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IN THE
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.

(Additional Caption On the Reverse)

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

BRIEF OF AMICI CURIAE

**ANAHEIM BALLETT, MICHAEL MOORE, KHAN ACADEMY INC., ADAM
BAHNER, MICHAEL BASSIK, DANE BOEDIGHEIMER, MATTHEW BROWN,
MICHAEL BUCKLEY, SHAY BUTLER, CHARLES COMO, IMAN CROSSON,
PHILIP DE VELLIS, RAWN ERICKSON, HANK GREEN, JOHN GREEN, KASSEM
GHARAIBEH, WILLIAM LOUIS HYDE, KEVIN NALTY, ALLISON SPEED,
CHARLES TODD, CHARLES TRIPPY AND BARNETT ZITRON IN SUPPORT OF
APPELLEES**

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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.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that:

1. *Amicus curiae* Anaheim Ballet is a not-for-profit California Corporation organized pursuant to Section 501(c)(3) of the Internal Revenue Code. No parent corporation or publicly held corporation owns 10% or more of the stock of Anaheim Ballet.

2. *Amicus curiae* Khan Academy Inc. is a not-for-profit California Corporation organized pursuant to Section 501(c)(3) of the Internal Revenue Code. No parent corporation or publicly held corporation owns 10% or more of the stock of Khan Academy Inc.

Dated: April 7, 2011
New York, New York

/s/ Ron Lazebnik
Ron Lazebnik

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STATEMENT OF INTEREST OF AMICI CURIAE¹

*Amici curiae*² submit this brief pursuant Federal Rule of Appellate Procedure 29(a) with the consent of all parties.

Amici curiae are creative individuals and organizations who post original content on websites of Appellees YouTube, Inc., YouTube, LLC and Google, Inc. (collectively “YouTube”). Included among *amici* are some of the entertainers, musicians, educators, political commentators, comedians and institutions that make up YouTube’s community. Thanks to YouTube and similar online service providers (“OSPs”), *amici* have been able to disseminate content that would otherwise be inaccessible to the masses. Combined, the videos of *amici* have been viewed over 3.3 billion times. *Amici* submit this brief in support of the Appellees.

Anaheim Ballet³ is a ballet company based in California. Despite its limited touring range, Anaheim Ballet shares dance with people of all ages and socioeconomic backgrounds all over the world because of YouTube. While ballet has traditionally been considered an inspiring but elitist art form accessible only to

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1(b), *amici* state that this brief was not authored in whole or in part by the counsel of any party, and no party, party’s counsel, or person other than *amici* or their counsel contributed money intended to finance the preparation or submission of this brief.

² *Amici* include Anaheim Ballet, Michael Moore, Khan Academy Inc., Adam Bahner, Michael Bassik, Dane Boedigheimer, Matthew Brown, Michael Buckley, Shay Butler, Charles Como, Iman Crosson, Philip De Vellis, Rawn Erickson, Kassem Gharaibeh, Hank Green, John Green, William Louis Hyde, Kevin Nalty, Allison Speed, Charles Todd, Charles Trippy and Barnett Zitron.

³ <http://www.youtube.com/anaheimballet>.

the privileged and affluent, OSPs like YouTube allow Anaheim Ballet to expand this art form's reach.

Michael Moore⁴ is an Academy Award winning filmmaker and a writer, producer and director of such films as "Roger & Me," "The Big One," "Bowling for Columbine," "Fahrenheit 9/11," "Sicko" and "Capitalism: A Love Story." Through Youtube and other OSPs, he frequently writes and produces multimedia commentaries on politics including the free-to-download movie "Slacker Uprising."

Khan Academy Inc.⁵ is a not-for-profit with the goal of changing education for the better by providing a free world-class education to anyone anywhere. Through YouTube, it is able to upload and make available thousands of educational videos that provide free online classes to people all over the world.

Under the pseudonym "Tay Zonday," Adam Bahner⁶ uploads original songs and performances to YouTube, enabling Mr. Bahner to transform his passion into his career.

Michael Bassik,⁷ Philip De Vellis⁸ and Barnett Zitron⁹ participate in political causes and debates and use YouTube as a medium for their expression of free

⁴ <http://www.youtube.com/user/mmflint>.

⁵ <http://www.youtube.com/user/khanacademy>.

⁶ <http://www.youtube.com/user/tayzonday>.

⁷ <http://www.youtube.com/user/politicstv>.

⁸ <http://www.youtube.com/user/parkridge47>.

speech. Without OSPs like YouTube, these individuals would not have a means to rally supporters or a forum to raise political issues ignored by the traditional press.

Iman Crosson,¹⁰ Dane Boedigheimer,¹¹ Matthew Brown,¹² Shay Butler,¹³ Rawn Erickson,¹⁴ Kassem Gharaibeh,¹⁵ Kevin Nalty,¹⁶ Charles Todd,¹⁷ Allison Speed and Charles Trippy¹⁸ are entertainers who rely on YouTube to share their performances with the public. OSPs like YouTube have given them the opportunity to entertain for a living without the need for additional support.

Michael Buckley¹⁹ and William Louis Hyde²⁰ use YouTube to disseminate news that would not receive sufficient attention in traditional broadcast forums. They create specialized news programs for niche audiences.

Charles Como,²¹ Hank Green and John Green²² use YouTube to post entertaining educational content. Mr. Como, along with the Internet personality

⁹ <http://www.youtube.com/user/whytuesday>.

¹⁰ <http://www.youtube.com/user/alphacat>.

¹¹ <http://www.youtube.com/user/daneboe>; <http://www.youtube.com/user/realannoyingorange>.

¹² <http://www.youtube.com/user/swiftkaratechop>.

¹³ <http://www.youtube.com/user/shaycarl>; <http://www.youtube.com/user/shaytards>; <http://www.youtube.com/user/shayloss>.

¹⁴ <http://www.youtube.com/user/hiimrawn>.

¹⁵ <http://www.youtube.com/user/kassemG>.

¹⁶ <http://www.youtube.com/user/nalts>.

¹⁷ Founder of “Improv Everywhere” (<http://www.youtube.com/user/improveverywhere>).

¹⁸ <http://www.youtube.com/user/ctfxc>; <http://www.youtube.com/user/trippy>; <http://www.youtube.com/user/charlestrippy>; <http://www.youtube.com/user/alli>.

¹⁹ <http://www.youtube.com/user/whatthebuckshow>.

²⁰ <http://www.youtube.com/user/thewillofdc>.

“HotForWords,” produces a show that teaches viewers philology. The Green brothers educate viewers on a myriad of topics using an innovative format.

Amici have a direct interest in the interpretation of 17 U.S.C. § 512(c) and in ensuring that the safe harbor protection afforded to OSPs is not constricted such that forums for speech and expression are silenced. *Amici* respectfully submit this brief in order to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

At stake in this case is the treatment of video content uploaded to the Internet by any member of the public. This material falls into one of three categories: (1) purely original content, (2) content incorporating copyrighted works that is a fair use, and (3) copyright infringing content. Appellants want to reread 17 U.S.C. § 512(c) in a manner that would severely hinder, if not completely prevent, distribution of the first two categories in an attempt to prohibit the third. Essentially, Appellants want OSPs to assume that all uploaders are infringers just because an accusation is made that some small segment of the OSP’s population might be.

Section 512(c) (the “Safe Harbor” provision) removes the liability OSPs would otherwise face if users of their services uploaded materials infringing the

²¹ <http://www.youtube.com/user/hotforwords>.

²² <http://www.youtube.com/user/vlogbrothers>.

copyrights of others. 17 U.S.C. § 512(c). To foster the growth of OSPs and the Internet in general, Congress shielded OSPs from liability as long as they did not have “actual knowledge” of the infringement, and were not “aware of facts or circumstances” from which infringement was apparent. *See* 17 U.S.C. § 512(c)(1)(A). The statute succeeded. *Amici* and others like them could now share original works in newly formed markets and the public’s reliance on these forums for speech continues to grow. *Cf.* 47 U.S.C. § 230(a)(5) (“Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.”).

More importantly, as discussed in part I, *infra*, these new forms of media allow for a more efficient connection between creators and their potential audience. Whereas traditional media’s distribution model is a limited fixed television time schedule, the model for OSPs is publishing user-generated content to be consumed at the viewer’s leisure. Further, the markets fostered by the Safe Harbor have lower barriers to entry than those in traditional media. While media like television requires a gatekeeper to determine what content consumes the precious resource of broadcast time, anyone can create online content and simply upload it to an OSP like YouTube to share anywhere in the world at any time.

Despite these benefits, Appellants want to reinsert a gatekeeper into content delivery. They do this not because they want to stifle creativity, but because they

believe that they should not have to protect their own works. Appellants apparently prefer to place the burden on OSPs. To do so, they reinterpret the statement of 17 U.S.C. § 512(c)(1)(A)(ii) that an OSP must remove materials when it becomes aware of “facts or circumstances from which infringing activity is apparent” (the “Awareness Standard”). Appellant Viacom argues that the Safe Harbor does not apply when an OSP has any “warning” that “it is likely hosting acts of infringement.” Opening Br. for Pls.-Appellants (“Viacom Br.”) at 26, Dec. 3, 2010, ECF No. 63. Similarly, Appellant Football Association Premier League Limited (“FAPL”) contends that “[b]y identifying the infringed work *and* certain infringing instances of the work on YouTube, [Appellant’s] notices provided more than enough information for YouTube to identify and locate the material wherever it resided on its website.” Opening Br. For Pls.-Appellants (“FAPL Br.”) at 45, Dec. 6, 2010, ECF No. 66. The Awareness Standard according to Appellants therefore requires loss of Safe Harbor protection if an OSP recognizes that some of its users may be uploading infringing material onto its site.

But determining what is a sufficient warning to be a “red flag” is not as simple as Appellants would have it. The statute makes it clear that awareness of these “facts or circumstances” cannot be imputed onto an OSP by a complaint from a copyright owner unless, among other requirements, it substantially complies with 17 U.S.C. § 512(c)(3)(A)(iii) by identifying “the material that is claimed to be

infringing or to be the subject of infringing activity . . . and information reasonably sufficient to permit the service provider to locate the material.” *See* 17 U.S.C. § 512(c)(3)(B). Absent such compliance, that information is not “considered under [§ 512(c)(1)(A)] in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.”

Id.

Appellants’ interpretation is especially dangerous because if general awareness of “likely” infringement, without specification of where or by whom, is enough to trigger liability, an OSP would immediately need to investigate all its content for infringing activity. *See Wolk v. Kodak Imaging Network*, No. 10 Civ. 4135 (RWS), 2011 WL 940056, *4-5 (S.D.N.Y. Mar. 17, 2011) (rejecting plaintiff’s contention that once defendant OSP received some DMCA-complaint notices it “must now police its sight [sic] to uncover current infringements and prevent future infringements, without [plaintiff] providing DMCA-compliant notice in each instance” because “[p]laintiff’s position places a burden on [defendant] beyond what is required under the DMCA.”). Such an obligation would defeat the need for a takedown notice to ever be sent under § 512(c)(3). Instead, the statute would mean that once an OSP is alerted – no matter how informally – to “likely” infringement, the OSP must treat all users as suspects.

As discussed in part II, *infra*, reinterpreting the Awareness Standard as Appellants suggest would unnecessarily chill speech and hurt creators like *amici*. If this Court rules for Appellants, OSPs will have to monitor every video uploaded either manually or through overly-inclusive filtering technology. Either method will force OSPs to err on the side of caution to avoid liability, and remove videos that may fall within copyright's fair use exception – effectively silencing free expression.

The balance created by § 512 was intended to place the burden of policing copyrighted works in the hands of their owners, while ensuring that OSPs would not create unnecessary hurdles for owners to reclaim their rights. OSPs have a duty to terminate user accounts of repeat infringers, and accommodate technical measures employed by copyright holders. *See* 17 U.S.C. § 512(i)(1). Copyright holders, in turn, are not to use technical measures that would “impose substantial costs on service providers or substantial burdens on their systems.” 17 U.S.C. § 512(i)(2)(C). This system is in line with how other intellectual property is protected online, as recently reaffirmed in this Court's review of trademark law. *See Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010) (holding that imposing liability on an OSP because it could not guarantee that all goods bearing a trademark owner's mark were genuine would unduly inhibit the lawful sale of goods). Shifting this balance to what Appellants desire would unnecessarily

burden OSPs and would likely adversely affect the online forums that creators use to share their content.

Amici are not in a position to comment on the underlying facts of this case other than to note that they have always understood YouTube's purpose to be a location where individuals can share their original works. As this Court reviews the lens through which the facts are gauged, *amici* urge the Court to remember the effects the wrong interpretation of the Awareness Standard could have on the tangible benefits websites like YouTube provide. The incentives and burdens placed on OSPs should not be changed in a manner that would likely terminate their existence. For these reasons, and those stated more fully below, *amici* respectfully request the Court affirm the District Court's decision.

ARGUMENT

I. THE SAFE HARBOR REMEDIES A FLAW CONTAINED IN TRADITIONAL AVENUES AVAILABLE TO CREATORS

In amending the Copyright statutes through the Digital Millennium Copyright Act ("DMCA"), Congress did not intend to mirror the distribution models of the film or television industry. Nor should it have. Inherent in those distribution models are bottlenecks that run counter to the ultimate purpose of copyright: "[t]o promote the Progress of Science and useful Arts." U.S. CONST. art. I § 8 cl. 8. Additionally, the laws and customs pertaining to those forms of distribution curtail what creators can accomplish while working in such

mediums.²³ Through the DMCA, Congress enabled the Internet to fill a gap and allow for creators to have greater control over their works while at the same time encouraging OSPs to build platforms for distributing those works to the masses.

A. Traditional Media Forms Rely on Gatekeepers that Curtail Expression

The traditional media model of broadcast and cable television is severely limited because of its twenty-four-hour, seven-day-a-week format. Content is broadcast in specific time slots that the target audience will likely be watching. As a result, there are a very limited number of time slots available for programs; thus only a very select portion of the content proposed to networks is ever broadcast. This limitation also forces viewers to prioritize what they want to see. Even new recording technologies, such as DVRs,²⁴ are limited in terms of simultaneous recordings and storage capacity.

As a result of the time limitation faced by television companies, the old media model creates two undesired effects on expression. First, it limits the number of content creators who get to distribute their work to the masses. Second,

²³ For example, the Federal Communications Commission regulates what speech is acceptable for expression on radio and broadcast television. *See, e.g., Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464*, 16 F.C.C.R. 7999 (2001) (Indecency policy statement limiting what material is permissible for broadcast television).

²⁴ Digital Video Recorders are devices that allow television viewers to record programs onto a hard drive for later viewing. They are the modern-day VCR, allowing users to program them to record several channels simultaneously and store many hours of programming.

it leaves consumers with fewer choices of content to view. The limited number of time slots forces executives to choose only shows projected to garner high viewership. Consumers are consequently left to choose from programs that networks believe will have mass appeal. This inherent bottleneck has positioned media conglomerates as content gatekeepers to the detriment of creators and consumers. Only “mainstream” content is distributed to consumers, leaving many creators of alternative or developing art without a forum.

The fact that traditional media is already highly concentrated amongst a few corporations enhances the problem with a content gatekeeper. As the recent NBCUniversal, LLC and Comcast Corporation merger demonstrates, the number of competing content distribution gatekeepers keeps shrinking.²⁵ Diversity of expression is therefore not only hampered by a gatekeeper making choices for the public, but also by the reality of fewer decision makers competing for new content and viewer attention.

The Safe Harbor provision acts as a check on consolidation in traditional media by fostering growth of OSPs which serve as competitors for new content and viewers. Through OSPs such as YouTube, creators like *amici* Michael

²⁵ See Yinka Adegoke and Dan Levine, *Comcast Completes NBC Universal Merger*, REUTERS, Jan. 29, 2011, <http://www.reuters.com/article/2011/01/29/us-comcast-nbc-idUSTRE70S2WZ20110129> (last viewed Apr. 6, 2011) (“Regulators, who approved the deal on January 18 with conditions, were concerned that an all powerful Comcast might stifle competition from new online video competitors.”).

Buckley and Anaheim Ballet can thus avoid the old media's bottlenecked model and connect directly with their audience. Mr. Buckley originally had a little-watched weekly show on a local Connecticut public access station that reached only a small portion of his potential audience. While national access channels like Logo and MTV2 turned him away, Mr. Buckley found success by using YouTube to distribute his creative content to the world. Anaheim Ballet, whose fan base was originally limited to Southern California, achieved similar success. Since creating its own YouTube channel, Anaheim Ballet's dance troupe has earned a global audience.²⁶ Neither Mr. Buckley, who now makes a living off of his content, nor Anaheim Ballet could have reached such a broad audience without the aid of a user-generated content hosting website such as YouTube.

B. The Safe Harbor Allows for Distribution without the Need for a Gatekeeper

As it currently stands, 17 U.S.C. § 512 does not encourage the creation of a gatekeeper role within OSPs. Rather, as clearly stated in 17 U.S.C. § 512(m), an OSP is not expected to “affirmatively seek[] facts indicating infringing activity” to remain eligible for Safe Harbor protection. Appellants, however, want to reinterpret the Awareness Standard in a way that would eliminate the function of § 512(m) and require a gatekeeper to exist. *See* Viacom Br. at 47; FAPL Br. at 45.

²⁶ Its video views total more than 31,000,000 and its channel has 40,205 followers. <http://www.youtube.com/user/anaheimballet> (last viewed Mar. 20, 2011).

But the lack of both a gatekeeper and an Awareness Standard requiring one to exist are what make OSPs like YouTube ideal places to foster creativity that would not be considered by traditional media. *Cf.* 47 U.S.C. § 230(a)(3) (“The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”). There is no arbiter present to determine if content brought forth is too reminiscent of another’s creation or if an idea is unlikely to gain enough viewers to warrant distribution. Instead, OSPs are free to store and disseminate videos that come from anyone and everywhere, while copyright holders have the ability to demand material that infringes their rights to be taken down. Artists no longer have to pitch an idea to profit-focused executives who determine its fate. Rather, the value of content is now decided by a free market. Consumers decide what is worthy of support by viewing and sharing it with others.

This new media model also allows users from around the world to access and distribute information that governments might otherwise try to suppress. OSPs like YouTube were instrumental in showing the world the Tunisian and Egyptian revolutions.²⁷ Users provided video clips of protests and the government backlash

²⁷ Don Tapscott, *The World’s Unemployed Youth: Revolution in the Air?*, GUARDIAN, Apr. 4, 2011, <http://www.guardian.co.uk/commentisfree/2011/apr/04/unemployed-youth-revolution-generational-conflict> (last viewed Apr. 4, 2011); Ian Potts, *From Cairo to Damascus: The New Social Network*,

when traditional news outlets could not gain access.²⁸ The world witnessed the events in North Africa and the Middle East because YouTube provided a channel for distributing content without intermediaries filtering the content.

Further, this new media model enables niche markets of content to form that would otherwise not have received funding from old media providers. *Amicus* Charles Como, for example, creates videos focusing on the origin of words. While highly educational, the concept would have probably not gained sufficient support from traditional media for a stand-alone television show. Content published via the new media model gains exposure not because of advertising and marketing, but because the content is enjoyed and shared by viewers.

Many artists like Justin Bieber and *amicus* Adam Bahner were discovered by publishing their own content on YouTube and developing a network of fans all over the world.²⁹ Mr. Bahner was virtually unknown prior to finding success on

MEDIAGLOBAL, Apr. 4, 2011, http://mediaglobal.org/article/2011-04-04/from_cairo_to_damascus_the_new_social_network (last viewed Apr. 4, 2011).

²⁸ See Jennifer Preston, *Movement Began With Outrage and a Facebook Page That Gave It an Outlet*, N.Y. TIMES, Feb. 5, 2011, <http://www.nytimes.com/2011/02/06/world/middleeast/-06face.html> (last viewed Apr. 5, 2011) (“Mr. Eid said that Facebook, YouTube, Twitter and cellphones made it easy for human rights advocates to get out the news and for people to spread and discuss their outrage about Mr. Said’s death in a country where freedom of speech and the right to assemble were limited and the government monitored newspapers and state television.”).

²⁹ See Jan Hoffman, *Justin Bieber is Living the Tween Idol Dream*, N.Y. TIMES, Dec. 31, 2009, <http://www.nytimes.com/2010/01/03/fashion/03bieber.html> (last viewed Mar. 25, 2011) (“In contrast to stars like Kelly Clarkson, who sprang from

YouTube. While a graduate student studying American Studies, he used the pseudonym, “Tay Zonday,” to upload a YouTube video for an original song, “Chocolate Rain.” The unexpected popularity of the video allowed him to leverage his Internet fame to launch a successful career as a musician. Artists like Mr. Bahner face fewer obstacles to becoming commercially successful through OSPs than when relying on the old media model for funding, promoting and distributing their content.

Institutions have also come to realize the potential for artists to use websites such as YouTube to distribute their work globally. Last year, the Guggenheim Museum in New York City hosted “*YouTube Play. A Biennial of Creative Video.*” The purpose of the exhibition was to “find and showcase the world’s most creative online artists”³⁰ and to “discover innovative work from unexpected sources.”³¹ The submissions exceeded 23,000 videos from 91 countries.³² The finalists included amateurs, visual artists, composers, video game programmers and

‘American Idol,’ or Disney factory best sellers like Miley Cyrus, Justin, his fans passionately believe, is homemade. Long before he released his EP, ‘My World,’ in mid-November, the YouTube videos attracted millions of views.”)

³⁰ Michelle Kung, *Guggenheim Museum’s YouTube Play Shortlist Announced*, WALL ST. J., Sept. 20, 2010, <http://blogs.wsj.com/speakeasy/2010/09/20/guggenheim-museums-youtube-play-shortlist-announced> (last viewed Mar. 29, 2011).

³¹ Carol Vogel, *Guggenheim and YouTube Seek Budding Video Artists*, N.Y. TIMES, June 13, 2010, <http://www.nytimes.com/2010/06/14/arts/design/14video.html> (last viewed Mar. 29, 2011).

³² Press Release, Guggenheim Museum, *YouTube Play. A Biennial of Creative Video Announces Top 25 Videos* (Oct. 21, 2010) (on file with author).

musicians from all over the world. The exhibition was a resounding success, with critics describing the winning videos as museum grade productions.³³ Without YouTube, it would have been impossible to view all the video submissions.³⁴ Takashi Murakami, a world renowned visual artist and one of the judges for the exhibition, went as far as to say that “YouTube is a medium to communicate with the world at large and we artists can no longer call ourselves artists merely by discovering something special and presenting it to the public alone. In that way, YouTube has incited a revolution.”³⁵ Requiring OSPs to take on a more active gatekeeping role would significantly curtail this and other rich avenues for free expression.

II. APPELLANTS’ INTERPRETATION OF THE AWARENESS STANDARD WILL HAVE A CHILLING EFFECT ON SPEECH

Appellants improperly interpret the Awareness Standard to require unreasonable action on the part of OSPs. Their focus, and that of their supporting *amici*, is on a small portion of what may occur on these websites and ignores the adverse effects their standard would have on speech in a broader sense. If the Awareness Standard becomes what Appellants propose, third parties will be silenced. Many individuals and groups, like *amici*, rely on OSPs to convey their

³³ Roberta Smith, *The Home Video Rises to Museum Grade*, N.Y. TIMES, Oct. 21, 2010, <http://www.nytimes.com/2010/10/22/arts/design/22youtube.html> (last viewed Mar. 29, 2011).

³⁴ *See id.*

³⁵ Press Release, *supra* note 31; Vogel, *supra* note 30.

political messages, news, commentaries, artistic expressions and criticisms.

Without such OSPs, many of them would not have access to a free marketplace of ideas. The true purpose of these websites is to act as a forum for free expression. By trying to restrict OSPs' ability to function as platforms for speech, Appellants are asking the Court to interpret the Safe Harbor in a way that creates a class of preferred speakers, namely old media members who act as the gatekeepers of content distribution.

The monitoring required by Appellants' proposed Awareness Standard will force OSPs to take one of two paths. OSPs will have to either manually monitor all media content uploaded to their website or institute a technological filtering regime. Manual monitoring would be cost prohibitive and unscalable, while technological filtering would eliminate a huge amount of non-infringing material. Both options generate an unacceptable result that may lead websites hosting user-generated content to close shop, and likely block fair uses of copyrighted works.

Amici and those like them would be left without a forum to present their protected and valuable content if speech was chilled in this manner. In considering 17 U.S.C. § 512, it is important to follow this Court's previous guideline that "[w]here an otherwise acceptable construction of a statute would raise serious constitutional problems, we may construe the statute to avoid such problems." *Empire Healthchoice Assur., Inc. v. McVeigh*, 396 F.3d 136, 144 (2d Cir. 2005)

(quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988)). Here, the Court should interpret the standard at issue to protect speech. As comparable areas of law demonstrate, the Awareness Standard should be viewed in a light most favorable to First Amendment protection. See *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989); see also *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). This Court has previously limited trademark law in order to protect expression. See *Rogers*, 875 F.2d at 999 (holding that the Lanham Act should be construed narrowly when applied to artistic works because the public interest in avoiding consumer confusion is outweighed by the public interest in free expression). Likewise, in *New York Times*, the Supreme Court held that the chilling effect of libel law required substantive changes in light of the First Amendment because newspaper publishers were unlikely to publish controversial statements for fear of ramifications. See *New York Times*, 376 U.S. at 279. To protect free speech and prevent silencing content creators, this Court should affirm the District Court's proper interpretation of 17 U.S.C. § 512.

A. Overly Cautious Screening Will Lead to a Speech Silencing Regime if This Court Rules in Favor of Appellants

If OSPs are required to make infringement determinations for all the videos uploaded to their websites as Appellants suggest, it will severely limit the content uploaded. In particular, new forms of expression based on works already created

will be censored by this kind of standard. While copyright owners have the exclusive right to determine how their work is used, this right is tempered by fair uses of their work. *See* 17 U.S.C. §§ 106, 107. Although the law permits the use of copyrighted material under the fair use exception, what constitutes a fair use is not easily determined and requires a fact intensive inquiry. *See Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1984) (noting that a test for fair use cannot be “simplified with bright line rules, for the statute, like the doctrine it recognizes, calls for case by case analysis.”). As this Court has previously noted, fair use is “the most troublesome in the whole law of copyright” due to its inherent ambiguity. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (*per curiam* decision by a panel including Judge Learned Hand). This sentiment has been cited and repeated often in the years since.³⁶

Interpreting the Awareness Standard as Appellants suggest would force OSPs to seek out copyrighted works and make fair use analyses without being prompted. Faced with the threat of copyright liability if they are wrong, OSPs will likely err on the side of caution and take down many videos containing copyrighted material whether or not the videos actually constitute infringement. *Cf. Citizens*

³⁶ *See, e.g., Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1255 (2d Cir. 1986) (also noting that the inquiry requires “a difficult case-by-case balancing of complex factors.”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 475 (1984) (Blackmun, J., dissenting); *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977); *Triangle Publ’ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980).

United v. FEC, 130 S. Ct. 876, 896 (2010) (noting that “[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech – harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.”). In essence, OSPs will be compelled to act as gatekeepers silencing speech for fear of liability, causing content creators to suffer unnecessary censorship.

The District Court decision should be affirmed because its accurate interpretation of § 512 protects against the chilling of protected speech. By shielding OSPs from liability for their users’ uploads unless notice is given, the Safe Harbor effectively fosters a balance between the protection of copyright holders and speakers who upload fair use content. Interpreting the Awareness Standard as Appellants suggest would shift the burden toward OSPs, deterring certain speakers and censoring others. Such an interpretation ignores the critical role fair use plays in copyright law. *See Association of Am. Med. Colls. v. Cuomo*, 928 F.2d 519, 523 (2d Cir. 1991) (noting that the “fair use doctrine permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” (internal quotations omitted)). The standard should therefore not be interpreted in a way that would chill the speech of many to serve the interests of few, especially when those few

already have many avenues under 17 U.S.C. § 512 to protect their copyright interests. *See Wolk*, 2011 WL 940056 at *5 (“The Court does not accept [plaintiff’s] invitation to shift the burden from her to [defendant], as the underlying purpose of the notice requirements is to place the burden of policing copyright infringement-indentifying [sic] the potentially infringing material and adequately documenting infringement-squarely on the owners of the copyright.” (internal quotation omitted)).

B. Requiring OSPs to Monitor All of Their Content Will Adversely Affect Innocent Creators

Assuming OSPs could properly analyze the fair use of videos, these new monitoring responsibilities would require unreasonable burdens. OSPs would have to either implement a system of manual oversight, analyzing every video posted by their users in order to determine infringement, or institute a technological filtering system. If either of these options were required, speech would be unnecessarily and unacceptably chilled. A system of manual oversight would either be exceedingly expensive, inaccurate or both, and a modern technological filtering system would be overbroad. Appellant Viacom’s claim that YouTube easily could have ended infringement would be just as true if their suggestion was to shut down the YouTube concept, but that argument also runs directly counter to the purpose of the statute.

1. Forcing OSPs to Manually Monitor Each Upload Will be Cost Prohibitive and Lead to the Chilling of Speech

A manual oversight regime would require companies to either internally review all uploaded content or rely on their users to police each other. Both systems are flawed in a manner that would stunt the potential growth of OSPs and would likely disincentivize the existence of video hosting sites. That, in turn, would decrease or eliminate forums for the free exchanges of ideas – a problem only exacerbated by the recent consolidations in other forums for expression like television and radio. *See* part I.A, *supra*.

Under an internal manual oversight regime, OSPs would spend a significant amount of time and resources monitoring every upload for infringement to avoid liability. OSPs would need potentially thousands of specialists to determine which uploads are either purely original, fair uses of copyrighted works or indeed infringing the rights of others.³⁷ Such costs will deter OSPs who otherwise would have had the means to enter the market. It would also potentially prevent OSPs already in the market from growing because their working capital might not sustain the unscalable yet necessary hiring demands caused by an increase in their

³⁷ Uploads to YouTube, for instance, constitute approximately 35 hours of video every minute. *See* Statistics, YOUTUBE, http://www.youtube.com/t/press_statistics (last visited Mar. 27, 2011). Multiplied out by the number of minutes in a day, it means that approximately 50,400 hours of video are uploaded daily. It would take 6,300 employees working eight hour days to keep up with these uploads.

popularity and the content uploaded. Such an effect chills the avenues of speech available to creators like *amici*.

A reliance on an OSP's user base for manual oversight brings with it even more problems. The vast majority of viewers are not likely trained in differentiating fair use from infringement. A user-based review is also likely under-inclusive by Appellants' standard, as there is no guarantee that an uploaded video would be screened by another user. Furthermore, the system easily lends itself to censorship abuses, with viewers labeling a video as infringing solely because they do not agree with its message. *Cf. Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1204-05 (N.D. Cal. 2004) (finding that defendant knowingly misused the takedown procedure of § 512 and "sought to use the DMCA's safe harbor provisions—which were designed to protect ISPs, not copyright holders—as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property."). Such abuses have grave implications for political speakers like *amici* Michael Bassik, Philip De Vellis and Barnett Zitron who post political content on YouTube. With a user-based review system, users who disagree with a political message could silence it under the guise of copyright infringement.

Such a scenario is more than theoretical and already happens in the context of takedown notices. For example, 2010 Nevada senatorial candidate Sharron

Angle sent opponent Harry Reid a DMCA takedown notice for re-posting an older version of her website as a political critique.³⁸ OSPs should not be placed in the position where they would silence protected speech because they must rely on their users to flag content in order to maintain Safe Harbor protection. Resting the liability of an OSP on such a system is simply too dangerous.

2. A Technological Filtering Regime Would Also Unacceptably Chill Speech

A substantial part of Appellants' argument is that YouTube could use available filtering technology to monitor for infringement. *See* Viacom Br. at 33; FAPL Br. at 50-52. Appellants, however, fail to address the weaknesses in modern filtering technology. Even *amicus* Audible Magic, a company whose entire business is marketing this technology, concedes that it is limited. *See* Brief of Amicus Curiae Audible Magic Corp. in Supp. of Neither Party at 3, Dec. 10, 2010, ECF No. 117 (stating that modern filtering technology "was not designed or marketed to make legal conclusions about copyright infringement."). Current filtering technology merely compares the uploaded work to a library of copyrighted works and determines if any portion of the upload contains copyrighted material. Identification of a clip containing copyrighted material

³⁸ Eric Kleefeld, *Angle Sends Cease-And-Desist to Reid – For Reposting Her Own Website*, TALKING POINTS MEMO, July 5, 2010, <http://tpmdc.talkingpointsmemo.com/2010/07/angle-sends-cease-and-desist-to-reid-for-reposting-her-own-website.php> (last viewed Mar. 27, 2011).

cannot, however, be the end of the inquiry. *See id.* The ambiguity inherent in questions of fair use prevents algorithmic filters from answering this question of law.

Relying on filtering software to determine whether a video is infringing would force the removal of non-infringing materials. The most disturbing of examples would be censoring content using copyrighted work for “criticism, comment, news reporting, teaching, scholarship, or research.” 17 U.S.C. § 107. As a result of the inadequacy of available filters, OSPs would be required to either prevent any content containing copyrighted material without a proper determination of fair use, or perform a manual review of all materials found by the filters. The former approach would censor speech unnecessarily, and the latter may stop OSPs from existing altogether for the reasons stated in part II.B.1, *supra*.

More problematic is that even if OSPs would be able to find all videos that contain copyrighted works, the statute’s intent is clearly not for them to be the arbiters of fair use. Section 512(g) describes the system to follow when there is a dispute regarding whether content should be taken down. *See* 17 U.S.C. § 512(g)(2). The OSP is required to notify the uploader of the problem, and the burden then rests with the uploader to respond. *Id.* If the uploader challenges the claim, the OSP’s responsibility is to reinstate the upload unless the alleged copyright owner has started a judicial proceeding against the uploader. *Id.* The

OSP is not meant to make any determination as to which side is correct. Nor should it. This is not a decision that should happen beyond the neutral eyes of a court, where the public's interests in free speech and fair use can be correctly balanced against the interests of copyright holders.

CONCLUSION

The Safe Harbor has fostered an environment that enables creators to educate, entertain, express political views and make music for audiences around the world through OSPs like YouTube. Appellants' interpretation of the Awareness Standard surrounding the Safe Harbor threatens the existence of these forums for free speech and creative content. While interpreting the provisions of 17 U.S.C. § 512, *amici* urge this Court to consider the implications any deviation from the District Court's holding would have on content creators who rely on this form of media. For the foregoing reasons, *amici* believe the Court should affirm the District Court's opinion.

Dated: April 7, 2011
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A), because it is written in 14-point Times New Roman font, and with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), because it contains 6,146 words, excluding the portions excluded under Fed. R. App. P. 32(a)(7)(A)(iii). This count is based on the word count feature of Microsoft Word.

Dated: April 7, 2011
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CERTIFICATE OF FILING AND SERVICE

I, Ron Lazebnik, hereby certify that on this 7th day of April 2011, I caused a true and correct copy of the foregoing Brief of Amici Curiae Anaheim Ballet et al. in Support of Appellees, to be electronically served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h).

I certify under penalty of perjury under the laws of the United States that the foregoing is true and correct.

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