

10-3270-cv

10-3342-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

v.

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

(Additional Caption and Attorneys on Reverse)

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

**BRIEF OF AMICI CURIAE COMPUTER & COMMUNICATIONS
INDUSTRY ASSOCIATION AND NETCOALITION IN SUPPORT OF
APPELLEES AND URGING AFFIRMANCE**

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 ROGERS & 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., and 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, and GOOGLE, INC.,
Defendants-Appellees

Markham C. Erickson
Holch & Erickson LLP and
Executive Director, NetCoalition
400 N. Capitol Street NW, Suite 585
Washington, DC 20001
(202) 624-1460
merickson@holcherickson.com

Jonathan Band
Jonathan Band PLLC
21 Dupont Circle NW,
Suite 800
Washington, D.C. 20036
(202) 296-5675
jband@policybandwidth.com

Matthew Schruers
Vice President, Law & Policy
Computer & Communications
Industry Association
900 Seventeenth Street NW, 11th Floor
Washington, D.C. 20006
(202) 783-0070
MSchruers@ccianet.org

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae state that:

The Computer & Communications Industry Association (CCIA) represents large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services – companies that collectively generate more than \$250 billion in annual revenues. A complete list of CCIA members is available at <http://www.ccianet.org/members>. No publicly held corporation has an ownership stake of 10% or more in CCIA.

NetCoalition 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, Wikipedia, Yahoo!, and Google. No publicly held corporation has an ownership stake of 10% or more in NetCoalition.

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INTEREST OF AMICI

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NetCoalition 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, Wikipedia, Yahoo!, and Google.¹

Viacom contends that affirmance of the decision below would “radically transform the functioning of the copyright systems and severely impair, if not completely destroy, the value of many copyrighted creations.” Viacom Brief at 3.

¹ Amici hereby state pursuant to Rule 29.1 of the Rules of this Court that although Google is a member of both CCIA and NetCoalition, none of the parties to either of these cases (*i.e.*, Plaintiffs-Appellants or Respondents-Defendants) nor their counsel authored this brief in whole or in part; nor did any party or any party’s counsel contribute money intended to fund preparing or submitting the brief; nor did anyone else other than Amici and their counsel contribute money that was intended to fund preparing or submitting this brief.

Viacom has it exactly backwards; *reversal* of the decision below would radically transform the functioning of the copyright system and severely impair, if not completely destroy, the value of many of the services provided by CCIA and NetCoalition members. Under the liability regime proposed by Viacom, many Internet companies would no longer be able to provide a free and open platform for user generated content. The potential cost of liability would force Internet companies to charge for their currently free services, or monitor their users' communications in search of potentially infringing material. Either approach would harm CCIA and NetCoalition members, as well as their hundreds of millions of regular users.

INTRODUCTION AND SUMMARY OF ARGUMENT

Justice Stevens in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 850 (1997) wrote that “[t]he Internet is a unique and wholly new medium of worldwide human communication.” He observed that “It is no exaggeration to conclude that the content on the Internet is as diverse as human thought.” *Id.* at 852. From the user’s perspective, the Web is comparable “to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.” *Id.* at 853. From the publishers’ point of view, the Web “constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any

person or organization with a computer connected to the Internet can ‘publish’ information.” *Id.*

In the thirteen years since Justice Stevens wrote his opinion in *Reno v. ACLU*, the Internet has become even more central to the lives of Americans and people around the world.² Thus, even more care must be taken to avoid application of the law in a manner that endangers this essential platform for commerce and communications.³ As the Ninth Circuit stated just last month, “[w]e must be

² When visiting China in 2009, President Obama said that access to information was a universal right. He added,

“I am a big believer in technology and I’m a big believer in openness when it comes to the free flow of information. I think that the more freely information flows, the stronger the society becomes, because then citizens of countries around the world can hold their own governments accountable. They can begin to think for themselves. That generates new ideas. It encourages creativity. And so I’ve always been a strong supporter of open Internet use....I can tell you that in the United States, the fact that we have...unrestricted Internet access is a source of strength, and I think it should be encouraged.”

President Barack Obama Remarks at Town Hall Meeting with Future Chinese Leaders, Museum of Science and Technology, Shanghai, China (Nov. 16, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-barack-obama-town-hall-meeting-with-future-chinese-leaders>. Last year, Secretary of State Hillary Clinton said: “We will promote new tools of communication, so people are empowered to connect with one another – and, in repressive societies, to do so with security. We will support a free and open Internet, so individuals have the information to make up their own minds.” Secretary Hillary Clinton, Remarks on Internet Freedom, The Newseum, Washington, D.C. (Jan. 21, 2010), available at <http://www.state.gov/secretary/rm/2010/01/135519.htm>.

³ There are over 1.97 billion Internet users worldwide, with over 262 million Internet users in North America. More than 10 trillion non-spam emails were sent in 2010. At the end of 2010, there were over 255 million websites, and 88.8 million

acutely aware of excessive rigidity when applying the law in the Internet context; emerging technologies require a flexible approach.” *Network Automation v. Advanced Sys. Concepts*, _ F.3d _, 2011 U.S. App. LEXIS 4488 (9th Cir. March 8, 2011).

The positions advocated by Viacom in this case would do exactly that. It advances secondary liability theories that would treat virtually all providers of digital technology products and services as infringers. Viacom also offers an interpretation of the Digital Millennium Copyright Act (DMCA) so narrow that it would provide little shelter against liability, contrary to the intent of Congress.

This brief focuses on aspects of the case relating to intentional inducement, a dimension of secondary liability addressed at length by the Supreme Court in *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). First, the brief argues that intentional inducement is not a new form of secondary copyright infringement liability distinct from contributory infringement. Rather, the Supreme Court in *Grokster* redefined contributory infringement as intentionally inducing infringement.

Second, the brief demonstrates that Viacom distorts the *Grokster* Court’s finely-tuned test for determining whether a distributor of a technology product or service has intentionally induced infringement. Viacom ignores the Supreme

.com domain names. *Internet 2010 in numbers*, Jan. 12, 2011, <http://royal.pingdom.com/2011/01/12/internet-2010-in-numbers/>.

Court’s careful calibration of the inducement doctrine to ensure that it “does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.” *Id.* at 937.

Third, the brief shows that the safe harbors of the DMCA apply to all forms of copyright liability. Contrary to Viacom’s suggestion, intentional inducement is not categorically ineligible for the safe harbor’s protections.

Finally, the brief contends that Viacom attempts to upset the balance Congress and the courts have established in our intellectually property (IP) laws. The Supreme Court has observed that the IP laws strike a “difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other....” *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). While the Internet has posed challenges to traditional distributors of copyrighted works, it has also presented a wide range of new opportunities for the creation and distribution of creative works.

ARGUMENT

I. INTENTIONAL INDUCEMENT IS NOT A THEORY OF SECONDARY COPYRIGHT LIABILITY SEPARATE FROM CONTRIBUTORY INFRINGEMENT.

From the beginning of this case, Viacom has argued that intentional inducement is a species of secondary copyright liability distinct from contributory infringement and vicarious liability. In its complaint filed on March 13, 2007, Viacom included three counts relating to secondary liability: Count IV – Inducement of Copyright Infringement; Count V – Contributory Copyright Infringement; and Count VI – Vicarious Copyright Infringement. Viacom continues to take this position on appeal, asserting that “*Grokster* liability is predicated on the intentional facilitation of infringement.” Viacom Brief at 57.

Contrary to Viacom’s assertion, intentional inducement is not a theory of secondary copyright liability distinct from contributory infringement. Rather, the Supreme Court in *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005), held that “[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement.” In other words, intentional inducement is the basis of contributory infringement liability. To be sure, in the Patent Act active inducement and contributory infringement are separate causes of action codified at

35 U.S.C. §§ 271(b) and 271(c).⁴ But in the judicially created secondary *copyright* liability framework, intentional inducement is the same as contributory infringement.

The *Grokster* Court merged contributory infringement with intentional inducement by defining contributory infringement as intentional inducement. Previously, a contributory infringer was “one who, with *knowledge* of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.” *Gershwin Publishing Corp. v. Columbia Artists Management*, 443 F.2d 1159, 1162 (2d Cir. 1971)(emphasis supplied). The *Grokster* Court replaced the knowledge prong of the contributory infringement test with intent, and thus created a new formulation: “[o]ne infringes contributorily by *intentionally* inducing or encouraging direct infringement.” *Grokster*, 545 U.S. at 930 (emphasis supplied).

This formulation is narrower than the *Gershwin* formulation, in that the *Gershwin* formulation appeared to impose liability on a person who engaged in an activity that he knew contributed to infringement, even if that was not his intent.

This is precisely the situation the Supreme Court addressed in *Sony Corp. v.*

⁴ 35 U.S.C. § 271(b) provides that “[w]hoever actively induces infringement of a patent shall be liable as an infringer.” 35 U.S.C. § 271(c) provides that “[w]hoever offers to sell...a component of a patented machine... knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article of commerce ... suitable for substantial noninfringing use, shall be liable as a contributory infringer.”

Universal City Studios, 464 U.S. 417 (1984). Sony continued to distribute the Betamax device even though it knew that some users were likely to employ it to infringe. To avoid imposing liability on Sony, the Supreme Court imported the staple article of commerce doctrine from section 271(c) of the Patent Act, and declared that the sale of copying equipment did not constitute contributory copyright infringement so long as the equipment was “merely ... capable of substantial noninfringing uses.” *Sony*, 464 U.S. at 442.

Lower courts viewed *Sony* as an exception to contributory infringement as formulated in *Gershwin*, but had difficulty in applying *Sony* and *Gershwin* in a consistent manner to Internet-related products and services. Compare, e.g., *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir. 2001), with *MGM Studios Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004), *rev'd*, 545 U.S. 913 (2005). The Supreme Court in *Grokster* resolved the confusion by clarifying that contributory infringement requires a showing of intent to encourage infringement, rather than mere knowledge of the infringing activity. The *Grokster* Court explained how *Sony* fit into this reformulation of contributory infringement: “*Sony* barred secondarily liability based on presuming or imputing intent to cause infringement solely from the design or distribution of a product capable of substantial lawful use, which the distributor knows is in fact used for infringement.” *Grokster*, 545 U.S. at 933. Thus, although Sony *knew* that the Betamax could be used for

infringing purposes, the *Sony* rule “limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product.” *Id.* at 934. Since “[t]here was no evidence that Sony had expressed an object of bringing about taping in violation of copyright or had taken active steps to increase its profits from unlawful taping,” *id.* at 931, and since such an unlawful objective could not be presumed, Sony was not liable for contributory infringement.

In contrast, it appears that Grokster did intend for users to employ their software to infringe. And the *Grokster* Court explained that “nothing in *Sony* requires courts to ignore evidence of intent if there is such evidence....” *Id.* at 934. If the evidence at trial demonstrates that the defendants intended to encourage infringement, they can be found liable for infringement – even if their products are capable of substantial noninfringing uses.

This case is this court’s first opportunity since *Grokster* to consider the standards for secondary copyright liability. This court should clarify the relationship between contributory infringement and intentional inducement.⁵

Even if this court is disinclined to find that *Grokster* narrowed *Gershwin* by

⁵ The need for clarification cannot be overstated. Within a five month period, two different panels of the Ninth Circuit articulated different tests for contributory infringement in different cases involving the same plaintiff. *Compare Perfect 10, Inc. v. Amazon.com*, 508 F.3d 1146, 1170 (9th Cir. 2007) with *Perfect 10, Inc. v. Visa International Service Ass’n*, 494 F.3d 788, 795 (9th Cir. 2007).

replacing the knowledge requirement with an intent requirement, there should be no question that intentional inducement is not a separate cause of action from contributory infringement.

II. VIACOM MISSTATES THE STANDARD FOR INTENTIONAL INDUCEMENT.

Regardless of whether intentional inducement is a subset of contributory infringement or identical to it, the Supreme Court in *Grokster* provided a very clear standard for evaluating the liability of the provider of technology products or services: “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.” *Grokster*, 545 U.S. at 919. Rather than quote this holding, which appears in the second sentence of the opinion, Viacom instead paraphrases dicta from deep in the opinion. Viacom Brief at 57.

This paraphrase is no accident. Viacom obviously seeks to avoid the *Grokster* Court’s requirement that the defendant’s objective of promoting a technology’s use to infringe copyright must be “shown by clear expression or other affirmative acts.” *Id.* The Supreme Court stressed that the intent to encourage infringement must be blatant: “[i]f liability for inducing infringement is ultimately found, it will not be on the basis of presuming or imputing fault, but from inferring

a patently illegal objective from statements and actions showing what that objective was.” *Grokster*, 545 U.S. at 941. Similarly, the Court insisted on “unequivocal indications of unlawful purpose.” *Id.* at 938. The Court emphasized that “mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering technical support or product updates, support liability in themselves.” *Id.* at 937. Interpreting *Grokster*, the Ninth Circuit found that “to establish inducement liability, it is crucial to establish that the distributors ‘communicated an inducing message to their users....’”

Perfect 10, Inc., v. Visa International Service Ass’n, 494 F.3d 788, 801 (9th Cir.

2007)(citing *Grokster*, 545 U.S. at 937).⁶ In this case, unlike in *Grokster*, there are

⁶ The language of the opinion suggests that liability should attach only if the defendant had the specific intent to cause infringement: “the object of promoting its use to infringe,” *Grokster*, 545 U.S. at 919, “their principal object was use of their software to download copyrighted works,” *id.* at 926, “an actual purpose to cause infringing use,” *id.* at 934, “statements or actions directed to promoting infringement,” *id.* at 935, “active steps taken to encourage direct infringement, such as advertising an infringing use or instructing how to engage in an infringing use, show an affirmative intent that the product be used to infringe,” *id.* at 936, “purposeful, culpable expression and conduct,” *id.* at 937, “active steps were taken with the purpose of bringing about infringing acts,” *id.* at 938, “acted with a purpose to cause copyright violations,” *id.*, “unequivocal indications of unlawful purpose,” *id.*, “a principal, if not exclusive, intent on the part of each to bring about infringement,” *id.* at 939, “intentional facilitation of their users’ infringement,” *id.*, “unlawful objective,” *id.*, “the distributor intended and encouraged the product to be used to infringe,” *id.* at 940, n.13, “a purpose to cause and profit from third-party acts of copyright infringement,” *id.* at 941, and “patently illegal objective.” *Id.*

no unequivocal indications of unlawful purpose or communication of an inducing message to users.

Viacom also selectively quotes phrases from *Grokster*, thereby missing the qualifications and nuance in the Supreme Court's opinion. With respect to a company not taking affirmative steps such as filtering to prevent infringement, the Court said, "[o]f course, in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device was otherwise capable of substantial noninfringing uses. Such a holding would tread too closely to the *Sony* safe harbor." *Grokster*, 545 U.S. at 939 n.12.

Similarly, with respect to the defendants' adopting an advertising-based business model that could benefit from traffic stimulated by infringing material, the Court stated that "[t]his evidence alone would not justify an inference of unlawful intent...." *Id.* at 940. The Court also described a business model that could benefit from infringement as evidence of intent that is only a "complement to the direct evidence of unlawful objective." *Id.* at 939. In this case, there is no direct evidence of unlawful objective. At most, the evidence shows YouTube's owners' awareness of infringing activity and the possibility that it might benefit them by increasing the market value of YouTube. This awareness does not constitute "clear expression or other affirmative acts taken to foster infringement."

Viacom misleadingly suggests that noninfringing uses have no relevance to inducement liability. Viacom Brief at 60 (“the existence of such substantial noninfringing uses is *not* a defense to intentional facilitation of copyright infringement”)(emphasis in original). To the contrary, the *Grokster* Court stated,

“where an article is good for nothing else but infringement, there is no legitimate public interest in its unlicensed availability, and there is no injustice in presuming or imputing an intent to infringe. Conversely, the doctrine absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limits liability to instances of more acute fault than the mere understanding that some of one’s products will be misused. It leaves breathing room for innovation and a vigorous commerce.”

Grokster, 545 U.S. at 932-33 (internal citations and quotation marks omitted).⁷

The *Grokster* Court states that the inducement rule “premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise

⁷ Viacom repeatedly quotes a statement by a YouTube employee that “probably 75-80% of our views came from copyrighted material.” *E.g.*, Viacom Brief at 10, 60. This is a meaningless statement. In fact, virtually 100% of the views were of copyrighted material, given that copyright comes into existence at the instant of fixation, and few of the videos were in the public domain. When a user uploads material she created, she is uploading copyrighted material. When Viacom’s contractors secretly uploaded Viacom’s own content to YouTube under assumed names, this too was copyrighted material. Even if the employee meant that 75% of the views came from material uploaded without the authorization of the copyright owner, there is no way she or anyone else could assess with any accuracy whether those uploads likely infringed copyright. This is because so many of the videos arguably fall within the fair use privilege. Many videos on YouTube are short clips from news broadcasts or political satires such as the Daily Show or the Colbert Report. Others are “mash-ups” that are clearly transformative. In this respect, YouTube differs from services such as Napster or Grokster, where a plausible fair use argument applied to very little of the material unauthorized by the copyright owner.

legitimate commerce or discourage innovation having a lawful promise.” *Id.* at 937. The vital role YouTube plays today in political, cultural, and social discourse, in addition to the substantial revenue it generates for copyright owners, demonstrates that it was “innovation having a lawful promise” at the time the alleged infringement at issue in this case occurred.

III. THE DMCA’S SAFE HARBORS APPLY TO ALL FORMS OF INFRINGEMENT, INCLUDING INTENTIONAL INDUCEMENT.

When Congress enacted the DMCA in 1998, it established the framework for copyright enforcement in the Internet environment. The framework has two basic elements. First, in Title I, Congress implemented the provisions of the World Intellectual Property Organization Internet Treaties regarding the circumvention of technical protection measures. 17 U.S.C. § 1201. Second, in Title II, Congress fashioned limitations on copyright liability for Internet service providers that created incentives for the services providers to work cooperatively with copyright owners. To qualify for the safe harbors, a service provider had to adopt and reasonably implement “a policy that provides for the termination in appropriate circumstances of the subscribers and account holders of the service provider’s system or network who are repeat infringers....” 17 U.S.C. § 512(i)(1)(A). Additionally, providers of hosting and search services had to comply with the statute’s notice and takedown regime. Upon receiving a compliant notice of

claimed infringement from the copyright owner, the service provider had to “respond[] expeditiously to remove, or disable access to, the material that is claimed to be infringing....” 17 U.S.C. § 512(c)(1)(C), (d)(3).

The notice and takedown regime carefully balances the interests of copyright owners and service providers. In essence, it provides copyright owners with automatic injunctive relief stopping alleged infringement without stepping into court. At the same time, it shelters service providers from liability for infringing activity initiated by millions of third parties. Although both copyright owners and service providers share responsibility under the DMCA for enforcing copyrights, the “DMCA notification procedures place the burden of policing copyright infringement – identifying the potentially infringing material and adequately documenting infringement – squarely on the owners of copyright.” *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007).

Viacom attempts to upset the DMCA’s balance by suggesting that the safe harbors *per se* cannot apply to intentional inducement. *See* Viacom Brief at 30. *Dicta* in two district court decisions could be read as indicating that intentional inducement is categorically excluded from the safe harbors’ protections. *Arista Records LLC v. USENET.com, Inc.*, 633 F.Supp.2d 124 (S.D.N.Y. 2009), *Columbia Pictures Industries, v. Fung*, 2009 U.S. Dist. LEXIS 122661 (C.D. Cal. 2009). These courts, and Viacom, are incorrect. The DMCA provides that “[a]

service provider shall not be liable for monetary relief ... for infringement of copyright,” 17 U.S.C. §§ 512(c) and (d), provided that it meets certain conditions. The plain language of the statute does not exclude certain forms of copyright liability from its scope; it provides protection from all forms of copyright infringement liability. Likewise, the DMCA’s legislative history explains that the safe harbors “protect qualifying service providers from liability for all monetary relief for direct, vicarious, and contributory infringement.” H.R. Rep. 105-551 (Part II), at 50; S. Rep. 105-190, at 19-20. The Ninth Circuit has also held that “the limitations on liability contained in 17 U.S.C. § 512 protect secondary infringers as well as direct infringers.” *Perfect 10, Inc., v. Amazon.com*, 508 F.3d 1146, 1175 (9th Cir. 2007).

Without question, in a particular case the facts that prove inducement may also disqualify the service provider from a safe harbor under sections 512(c)(1)(A) and (B) or 512(d)(1)(A) and (B). Nonetheless, nothing in the statute or its legislative history even remotely hints that inducement – or any other forms of liability -- is categorically ineligible for protection. Determining DMCA eligibility requires courts to interpret and apply the statutory requirements, which are different from the elements of the judicially created principles of secondary liability. Whether a defendant qualifies for a DMCA safe harbor is a different

inquiry from whether the defendant is liable for inducement.⁸ The two questions should not be conflated.

IV. VIACOM SEEKS JUDICIAL CREATION OF A COPYRIGHT REGIME THAT WOULD FRUSTRATE THE OBJECTIVES OF THE COPYRIGHT LAWS.

A. THE COPYRIGHT ACT REFLECTS A DELIBERATE BALANCE OF THE INTERESTS OF AUTHORS AND THE PUBLIC.

Our IP laws are based on the balancing of the interests of authors and inventors on the one hand with the interests of the public on the other. Quoting Thomas Jefferson, the Supreme Court in *Bonito Boats v. Thunder Craft Boats* recognized that “federal patent law has been about the difficult business ‘of drawing a line between things which are worth to the public the embarrassment of an exclusive patent, and those which are not.’” *Bonito Boats, Inc., v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 148 (1989) (quoting 13 Writings of Thomas Jefferson 335 (Memorial ed. 1904)). The Court observed that “[t]he Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the ‘Progress of Science and useful Arts.’” *Id.* at 146. The Supreme Court stated in *Sony v. Universal City Studios* that

⁸ *See, e.g.*, 17 U.S.C. § 512(l)(a) (a service provider’s failure to qualify for a DMCA safe harbor “shall not bear adversely upon consideration of a defense by the service provider that the service provider’s conduct is not infringing.”)

it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or inventors in order to give the public appropriate access to their work product [T]his task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other

Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984). This court in *Computer Associates Int'l, Inc., v. Altai, Inc.*, 982 F.2d 693, 696 (2d Cir. 1992), recognized that "the copyright law seeks to establish a delicate equilibrium. On the one hand, it affords protection to authors as an incentive to create, and, on the other hand, it must appropriately limit the extent of that protection so as to avoid the effects of monopolistic stagnation." *See also CCC Information Serv. Inc. v. Maclean Hunter Market Reports, Inc.* 44 F.3d 61, 69 (2d Cir. 1994). Likewise, the Fifth Circuit wrote that in the Copyright Act "Congress balanced the competing concerns of providing incentive to authors to create and of fostering competition in such creativity." *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1463 (5th Cir. 1990).

More recently, the Supreme Court has addressed balancing the interests of the entertainment and technology industries. In *Grokster*, the Supreme Court recognized that the administration of copyright law required "a sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies."

Grokster, 545 U.S. at 928. The Court noted that “[t]he more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off.” *Id.*

Understanding the importance of maintaining balance between the various interests served by the intellectual property laws, the Chief Judge of the U.S. Court of Appeals for the Ninth Circuit, Alex Kozinski, has recognized that

Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each creator building on the works of those who came before. Overprotection stifles the very creative force it’s supposed to nurture.

White v. Samsung Electronics of America, Inc., 989 F.2d 1512, 1513 (9th Cir.)(Kozinski, J., dissenting), *cert. denied*, 113 S. Ct. 2443 (1993). Chief Judge Kozinski concluded that “[t]his is why intellectual property law is full of careful balances between what’s set aside for the owner and what’s left in the public domain for the rest of us.” *Id.* at 1516.

The Supreme Court’s intellectual property cases typically concern substantive rights rather than enforcement procedures. But in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994), the Court explained the importance of maintaining a level litigation playing field so that defendants would be encouraged to assert meritorious defenses:

Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible. To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement [A] successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright.

Viacom seeks to tilt the copyright laws in the direction of the entertainment industry. Under its expansive interpretation of *Grokster*, virtually every technology company would be liable for intentional inducement because it profits from the distribution of a technology that it knows some users employ for infringing purposes. And under Viacom's narrow interpretation of the DMCA, the safe harbor would apply only to the first takedown notice. After that, the service provider would have a general awareness of facts of circumstances from which infringing activity is apparent. Viacom's approach would obstruct "innovation in new communications technologies," *Grokster*, 545 U.S. at 928, to the detriment of the public.

B. TRADITIONAL CONTENT COMPANIES HAVE BEGUN TO TAKE ADVANTAGE OF DIGITAL DISTRIBUTION TECHNOLOGIES.

Without question, the availability of infringing content on the Internet has resulted in some copyright owners losing some sales.⁹ Nonetheless, numerous

⁹ It is difficult to quantify the impact of this infringement. *See* Government Accountability Office, *Intellectual Property: Observation on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods; The Impact of Innovation and the Role of IP Rights on U.S. Productivity, Competitiveness, Jobs, Wages and Exports*, GAO-10-423 (April 12, 2010) at 1. The GAO asserted that the lack of data is the primary challenge for quantifying the impact of infringement. The GAO report quoted a 2008 OECD study that found that “available information on the scope and magnitude of counterfeiting and piracy provides only a crude indication of how widespread they may be....” *Id.* at 16. The OECD study further stated that “data have not been systematically collected or evaluated and, in many cases, assessments ‘rely excessively on fragmentary and anecdotal information; where data are lacking, unsubstantiated opinions are often treated as facts.’” *Id.* The GAO observed that the U.S. government has relied upon rightsholder statistics on infringement, but “industry associations do not always disclose their proprietary data sources and methods, making it difficult to verify their estimates.” *Id.*

The GAO report stated that in the absence of real data on infringement, methods for calculating estimates of economic losses involve assumptions that have a significant impact on the resulting estimate. Two key assumptions are the rate at which a consumer is willing to switch from an infringing good to a genuine product (substitution rate); and value of the infringing good. The GAO suggested that assuming a one-to-one substitution rate at the manufacturer’s suggest retail price could lead to lead to a dramatic overstatement of economic loss. The GAO noted that some copyright industry studies made precisely this problematic assumption. *Id.* at 21. In other instances, the studies failed altogether to reveal their assumptions. *Id.* The GAO stated that “[u]nless the assumptions about substitution rates and valuations of counterfeit goods are transparently explained, experts observed that it is difficult, if not impossible, to assess the reasonableness of the resulting estimate.” *Id.* at 18.

The GAO report concluded that “it is difficult, if not impossible, to quantify the net effect of counterfeiting and piracy on the economy as a whole.” *Id.* at 16. The GAO also stated that the “net effect” of infringement on the economy “cannot be determined with any certainty.” *Id.* at 18.

industries have developed business strategies that have had the effect of reducing the demand for infringing products. Software companies, for example, have licensed computer manufacturers to preload software on their computers prior to consumer purchase. Video game companies offer multi-player game platforms accessible only to authorized users. Some entertainment companies license their content for online distribution at low or no cost. These strategies succeed when they are designed and implemented by industry participants with a deep understanding of the relevant products, technology delivery platforms, and consumers.

Examples of successful business models for the digital distribution of content include:

- iTunes is now the largest music retailer in the United States, accounting for more than 25% of overall music sales.¹⁰ There are over 400 legitimate online music services, with a total revenue of \$4.2 billion.¹¹
- Amazon now sells more ebooks for the Kindle than hardcover books.¹² eBook sales in the U.S. are expected to rise from a current \$1 billion to \$3 billion in 2015.¹³

¹⁰ Ed Christman, *Apple Solidifies Lead Among U.S. Music Accounts, As Mobile Merchants Fade*, BILLBOARD.BIZ, May 22, 2010, http://www.billboard.biz/bbbiz/content_display/magazine/upfront/e3i12fe2557a9382597671a522cc1cc901d.

¹¹ *IFPI publishes Digital Music Report 2010*, Jan. 21, 2010, http://www.ifpi.org/content/section_resources/dmr2010.html.

- Netflix is expected to pay rightsholders over \$2 billion for streaming rights through 2011.¹⁴
- X-Box Live generated over \$1 billion in the last fiscal year, with revenues driven by sales of films and television shows.¹⁵

Studies show that the vast majority of consumers desire legal sources of online content. They turn to infringing content when convenient and affordable legitimate content is not available.¹⁶

¹² M.G. Siegler, *Kindle Books Outselling Hardcover Books. 'Tipping Point' Reached, Amazon Says*, TECHCRUNCH, July 19, 2010, <http://techcrunch.com/2010/07/19/kindle-sales/>.

¹³ Mike Melanson, *eBook Sales to Hit \$1 Billion By Year's End, \$3 Billion by 2015*, READWRITEWEB, Nov. 8, 2010, http://www.readwriteweb.com/archives/ebook_sales_to_hit_1_billion_by_years_end_3_billio.php.

¹⁴ Mark Hefflinger, *Report: Netflix Streaming Rights May Cost \$2 Billion through 2011*, DIGITAL MEDIA WIRE, Oct. 28, 2010, <http://www.dmwmmedia.com/news/2010/10/28/report-netflix-streaming-rights-may-cost-2-billion-through-2011>.

¹⁵ Christopher Rick, *Online Video Pushes Microsoft Xbox Live Sales Over \$1 Billion*, REELSEO, July 8, 2010, <http://www.reelseo.com/video-pushes-xbox-live-sales/>.

¹⁶ Michael D. Smith, *Converting Pirates Without Cannibalizing Purchasers: The Impact of Digital Distribution on Physical Sales and Internet Piracy* (2010). In this context, it is worth noting that the holders of the copyrights in the Beatles catalog have just authorized the sale of Beatles music on the iTunes store – seven years after the iTunes store began operating. Ethan Smith, *Apple Finally Snares Beatles*, WALL ST. JOURNAL, Nov. 16, 2010, <http://online.wsj.com/article/SB10001424052748703326204575617004052395816.html>. Inexpensive legitimate distribution models are also essential to reducing infringement in the developing world. “The key question for media access and the legalization of media markets ... has less to do with enforcement than with

C. THE INTERNET PROMOTES CREATIVITY.

As difficult as it is to measure the economic impact of online infringement, it is even more difficult to measure the effect of the Internet on the overall state of creative activity. Even if online infringement has led to lost revenue for some entertainment companies, and that lost revenue has in turn resulted in less investment in new creative activity by those companies, this negative impact must be weighed against the many positive effects the Internet has had on creative activity.

As discussed above, services such as iTunes, Kindle, Netflix and YouTube enable existing entertainment companies to distribute their content with significant compensation, either from license fees or advertising revenues. These companies also have learned how to use services such as YouTube, Facebook, MySpace, and Twitter to promote their products. Indeed, discovery in this case revealed that

fostering competition at the low end of media markets – the mass market that has been created through and largely left to piracy.” Joe Karaganis, *Media Piracy in Emerging Economies: Price, Market Structure and Consumer Behavior* 5, available at http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_6/wipo_ace_6_5.pdf. Karaganis explains that a critical feature of this competition “is neither strong enforcement nor the innovative use of digital distribution, but rather the presence of firms in national markets that actively compete on price and services for local audiences.” *Id.* at 4. Karaganis adds that local firms are much more likely than multinational firms “to aggressively compete for audiences on price and service – the domestic market is their market.” *Id.*

Viacom employees uploaded clips on to YouTube from their personal accounts in order to create an artificial “buzz” for Viacom products. Performers such as Justin Bieber have leveraged their YouTube videos into successful careers with major record labels. In fact, hundreds of YouTube partners are now making over \$100,000, and numerous artists have used YouTube to launch successful careers.¹⁷

Additionally, Internet services enable authors and artists to “disintermediate” the traditional publishers and record labels and directly reach their fans. The creators receive compensation from license fees, advertising revenue, or live performances promoted via these services. By cutting out the publishers and record labels, the creators are able to keep a larger share of the revenue. Likewise, thousands of individual programmers develop “apps” that are sold through the iTunes store or other websites.

Further, the Internet provides a means for the creation and distribution of vast amounts of content where the creators do not seek financial reward. The free

¹⁷ See Claire Cain Miller, *YouTube Ads Turn Videos into Revenue*, N.Y. TIMES, Sep. 2, 2010, <http://www.nytimes.com/2010/09/03/technology/03youtube.html>. Twenty-two year old Shane Dawson is estimated to make \$295,000 a year solely off of YouTube revenues from his comedy videos. Kevin Voigt, *So you wanna be a YouTube star?*, CNN, Sep. 24, 2010, <http://edition.cnn.com/2010/BUSINESS/09/24/youtube.hitmakers.dawson/>. The hit song by the Gregory Brothers, “Bed Intruder Song” went from being a YouTube sensation to a Billboard 100 charting single. Jenna Wortham, *From Viral Video to Billboard 100*, N.Y. TIMES, Sep. 5, 2010, <http://www.nytimes.com/2010/09/06/business/media/06tune.html>.

online encyclopedia, Wikipedia, is primarily written collaboratively by anonymous volunteers. It has more than 91,000 active contributors working on more than 17,000,000 articles in over 270 languages. English Wikipedia contains 3,478,986 articles with 22,232,894 pages.¹⁸ Flickr hosts 5 billion photographs.¹⁹ Over 125 million bloggers comment on politics, food, travel, and a host of other topics, ranging from the esoteric to the trivial.²⁰ Thirty-five hours of video are uploaded to YouTube every minute.²¹ If the four major networks (ABC, NBC, CBS, and Fox) had aired new content twenty fours a day and seven days a week from the moment of their founding until now, they would not have broadcast as much content as YouTube has in the past *six months* alone.

The entertainment companies have a dismissive attitude towards user-generated content, suggesting that it is far more frivolous and of lower quality than the material created by the commercial entertainment companies. Without question, much user generated content is frivolous and of low quality. But so is

¹⁸ Wikipedia: *About*, <http://en.wikipedia.org/wiki/Wikipedia:About>. Wikipedia attracts 78 million visitors a month. *Id.*

¹⁹ Flickr blog, Sept. 19, 2010, <http://blog.flickr.net/en/2010/09/19/5000000000/>. 30 billion photographs are uploaded to Facebook annually. *Internet 2009 in numbers*, Jan. 22, 2010, <http://royal.pingdom.com/2010/01/22/internet-2009-in-numbers/>.

²⁰ *Id.*

²¹ Don Reisinger, *YouTube: 35 hours of video uploaded every minute*, CNET NEWS, Nov. 11, 2010, http://news.cnet.com/8301-13506_3-20022481-17.html?part=r. YouTube serves 1 billion videos a day. *Internet 2009 in numbers, supra.*

much of the content distributed by entertainment companies. It is hard to argue that songs with misogynistic lyrics or reality television programming on Viacom's MTV Networks have more redeeming social value than the Jib-Jab remixes, the Obama Girl videos, Randy Pausch's Last Lecture or the Wikipedia articles we all consult. One of the rightsholders that has most aggressively attacked alleged online infringement is Perfect 10, a publisher specializing in images of naked women who have not been surgically altered.²²

This court should not interpret the copyright law in a manner that assists one set of copyright holders at the expense of another, much larger set of copyright holders because of a misimpression that the works distributed by the first set of copyright holders have greater artistic or social merit than the works created by the second set of copyright holders. Yet that would be the result if this court adopts the liability regime advocated by Viacom. Many Internet companies would no longer be able to provide a free and open platform for user generated content because of the potential cost of liability. Instead, Internet companies would have to charge for their services or monitor their users' content for infringing material. Either approach would frustrate both of the values identified by the *Grokster*

²² See, e.g., *Perfect 10, Inc. v. Amazon.com*, 508 F.3d 1146 (9th Cir. 2007); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007); *Perfect 10, Inc. v. Visa International Service Ass'n*, 494 F.3d 788 (9th Cir. 2007).

Court: “supporting creative pursuits through copyright protection” and “promoting innovation in new communication technologies.” *Grokster*, 545 U.S. at 928.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,



Counsel for Amici Curiae

Markham C. Erickson
Holch & Erickson LLP and
Executive Director, NetCoalition
400 N. Capitol Street NW, Suite 585
Washington, DC 20001
(202) 624-1460
merickson@holcherickson.com

Jonathan Band
Jonathan Band PLLC
21 Dupont Circle NW, Suite 800
Washington, D.C. 20036
(202) 296-5675
jband@policybandwidth.com

Matthew Schruers
Vice President, Law & Policy
Computer & Communications
Industry Association
900 Seventeenth Street NW, 11th Floor
Washington, D.C. 20006
(202) 783-0070
MSchruers@ccianet.org

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,693 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the types style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.



Counsel for Amici Curiae

Jonathan Band
Jonathan Band PLLC
21 Dupont Circle NW, Suite 800
Washington, D.C. 20036
(202) 296-5675
jband@policybandwidth.com

April 7, 2011

CERTIFICATE OF SERVICE

I hereby certify, pursuant to FRAP 25(d)(2), that on this 7th day of April, 2011, a true and correct copy of the foregoing Brief of Amici Curiae Computer & Communications Industry Association and NetCoalition in Support of Appellees and Urging Affirmance was timely filed in accordance with FRAP 25(a)(2)(B) and served on all counsel of record in this appeal via CM/ECF pursuant to Second Circuit Rule 25.1(h).



Counsel for Amici Curiae

Jonathan Band
Jonathan Band PLLC
21 Dupont Circle NW, Suite 800
Washington, D.C. 20036
(202) 296-5675
jband@policybandwidth.com

April 7, 2011