purchasers of designer products on eBay – are likely indifferent to whether the content they view is authorized or unauthorized. *See id.* at 109 (“[P]rivate market forces give eBay and those

operating similar businesses a strong incentive to minimize the counterfeit goods sold on their web sites. eBay received many complaints from users claiming to have been duped into buying counterfeit Tiffany products sold on eBay. The risk of alienating these users gives eBay a reason to identify and remove counterfeit listings.” (citation omitted)). Principles of efficient harm-avoidance support a different result in the case of YouTube for not taking readily available steps to filter out infringing material uploaded to its web site, than in the case of eBay for not policing counterfeit goods offered for sale on its site.

In contrast to the situation in *Tiffany*, YouTube and Google not only had available cost-effective means for limiting harm, they actually had employed those means and discontinued them in order to profit from the infringements.¹⁶ A decision not to use cost-effective mechanisms – such as filtering – in the face of information showing massive copyright violations is consistent with a desire to encourage copyright violations, the linchpin of liability for contributory infringement. As Justice Souter’s opinion for the *Grokster* Court said in a similar context respecting co-defendants Grokster and StreamCast:

[N]either company attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software. While the Ninth Circuit treated the defendants’ failure to develop such tools as irrelevant because they lacked an

¹⁶ SUF ¶ 64.

independent duty to monitor their users' activity, we think this evidence underscores Grokster's and StreamCast's intentional facilitation of their users' infringement.

545 U.S. at 939.

The approach taken in the decision below in this case marks a sharp departure from the instructions of *Grokster*, *Aimster*, *H.L. Green*, and other cases. The district court's reading of the law would allow service providers who knowingly profit from massive copyright infringement on their web sites wholly to escape liability so long as they block or otherwise remove infringing material for which they have actual, specific knowledge – regardless of the service providers' ability to cheaply and efficiently avoid or limit all (or substantially all) infringing material on the site. This flies in the face of established principles of legal responsibility, efficient risk avoidance, and secondary liability in copyright law, and misapplies the DMCA. *Amici* urge this Court to reject that decision in favor of traditional principles of efficient risk avoidance embedded in the rules of responsibility for copyright infringement.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to reverse the judgment of the District Court and remand for further proceedings.

Dated: December 10, 2010 Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP

/s/ Carey R. Ramos

Carey R. Ramos

Lynn B. Bayard

Darren W. Johnson

1285 Avenue of the Americas

New York, New York 10019-6064

(212) 373-3000

Counsel of Record for Amici Curiae

CERTIFICATE OF COMPLIANCE

The undersigned counsel for *amici curiae* Stuart N. Brotman, Ronald A. Cass, and Raymond T. Nimmer certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,625 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certificate, I relied on the word count program in Microsoft Word. 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.

Dated: December 10, 2010

/s/ Carey R. Ramos
Carey R. Ramos

CERTIFICATE OF SERVICE

I certify that, on December 10, 2010, I filed this brief of *amici curiae* Stuart N. Brotman, Ronald A. Cass, and Raymond T. Nimmer electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Paul M. Smith
William M. Hohengarten
Scott B. Wilkens
JENNER & BLOCK LLP
1099 New York Avenue, NW
Washington, DC 20001
(202) 639-6000

Theodore B. Olson
Matthew D. McGill
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

Susan J. Kohlmann
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

Andrew H. Schapiro
A. John P. Mancini
MAYER BROWN LLP
1675 Broadway
New York, New York 10019
(212) 506-2500

/s/ Carey R. Ramos

Carey R. Ramos