

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.

YOU TUBE, INC., YOU TUBE, LLC, and GOOGLE, INC.,

Defendants-Appellees.

(ADDITIONAL CAPTION ON THE REVERSE)

*Appeal from a Decision of the United States District Court for the Southern District of New York,
No. 07-CV-2103 · Honorable Louis L. Stanton*

BRIEF OF AMICI CURIAE
ELECTRONIC FRONTIER FOUNDATION, CENTER FOR DEMOCRACY AND TECHNOLOGY,
INTERNATIONAL FEDERATION OF LIBRARY ASSOCIATIONS AND INSTITUTIONS,
AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF COLLEGE AND RESEARCH LIBRARIES,
AND ASSOCIATION OF RESEARCH LIBRARIES

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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., and THE MUSIC FORCE LLC,

Plaintiffs-Appellants,

and

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

Plaintiffs,

v.

YOU TUBE, INC., YOU TUBE, LLC, and GOOGLE, INC.,

Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* Electronic Frontier Foundation, Center for Democracy and Technology, International Federation of Library Associations and Institutions, American Library Association, Association of College and Research Libraries, and Association of Research Libraries (collectively, “*Amici*”) state that none of *Amici* has a parent corporation and that no publicly held corporation owns 10% or more of the stock of any of *Amici*.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
STATEMENT OF INTEREST OF <i>AMICI CURIAE</i>	1
INTRODUCTION	3
ARGUMENT	4
I. Reducing Legal Uncertainties for Service Providers Is Critical to Free Expression Online.....	4
A. Online Services Are Critical Platforms for Political Speech	5
B. Congress Created the DMCA Safe Harbors to Reduce the Legal Uncertainty That Could Impede the Development of Online Platforms for Expression and Innovation	12
II. Appellants’ Theories Contravene the Language and Purpose of the DMCA, Threatening Online Innovation and Expression	16
A. In Order to Establish Certainty and Thereby Promote Expression and Innovation, Congress Chose to Implement a Notice and Takedown Requirement for Service Providers, and Explicitly Provided that Monitoring Is Not Required.....	17
1. Congress Expressly Declined to Condition Safe Harbor Eligibility on an Obligation to Monitor.....	18
2. The District Court Correctly Rejected Appellants’ Efforts to Rewrite the Knowledge Disqualifier.....	21
3. If This Court Were to Adopt Appellants’ Theory of Generalized Knowledge, Online Expression Would Suffer	24
a. Under a “generalized knowledge” standard, content takedowns will necessarily be overbroad.....	24
b. Under a “generalized knowledge” standard, online intermediaries may have neither the resources nor the tolerance for legal risk to continue providing their services.....	26
4. A “Generalized Knowledge” Standard Would Discourage Beneficial Editorial Activities.....	27

B. The District Court Correctly Rejected Appellants’ Efforts to Conflate Common-Law Secondary Copyright Liability with the Section 512(c) Safe Harbor	28
CONCLUSION	31
CERTIFICATE OF COMPLIANCE.....	32
CERTIFICATE OF SERVICE	33

TABLE OF AUTHORITIES

Cases

<i>ACLU v. Reno</i> , 929 F.Supp. 824 (E.D. Pa. 1996).....	3
<i>Conn. ex rel. Blumenthal v. U.S. Dep’t of the Interior</i> , 228 F.3d 82 (2d Cir. 2000)	24
<i>Conn. Nat’l Bank v. Germain</i> , 503 U.S. 249 (1992)	24
<i>CoStar Group, Inc. v. LoopNet, Inc.</i> , 373 F.3d (4th Cir. 2004).....	13
<i>Ellison v. Robertson</i> , 357 F.3d 1072 (9th Cir. 2004)	3, 30
<i>Hendrickson v. eBay</i> , 165 F. Supp. 2d 1082 (C.D. Cal 2001).....	30
<i>Io Group, Inc. v. Veoh Networks, Inc.</i> , 586 F. Supp. 2d 1132 (N.D. Cal. 2008).....	20
<i>Perfect 10, Inc. v. CCBill</i> , 488 F.3d 1102 (9th Cir. 2007)	19, 23
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997)	3
<i>UMG Recordings, Inc. v. Veoh Networks, Inc. (“UMG v. Veoh”)</i> , 665 F. Supp. 2d 1099 (C.D. Cal. 2009).....	21, 22, 23, 30
<i>Viacom Intl, Inc. v. YouTube, Inc.</i> , 718 F. Supp. 2d 514 (S.D.N.Y. 2010).....	22
<i>Wolk v. Kodak Imaging Network, Inc.</i> , 2011 WL 940056 (S.D.N.Y. March 17, 2011).....	20, 21, 23

Statutes

17 U.S.C. § 512.....	28, 29
17 U.S.C. § 512(c)	passim

17 U.S.C. § 512(c)(1)(A) 15, 16 , 22
 17 U.S.C. § 512(c)(3)(A)15
 17 U.S.C. § 512(c)(3)(B)(i).....15
 17 U.S.C. § 512(d)27
 17 U.S.C. § 512(f) 16, 24
 17 U.S.C. § 512(g)16
 17 U.S.C. § 512(m)22
 17 U.S.C. § 512(m)(1) 14, 20, 21
 Digital Millennium Copyright Act (DMCA)..... passim

Other Authorities

144 CONG. REC. H10618 15, 25
 144 CONG. REC. H709216, 25
 H.R. REP. NO. 105-551..... passim
 H.R. REP. NO. 105-796.....14
 Jonathan Band & Matthew Schruers, *Safe Harbors Against the Liability
 Hurricane: the Communications Decency Act and the Digital Millennium
 Copyright Act*, 20 CARDOZO ARTS & ENT. L.R. 295, 316 (2002) 21, 31
 Jeffrey R. Kuester & Daniel R. McClure, *SPA v. ISPs: Contributory
 Copyright Infringement in Cyberspace*, INTELL. PROP. TODAY, Feb. 199712
 Joseph V. Meyers III, Note, *Speaking Frankly about Copyright Infringement on
 Computer Bulletin Boards: Lessons to be Learned from Frank Music, Netcom, and
 the White Paper*, 49 VAND. L. REV. 439 (1996)12
 3 MELVILLE B. NIMMER & DAVID NIMMER,
 NIMMER ON COPYRIGHT (2010).....12
 S. REP. NO. 105-190 passim
*Targeting Websites Dedicated To Stealing American Intellectual Property:
 Hearing Before the S. Comm. on the Judiciary, 157th Cong. (2011)*.....12

*WIPO Copyright Treaties Implementation Act and Online Copyright Liability
Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the H. Subcomm.
on Courts and Intellectual Property, 105th Cong. 102 (1997)14*

STATEMENT OF INTEREST OF *AMICI CURIAE*

This brief is filed pursuant to Fed. R. App. P. 29(a) with the consent of all parties.¹

The Electronic Frontier Foundation (EFF) is a nonprofit civil liberties organization that has worked for over 20 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its almost 15,000 dues-paying members have a strong interest in assisting the courts and policy-makers to help ensure that copyright law serves the interests of creators, innovators and the general public.

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

The International Federation of Library Associations and Institutions (IFLA) is the leading international body representing the interests of library and

¹ No party's counsel authored this brief in whole or in part. Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than amici contributed money intended to fund preparing or submitting this brief. Web sites cited in this brief were last visited on April 5, 2011.

information services and their users. It is the global voice of the library and information profession. Founded in 1927, IFLA represents over 750,000 library and information professionals in over 150 countries.

The American Library Association (ALA), established in 1876, is a nonprofit professional organization of more than 62,000 librarians, library trustees, and other friends of libraries dedicated to providing and improving library services and promoting the public interest in a free and open information society.

The Association of College and Research Libraries is a division of the American Library Association representing more than 12,600 academic and research librarians and interested individuals. ACRL is the only individual membership organization in North America that develops programs, products and services to meet the unique needs of academic and research librarians. Its initiatives enable the higher education community to understand the role that academic libraries play in the teaching, learning and research environments.

The Association of Research Libraries is a nonprofit organization comprising 126 research libraries at comprehensive, research-extensive institutions in the United States and Canada. The ARL's mission is to advance the goals of its member research libraries by fostering the exchange of ideas and expertise, providing leadership in public and information policy to the scholarly and higher

education communities, and facilitating the emergence of new roles for research libraries.

INTRODUCTION

In 1997, the Supreme Court called the Internet “the most participatory form of mass speech yet developed.” *Reno v. ACLU*, 521 U.S. 844, 863 (1997) (citing *ACLU v. Reno*, 929 F.Supp. 824, 883 (E.D. Pa. 1996)). Evidence of the truth of this statement has continued to mount ever since. Today, platforms such as YouTube, Facebook, Twitter, Flickr, Blogspot, and others enable people around the world to reach out to a global audience, sharing information, ideas, and commentary. Moreover, as recent events in the Middle East underscore, that ability has led to the development of new and potent forms of political expression and organizing.

The success of these platforms for speech and innovation depends in turn on the clear legal structure that Congress created when it enacted the safe harbor provisions of the Digital Millennium Copyright Act (DMCA). In order to galvanize and protect online expression and commerce, Congress set out to “provide ‘greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.’” *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (citing S. REP. NO. 105-190, at 20 (1998)).

Without these safe harbors, service providers would be vulnerable to potentially massive copyright damage awards when, as is virtually inevitable, use of their services implicates exclusive rights of copyright owners. To avoid that risk, service providers would be likely to block communications that occur via their services—including lawful communications—or shut those services down. Thus, changes to the legal climate for service providers can have profound consequences for free expression online, and proper interpretation of copyright laws as applied to online service providers is a matter of crucial public interest.

Appellants ask this Court to thwart Congress's intent and reinstate a climate of legal uncertainty that would harm innovative online services and the speech they foster. In the interest of protecting the millions of Internet users who rely upon online service providers to develop and support innovative platforms for expression, *Amici* urge the Court to reject Appellants' efforts to undermine the 17 U.S.C. § 512(c) safe harbor and to affirm the district court's ruling.

ARGUMENT

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

Online political expression is flourishing, thanks in large part to the development of new and innovative services that facilitate that expression. However, the continuing viability of these platforms for citizen participation

depends on the existence of clear rules of engagement that, when followed, protect service providers from debilitating liability for the misdeeds of a handful of users.

A. Online Services Are Critical Platforms for Political Speech

The events of the last few months in the Middle East offer a stunning example of the power of intermediary platforms to serve as tools for expression, diplomacy, and political discourse. In Tunisia, Egypt, Iran, and other Arab countries, protestors have used social media to ignite movements for political change and garner global support. These platforms have also helped ensure that Americans—from expatriates interested in happenings in their home countries to citizens simply looking for updates on world events—have access to an array of information and opportunities to share their own commentary.

In Tunisia, for example, a group of political activists operating under the name Nawaat maintain a collective blog and YouTube channel through which they communicate ideas about political change, educate about democracy, and solicit collaboration.² During Tunisia's revolution, Nawaat used its blog and YouTube channel to provide local citizens in Tunisia and other Arab countries with more accurate perspectives on important events as an alternative to unreliable reports

² See Nawaat, <http://nawaat.org>; Nawaat's Youtube Channel, <http://www.youtube.com/nawaat>.

from local media. When YouTube was blocked in Tunisia, Nawaat used third-party services to continue publishing videos on YouTube so people around the world could stay current with events as they unfolded. Through YouTube as well as Twitter, Facebook, and other media, those outside Tunisia were able to obtain rapid access to information and commentary about events taking place in the country.³ The news and videos Nawaat posted also helped garner international support and humanitarian assistance. Nawaat was recently awarded the Reporters Without Borders Netizen Prize for defending freedom of expression online.⁴

Nawaat and others have used these platforms to combat oppression outside Tunisia as well. As early as 2006, Middle East bloggers began to publish YouTube videos depicting police brutality in Egypt, helping to turn what had been a taboo topic into a subject of public debate.⁵ This action cleared the way for the more recent viral distribution of a video exposing law enforcement corruption created by

³ Robert Mackey, *Fresh Video of Tunisian Protests*, N.Y. TIMES, Jan. 13, 2011, available at <http://thelede.blogs.nytimes.com/2011/01/13/fresh-video-of-tunisian-protests/>.

⁴ Press Release, Reporters Without Borders, Netizen Prize 2011: Tunisian blog Nawaat awarded 2011 Netizen Prize (Mar. 25, 2011), <http://en.rsf.org/netizen-prize-2011-14-03-2011,39791.html>.

⁵ See, e.g., Sameer Padania, *Egypt: Bloggers open the door to police brutality online*, GLOBAL VOICES, Dec. 9, 2011, <http://globalvoicesonline.org/2006/12/09/egypt-bloggers-open-the-door-to-police-brutality-debate/>.

an Egyptian businessman, Khaled Said, who was beaten to death by local police after he posted the video online.⁶ Egyptian Wael Ghonim was inspired by the incident to start a Facebook page called “We are all Khaled Said,” which provided news, photos, and videos communicating ideas about government and ultimately became a central point for reform activities that led to the ousting of Egypt’s leader.⁷ Indeed, social media platforms were such a threat to the incumbent regime that it temporarily disabled Internet access in a misguided attempt to quash political dissent.⁸

Social media have had a profound impact on political discourse in Morocco, Iran, and Syria as well. In Morocco, a YouTube user posted videos of local policemen taking bribes from motorists.⁹ The videos spawned a national debate on police corruption and prompted other Moroccans to post exposés of their own. As

⁶ Jennifer Preston, *Movement Began With Outrage and a Facebook Page That Gave It an Outlet*, N.Y. TIMES, Feb. 5, 2011, available at <https://www.nytimes.com/2011/02/06/world/middleeast/06face.html>.

⁷ Mike Giglio, *The Facebook Freedom Fighter*, NEWSWEEK, Feb. 13, 2011, available at <http://www.newsweek.com/2011/02/13/the-facebook-freedom-fighter.html>.

⁸ Jordan Robertson, *The day part of the Internet died: Egypt goes dark*, ASSOCIATED PRESS, Jan. 28, 2011, available at <http://finance.yahoo.com/news/The-day-part-of-the-Internet-apf-1092937415.html?x=0>.

⁹ Layal Abdo, *Morocco’s “video sniper” sparks a new trend*, MENASSAT, Nov. 12, 2007, available at: <http://www.menassat.com/?q=en/news-articles/2107-moroccos-video-sniper-sparks-new-trend>.

a result, the government arrested a number of policemen and took steps to monitor its agents for corrupt behavior.¹⁰

During the 2009 uprisings in Iran that followed the controversial reelection of President Mahmoud Ahmadinejad, a cell-phone video of a woman shot and dying in the street that was uploaded to Facebook and re-posted on numerous video sites became a global icon and rallying point for the political opposition.¹¹ Another platform, Twitter, became the primary pipe for communications about the uprisings from Iran to the outside world. Indeed, the U.S. State Department deemed the service important enough to Iranian and U.S. international interests that it asked Twitter to postpone a major network upgrade so that the service would continue to be active for Iranian protesters.¹²

¹⁰ Wikipedia, Internet censorship in Morocco, https://secure.wikimedia.org/wikipedia/en/wiki/Internet_censorship_in_Morocco.

¹¹ See Nazila Fathi, *In a Death Seen Around the World, a Symbol of Iranian Protests*, N.Y. TIMES, Jun. 22, 2009, available at <https://www.nytimes.com/2009/06/23/world/middleeast/23neda.html>; Helen Kennedy, *Neda, young girl brutally killed in Iran, becoming symbol of rebellion*, N.Y. DAILY NEWS, Jun. 21, 2009, available at http://articles.nydailynews.com/2009-06-21/news/17925204_1_supreme-leader-ayatollah-ali-khamenei-facebook.

¹² Sue Fleming, *U.S. State Department speaks to Twitter over Iran*, REUTERS, Jun. 16, 2009, available at <http://www.reuters.com/article/2009/06/16/us-iran-election-twitter-usa-idUSWBT01137420090616>.

YouTube has also been used in Iran to expose sexual harassment,¹³ corruption,¹⁴ and human rights abuses. For example, as described in a brief filed below, the son of a prominent Iranian journalist created a YouTube channel¹⁵ to spread awareness about government human rights abuses and frequently posts cell-phone videos recorded by contacts in Iran to demonstrate these issues. Brief of Amicus Curiae The Sideshow Coalition in Support of Defendants 3-4, *Viacom Int'l, et al v. YouTube, Inc. et al*, No. 1:07-cv-02103 (Dkt No. 352) (S.D.N.Y. June 1, 2010).

In Syria, where public criticism of government officials is strongly discouraged, schoolchildren posted cell-phone videos online documenting serious physical abuse by their teachers.¹⁶ The public discussion and outrage that ensued ultimately obliged the government to fire the teachers. Secretary of State Hillary Clinton highlighted the incident in remarks late last year and observed that “new

¹³ Hamid Tehrani, *Iran: Citizen Media Sex Scandal*, GLOBAL VOICES, Jun. 19, 2008, available at <http://globalvoicesonline.org/2008/06/19/iran-citizen-media-sex-scandal/>.

¹⁴ Telmah Parsa, *The Iran Porn Video*, DAILY BEAST, Jan. 9, 2009, <http://www.thedailybeast.com/blogs-and-stories/2009-01-09/irans-hottest-porn-video/>.

¹⁵ Iran Election and Protest, onlymehdi Youtube Channel, <http://www.youtube.com/onlymehdi>.

¹⁶ Hillary Clinton, U.S. Sec’y of State, Remarks on Innovation and American Leadership to the Commonwealth Club (Oct. 15, 2010), available at <http://www.state.gov/secretary/rm/2010/10/149542.htm>.

communication tools . . . are helping to connect and empower civil society leaders, democracy activists, and everyday citizens even in closed societies.”¹⁷

The State Department has been a vocal champion of the use of social platforms as vehicles for expression and diplomacy,¹⁸ particularly in the context of Middle East reform movements.¹⁹ In a 2009 speech, Secretary Clinton credited these platforms with giving a voice to “ordinary citizens”:

We have seen the possibilities of what can happen when ordinary citizens are empowered by Twitter and Facebook to organize political movements, or simply exchange ideas and information. So we find ourselves living at a moment in human history when we have the potential to engage in these new and innovative forms of diplomacy and to also use them to help individuals be empowered for their own development.

Hillary Clinton, U.S. Sec’y of State, Remarks to U.S. Global Leadership Coalition (Dec. 7, 2009), *available at* <http://www.state.gov/statecraft/index.htm>. The State Department itself has maintained an active YouTube channel since February

¹⁷ *Id.*

¹⁸ Hillary Clinton, U.S. Sec’y of State, Internet Rights And Wrongs: Choices & Challenges In A Networked World (Feb. 15, 2011), *available at* <http://www.state.gov/secretary/rm/2011/02/156619.htm>; Dep’t of State, Joint Request for Statements of Interest: Internet Freedom Programs (Jan. 3, 2011), *available at* <http://www.state.gov/g/drl/p/127829.htm>.

¹⁹ Secretary Clinton also noted that many of these online services are American inventions. Hillary Clinton, Sec’y of State, Social Media Dialogue with Dr. Ahmed Ghanim of Egypt’s Masrawy.com (Feb. 23, 2011), *available at* <http://www.state.gov/secretary/rm/2011/02/157005.htm>.

2007.²⁰

Of course, these new platforms for expression have become equally central to U.S. politics. To take a few examples from YouTube alone: during the 2008 election, seven presidential candidates announced their candidacy on YouTube; official candidate videos received 200 million views; and there were 1 billion views of political videos created by individuals and groups not associated with a campaign.²¹ Forty-five percent of American Internet users watched online video related to a campaign.²² During the 2010 election cycle, political campaigns, advocacy groups, and ordinary citizens again created and posted videos dealing with a variety of campaign issues, including illegal immigration, health care reform, education and teachers' unions, the federal budget deficit, bank bailouts, the stimulus bill, and taxes.²³

²⁰ U.S. Dep't of State YouTube Channel, <http://www.youtube.com/user/statevideo>.

²¹ Nikki Schwab, *In Obama-McCain Race, YouTube Becomes a Serious Battleground for Presidential Politics*, US NEWS, Nov. 7, 2008, available at <http://www.usnews.com/news/campaign-2008/articles/2008/11/07/in-obama-mccain-race-youtube-became-a-serious-battleground-for-presidential-politics>.

²² Aaron Smith, *The Internet's Role in Campaign 2008*, PEW INTERNET, Apr. 15, 2009, available at <http://www.pewinternet.org/Reports/2009/6--The-Internets-Role-in-Campaign-2008.aspx>.

²³ CitizenTube Blog, *The 2010 Election on YouTube by the Numbers*, Nov. 1, 2010, <http://www.citizentube.com/2010/11/2010-election-on-youtube-by-numbers.html>.

As Senator Ron Wyden recently observed:

The Internet has advanced the cause of free speech in ways that I believe would make the nation's Founding Fathers proud. It has made lies harder to sustain, information harder to repress and injustice harder to ignore.

Targeting Websites Dedicated To Stealing American Intellectual Property: Hearing Before the S. Comm. on the Judiciary, 157th Cong. (2011) (statement of Sen. Ron Wyden, Member, S. Comm. on the Judiciary).²⁴ Given the importance of new speech platforms, courts should take care in considering challenges to the legal structure upon which they rely.

B. Congress Created the DMCA Safe Harbors to Reduce the Legal Uncertainty That Could Impede the Development of Online Platforms for Expression and Innovation

The crafters of the DMCA realized that establishing clear rules regarding intermediary liability for the acts of users was essential to the development of the Internet as a vehicle for free expression as well as innovation and commerce. The need was highlighted by a growing trend of copyright infringement suits against online service providers that challenged their existence.²⁵ Indeed, the limitations on

²⁴ Available at <http://wyden.senate.gov/issues/issue/?id=3ad1419c-9af9-4779-b575-f1b3f48b83dc>.

²⁵ See, e.g., Jeffrey R. Kuester & Daniel R. McClure, *SPA v. ISPs: Contributory Copyright Infringement in Cyberspace*, INTELL. PROP. TODAY, Feb. 1997, at 8 (describing lawsuits by the Software Publishers Ass'n against online service providers). See also Courtney Macavinta, *Yahoo Message Board Users Sued*, CNET NEWS, Sept. 9, 1998, available at <http://news.cnet.com/2100-1023->

liability were deemed “absolutely necessary to the immediate survival of ISPs.” *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 555 (4th Cir. 2004). Furthermore, fears of liability arising from doctrinal ambiguities and the possibility of high statutory damages threatened new market entrants. Specifically, Congress recognized,

[W]ithout clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet. In the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability. For example, service providers must make innumerable electronic copies by simply transmitting information over the Internet. Certain electronic copies are made to speed up the delivery of information to users. Other electronic copies are made in order to host World Wide Web sites. Many service providers engage in directing users to sites in response to inquiries by users or they volunteer sites that users may find attractive. Some of these sites might contain infringing material.

S. REP. NO. 105-190, at 8 (1998).

Accordingly, Congress designed the DMCA “to clarify the liability for copyright infringement of online and Internet service providers . . . [by setting] forth ‘safe harbors’ from liability for ISP’s and OSP’s under clearly defined circumstances, which both encourage responsible behavior and protect important

215292.html; Joseph V. Meyers III, Note, *Speaking Frankly about Copyright Infringement on Computer Bulletin Boards: Lessons to be Learned from Frank Music, Netcom, and the White Paper*, 49 VAND. L. REV. 439, 478-81 (1996). See also 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12B.01[A][1] (2010) (describing conflicting jurisprudence prior to 1998).

intellectual property rights.” S. REP. NO. 105-190, at 67 (additional views of Sen. Patrick Leahy, Member, S. Comm. on the Judiciary).²⁶ These statutory safe harbors replaced the conflicting jurisprudence that characterized early judicial efforts to apply secondary liability doctrines to new Internet contexts with detailed provisions that gave rightsholders and service providers relatively precise “rules of the road.”

The safe harbors embody a *quid pro quo* that balances the interests of online intermediaries against the interests of content owners and allocates responsibilities to both groups. In exchange for safe harbor protection, service providers must implement and maintain a DMCA policy that includes a notice-and-takedown process, a system to track and deactivate repeat infringers, a counter-notification process, and other prescribed steps. The statute also clarifies the outer limits of a service provider’s obligations—perhaps most importantly, by making it clear that a service provider need not monitor its service or affirmatively seek facts indicating

²⁶ See also *WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the H. Subcomm. on Courts and Intellectual Property*, 105th Cong. 102 (1997) (statement of Rep. Rick Boucher, Member, H. Subcomm. on Courts and Intellectual Property, noting importance of “stability in the law” and giving “the Internet service providers the assurances they need” to invest in the Internet); H.R. REP. NO. 105-796, at 72 (1998) (Conf. Rep.) (Section 512 “provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities”); H.R. REP. NO. 105-551, pt. II, at 49–50 (1998) (same).

infringing activity in order to enjoy the safe harbor. *See* 17 U.S.C. § 512(m)(1) (2006).

Copyright owners, for their part, were given an expedited, extra-judicial procedure for obtaining redress against alleged infringement, paired with explicit statutory guidance regarding the information that must be provided in an “effective” takedown notice to take advantage of this procedure. *See* 17 U.S.C. § 512(c)(3)(A).²⁷ As a practical matter, they have also been able to benefit from the new and innovative services the safe harbors have helped engender; for example, content owners including Appellants profit from YouTube advertising dollars.²⁸

Congress intended that this *quid pro quo* would help ensure that online IP enforcement did not come at the expense of stifling expression. 144 CONG. REC. H10618 (daily ed. Oct. 12, 1998) (Rep. Barney Frank stating, “As Members have mentioned, we have a tough situation here in which we want to protect intellectual property rights but not interfere with freedom of expression.”).²⁹ Indeed, Congress also included two provisions to ensure that the DMCA takedown process was not

²⁷ The importance of these procedures is underscored by 17 U.S.C. § 512(c)(3)(B)(i), which states that infringement notices that fail to meet these standards are not to be considered when evaluating a service provider’s knowledge under the knowledge disqualifier set forth in section 512(c)(1)(A).

²⁸ YouTube Statistics, https://www.youtube.com/t/press_statistics.

²⁹ Available at <http://hrrc.org/File/HR2281StearnsOct12.pdf>.

abused—the counter-notice procedure set forth in section 512(g), which sets out a process for reinstating lawful content, and the cause of action set forth in section 512(f), which imposes liability for knowing material misrepresentations in takedown notices. 17 U.S.C. §§ 512(f), (g).

In the words of Senator Leahy, the DMCA represented an “important step toward protecting American ingenuity and creative expression.” S. REP. 105-190, at 69 (additional views of Sen. Leahy).³⁰ *Amici* submit that the DMCA represented an *essential* step. Prior to its enactment, service providers seeking to develop new and innovative service risked crushing liability if their services were used, in part, for copyright infringement, even where the majority of the content they hosted or transmitted was perfectly lawful. By improving service providers’ ability to rationally assess and manage their legal risk, the DMCA allowed them to make reasonable investments, enabling the growth of digital innovation and expression described above.

II. Appellants’ Theories Contravene the Language and Purpose of the DMCA, Threatening Online Innovation and Expression

Appellants effectively ask this Court to rewrite the DMCA rules of the road, directly contravening congressional intent. First, Appellants’ claim that the section 512(c)(1)(A) knowledge standard can be satisfied by little more than “generalized”

³⁰ *See also* 144 CONG. REC. H7092 (daily ed. Aug. 4, 1998).

knowledge would replace section 512(c)'s detailed "notice-and-takedown" regime with an impracticable requirement that service providers monitor their sites for infringement. Second, Appellants' position that section 512(c) embodies the tests for common-law secondary copyright infringement would infuse safe harbor eligibility with the very unpredictability that Congress sought to avoid

Appellants' approach cannot be squared with the language, structure, and purpose of the statute.

A. In Order to Establish Certainty and Thereby Promote Expression and Innovation, Congress Chose to Implement a Notice and Takedown Requirement for Service Providers, and Explicitly Provided that Monitoring Is Not Required

Congress recognized that service providers are not well positioned to shoulder the burden of identifying infringement because copyright infringement is difficult for anyone other than the copyright holder to identify and because, as a practical matter, a monitoring requirement in most cases would be simply unfeasible to adopt. Accordingly, Congress devised a system whereby content owners would be responsible for identifying infringement, and service providers would be responsible for removing the identified material, in addition to taking prescribed actions with respect to the users who may have uploaded it. Thus, the DMCA includes a specific procedure for notice and takedown and separately clarifies that monitoring is not a requirement for safe harbor protection.

Appellants, however, put forward an interpretation of the knowledge disqualifier that would shift the burden of identifying infringing content from rightsholders to service providers and effectively convert the DMCA from a notice-and-takedown regime to a monitoring regime, inverting Congress's carefully aligned system of responsibilities and obligations and contradicting the language of the statute on its face.

This "generalized" knowledge scheme would directly undermine speech by encouraging intermediaries to adopt overbroad takedown policies or simply shut down their services altogether. In addition, it would discourage the use of valuable editorial controls.

1. Congress Expressly Declined to Condition Safe Harbor Eligibility on an Obligation to Monitor

Unlike copyright owners, online intermediaries are not in the best position to make determinations of infringement. Congress understood this:

[A] directory provider would not be [] aware [of infringement] merely because it saw one or more well known photographs of a celebrity at a site devoted to that person. The provider could not be expected, during the course of its brief cataloguing visit, to determine whether the photograph was still protected by copyright or was in the public domain; if the photograph was still protected by copyright, whether the use was licensed; and if the use was not licensed, whether it was permitted under the fair use doctrine.

H.R. REP. NO. 105-551, pt. II, at 57-58; *see also* S. REP. NO. 105-190, at 48. As a baseline matter, there is no central registry to which a service provider can turn to

determine whether material is under copyright. Even if protection is assumed, a service provider cannot be certain if the user who posts certain material is the copyright owner or authorized by the copyright owner. For example, it is not uncommon for media companies to upload content to YouTube to promote new productions; according to some, it is even customary.³¹ Appellants themselves acknowledge that several of “Viacom’s works on YouTube were authorized by Appellants for promotional purposes.” Appellants’ Br. at 25, n.2.

Further, even terms that might seem to suggest content is unauthorized can be misleading. As one court has noted, the use of words such as “illegal” or “stolen” in conjunction with photographs “may be an attempt to increase their salacious appeal, rather than an admission that the photographs are actually illegal or stolen.” *Perfect 10, Inc. v. CCBill*, 488 F.3d 1102, 1114 (9th Cir. 2007).

Indeed, even copyright owners err in their assessments. Shortly before filing this suit, Appellants sent YouTube 100,000 takedown notices. Appellants’ Br. at 25. Only a week later, at least 60 of the files identified by Appellants had been found to be not infringing or not Appellants’ content.³² Moreover, over the course

³¹ Martin Anderson, *YouTube and the Major Film Studios*, SHADOWLOCKED, Feb. 11, 2011, <http://www.shadowlocked.com/201102111470/opinion-features/youtube-and-the-major-film-studios.html>.

³² *Media Companies Blast YouTube for Anti-Piracy Policy*, REUTERS, Feb. 19, 2007, <http://www.foxnews.com/story/0,2933,252798,00.html>.

of this litigation, Appellants have continued to discover works that they mistakenly included in their claims, whether because it turned out they didn't own the copyright, they had authorized the upload, or for other reasons. Fewer than half of the works cited in Appellants' original complaint are currently at issue.³³

Even if a service provider wanted to try to proactively identify infringement, the demands of reviewing every piece of content uploaded to its site would in most cases render the task virtually impossible. Courts have “found that, where hundreds of thousands of videos had been uploaded to a site ... no reasonable juror could conclude that a comprehensive review of every file would be feasible.” *Wolk v. Kodak Imaging Network, Inc.*, 2011 WL 940056, at *6 (S.D.N.Y. March 17, 2011) (citing *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1153 (N.D. Cal. 2008)).

Because service providers are not well positioned to identify infringing material, Congress wisely did not require them to do so. Instead, Congress emphasized that the applicability of the safe harbors “is in no way conditioned on a service provider” monitoring its network or searching out infringement. H.R. REP.

³³ See Press Release, Viacom, Viacom Files Federal Copyright Infringement Complaint Against YouTube and Google, Mar. 13, 2007, *available at* <http://news.viacom.com/news/Pages/ytstatement.asp> (reporting “almost 160,000” videos cited in Appellants' original complaint); Viacom Litigation Page, “Things You Should Know,” <http://news.viacom.com/news/Pages/youtubelitigation.aspx> (reporting 62,637 videos at issue in suit).

No. 105-551, pt. II, at 64. Congress codified this principle in section 512(m)(1) of the DMCA, which provides that safe harbor eligibility does not depend on “a service provider monitoring its service or affirmatively seeking facts indicating infringing activity.” § 512(m)(1). The point is reinforced in the Senate Report language clarifying that the “repeat infringers” element of section 512(i) is not intended to suggest “that a provider must investigate possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing.” S. REP. NO. 105-190, at 52.

Case law and commentary further supports this conclusion. *See, e.g., UMG Recordings, Inc. v. Veoh Networks, Inc.* (“*UMG v. Veoh*”), 665 F. Supp. 2d 1099, 1111-12 (C.D. Cal. 2009) (finding that a service provider does not have an obligation to “ferret[] out” infringements); *Wolk*, 2011 WL 940056, at *5 (holding that 512(m)(1) “rejects any attempt to force ISPs to police their sites for copyright infringement”); Jonathan Band & Matthew Schruers, *Safe Harbors Against the Liability Hurricane: the Communications Decency Act and the Digital Millennium Copyright Act*, 20 CARDOZO ARTS & ENT. L.R. 295, 316 (2002) (supporting the finding that “knowledge” should not be interpreted to mandate monitoring).

2. The District Court Correctly Rejected Appellants’ Efforts to Rewrite the Knowledge Disqualifier

Despite the clear congressional intent outline above, Appellants’ expansive reading of the knowledge disqualifier would shift the DMCA burden and

effectively establish a monitoring requirement. Subsection 512(c)(1)(A) preserves safe harbor eligibility for the service provider who:

- (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
- (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
- (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material.

See § 512(c)(1)(A).

Appellants claim that the statutory language is satisfied by generalized knowledge of infringement on the part of the service provider. The district court correctly rejected that interpretation, holding:

Mere knowledge of prevalence of such activity in general is not enough. . . . To let knowledge of a generalized practice of infringement in the industry, or of a proclivity of users to post infringing materials, impose responsibility on service providers to discover which of their users' postings infringe a copyright would contravene the structure and operation of the DMCA.

Viacom Intl, Inc. v. YouTube, Inc., 718 F. Supp. 2d 514, 523 (S.D.N.Y. 2010).³⁴

As the district court recognized, tying the knowledge disqualifier to generalized knowledge would impermissibly burden service providers with the responsibility of identifying infringing content, in direct contravention of section

³⁴ *See also UMG v. Veoh*, 665 F. Supp. 2d at 1111-12 (general awareness of infringement is not “red flag” knowledge).

512(m)(1). *Id.*, see also *UMG v. Veoh*, 665 F. Supp. 2d at 1108 (citing *Perfect 10 v. CCBill*, 488 F.3d at 1113 (“DMCA notification procedures place the burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of the copyright.”)); accord *Wolk*, 2011 U2011 WL 940056, at *9 (“Placing such a debilitating burden on ISPs would defy the purpose of the DMCA, which was ‘to facilitate the growth of electronic commerce, not squelch it.’”) (citing *Io Group*, 586 F. Supp. 2d at 1154, citing S. REP. NO. 105-190, at 1-2).

Requiring intermediaries to proactively look for and remove content would not only contravene the case law and congressional intent, it would also render the DMCA’s comprehensive notice and takedown provisions superfluous. As courts have pointed out, it is to be expected that all online intermediary services will have some infringement on their sites. See, e.g., *UMG v. Veoh*, 665 F. Supp. 2d at 1111. If, as Appellants claim, this probability would be enough to give rise to statutory knowledge and a consequent monitoring obligation, then the notice and takedown provisions need never come into play. A content owner might still choose to send a specific demand for content takedown; however, because a service provider’s removal obligation would already have been triggered by its “generalized” knowledge, there would be no need for the content owner to follow statutory prescriptions. Indeed, content owners could benefit in another way from avoiding

those prescriptions: absent a specific complaint, a user subject to an improper takedown would be hard-pressed to take advantage of the counter-notice procedure, much less hold anyone accountable under section 512(f).

Thus, Appellants' interpretation of the knowledge disqualifier is openly inconsistent with the language and spirit of the statute. As Appellants themselves acknowledge, "it is 'well established' that where a statute can be interpreted to avoid superfluity and abnegation of statutory text it must be so interpreted," Appellants' Br. at 27 (*citing Conn. ex rel. Blumenthal v. U.S. Dep't of the Interior*, 228 F.3d 82, 88 (2d Cir. 2000) ("[W]e are required to 'disfavor interpretations of statutes that render language superfluous.'" (*quoting Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992)))).

3. If This Court Were to Adopt Appellants' Theory of Generalized Knowledge, Online Expression Would Suffer

A monitoring requirement would directly undermine online speech by causing service providers to perform overbroad takedowns or simply to stop providing their user platforms. In addition, it would dissuade online intermediaries from providing editorial input to foster expression.

- a. Under a "generalized knowledge" standard, content takedowns will likely be overbroad

Any intermediary monitoring activity is likely to lead to over-blocking. As explained above, intermediaries are not able to easily determine on its face if

content is infringing. Moreover, because the cost of investigating each allegation of infringement will almost always be greater than the cost of simply removing the content, intermediaries who fear liability will have little incentive to engage in exacting reviews. Therefore, service providers may err on the side of removing more rather than less—including lawful content. Thus, even if the infringing activities on a site issue only from a small minority of users, the expression of many users of that system may be affected.

Furthermore, unless properly constrained by a process like the DMCA, service providers will have not only an incentive to over-block but also a ready excuse for removing content they disfavor. Congress explicitly crafted the statute to avoid this result:

We have hit a balance which fully protects intellectual property, which is essential to the creative life of America, to the quality of our life, because if we do not protect the creators, there will be less creation. But at the same time we have done this in a way that will not give to the people in the business of running the online service entities and running Internet, it will not give them either an incentive or an excuse to censor.³⁵

144 CONG. REC. H7092 (daily ed. Aug. 4, 1998) (statement of Rep. Barney Frank).

Rightsholders will be equally well positioned to exploit this excuse. By removing the need for copyright owners to send DMCA-compliant notices in order to effect

³⁵ Available at <http://hrrc.org/File/2281HouseDebateAug4.pdf>; see also 144 CONG. REC. H10618 (daily ed. Oct. 12, 1998), available at <http://hrrc.org/File/HR2281StearnsOct12.pdf>.

content takedowns, a generalized knowledge standard will encourage abusive requests to block content for reasons other than copyright.

- b. Under a “generalized knowledge” standard, online intermediaries may have neither the resources nor the tolerance for legal risk to continue providing their services

Alternatively, given the tremendous burden of reviewing every piece of content uploaded to a given platform, intermediaries may simply decide to cease offering certain services, even where those services are used predominantly for lawful purposes. For example, users upload more than 35 hours of video to YouTube *every minute*.³⁶ If liability concerns arising from a minority of these videos were to compel a service provider on the scale of YouTube or Facebook to examine each video before it is posted, it would be prohibitively expensive for the service to continue to operate as an open forum for user expression. The same is true of the countless smaller online forums and blogs where users post comments and clips.

Instead, service providers faced with the risk of crippling liability may shut down such forums in favor of hosting only content that has been expressly cleared by a copyright owner. In sharp contrast to today’s often free-flowing online political and cultural exchange, the Internet may come to be permeated by the

³⁶ See Hunter Walk, *Great Scott! Over 35 Hours of Video Uploaded Every Minute to YouTube*, THE OFFICIAL YOUTUBE BLOG, Nov. 10, 2010, <http://youtube-global.blogspot.com/2010/11/great-scott-over-35-hours-of-video.html>.

same bureaucratic “clearance culture” that characterizes television, radio, and other mass media outlets—wherein creators who make fair uses of copyrighted content cannot find an audience without first satisfying a gauntlet of lawyers and insurers.

4. A “Generalized Knowledge” Standard Would Discourage Beneficial Editorial Activities

Appellants’ broad interpretation of the knowledge element may likewise undermine the quality of some forums by deterring service providers from taking any editorial role with respect to their networks. For example, a service provider might want to prohibit adult content on a forum for political discussion, or make efforts to reduce spam, or take steps designed to discourage illegal activity. According to Appellants’ analysis, such editorial actions could result in a “generalized” knowledge of infringement to the extent any infringing content happened to be on the site.

Congress raised this very concern in discussing the 512(d) safe harbor for information location tools, which, with respect to knowledge, mirrors section 512(c):

A question has been raised as to whether a service provider would be disqualified from the safe harbor based solely on evidence that it had viewed the infringing Internet site. If so, there is concern that on-line directories prepared by human editors and reviewers, who view and classify various Internet sites, would be denied eligibility to the information location tools safe harbor, in an unintended number of cases and circumstances. This is an important concern because such on-line directories play a valuable role in assisting Internet users to

identify and locate the information they seek on the decentralized and dynamic networks of the Internet.

H.R. REP. NO. 105-551, pt. II, at 57; S. REP. NO. 105-190, at 48. Congress constructed the DMCA such that “on-line editors and catalogers would not be required to make discriminating judgments about potential copyright infringement.” H.R. REP. NO. 105-551, pt. II, at 58. Appellants’ conclusion—that evidence of review of infringing material disqualifies YouTube from safe harbor protection—is precisely the outcome Congress declined to permit.

Narrow, clear constructions of the knowledge disqualifier give service providers confidence to exert editorial control without fear of copyright liability and help cultivate online fora for expression.

Interactive online platforms that provide content hosting services, bulletin boards, and social networking capabilities have created new opportunities for democratic participation and for users to forge communities, access information instantly, and discuss issues of public and private concern. *Amici* urge this Court to reject Appellants’ definition of knowledge under section 512 so that these online platforms can continue to flourish.

B. The District Court Correctly Rejected Appellants’ Efforts to Conflate Common-Law Secondary Copyright Liability with the Section 512(c) Safe Harbor

Appellants’ contention that the DMCA restates the common-law tests for secondary copyright liability fares no better than their knowledge analysis.

Appellants' Br. at 13, 43, 61. Congress deliberately drew a line between common-law doctrines of secondary liability and the conditions for safe harbor eligibility in order to define for service providers the parameters of their legal exposure. For example, the Senate Report states,

[T]he Committee is sympathetic to the desire of such service providers to see the law clarified in this area. There have been several cases relevant to service provider liability for copyright infringement. Most have approached the issue from the standpoint of contributory and vicarious liability. Rather than embarking upon a wholesale clarification of these doctrines, the Committee decided to leave current law in its evolving state and, instead, to create a series of "safe harbors," for certain common activities of service providers. A service provider which qualifies for a safe harbor, receives the benefit of limited liability.

S. REP. NO. 105-190, at 19 (footnotes omitted).

By the same token, because the safe harbors do not codify common-law standards of liability, disqualification from the safe harbors does not denote *de facto* liability. See S. REP. NO. 105-190 at 19, 40 ("Section 512 is not intended to imply that a service provider is or is not liable as an infringer either for conduct that qualifies for a limitation of liability or for conduct that fails to so qualify."); *see also* H.R. REP. NO. 105-551, pt. II, at 49-50 (same). As the House Report provides:

Even if a service provider's activities fall outside the limitations on liability specified in the bill, the service provider is not necessarily an infringer; liability in these circumstances would be adjudicated based on the doctrines of direct, vicarious or contributory liability for infringement as they are articulated in the Copyright Act and in the

court decisions interpreting and applying that statute, which are unchanged by new Section 512.

H.R. REP. NO. 105-551, pt. II, at 64; S. REP. NO. 105-190, at 45, 55 (same); *accord*

H.R. REP. NO. 105-551, pt. II, at 54.

Court after court has recognized this distinction. In *UMG v. Veoh*, for example, the court found that the “right and ability to control” element of 512(c)(1)(B), the DMCA “dictate[d] a departure from the common law standard” of vicarious liability. 665 F. Supp. 2d at 1116 (C.D. Cal. 2009). As another court observed, finding otherwise would put service providers in an impossible position:

The DMCA specifically requires a service provider to remove or block access to materials posted on its system when it receives notice of claimed infringement. *See* 17 U.S.C. § 512(c)(1)(C). The DMCA also provides that the limitation on liability only apply to a service provider that has “adopted and reasonably implemented ... a policy that provides for the termination in appropriate circumstances of [users] of the service provider’s system or network who are repeat infringers.” *See* 17 U.S.C. § 512(i)(1)(A). Congress could not have intended for courts to hold that a service provider loses immunity under the safe harbor provision of the DMCA because it engages in acts that are specifically required by the DMCA.

Hendrickson v. eBay, 165 F. Supp. 2d 1082, 1093-94 (C.D. Cal 2001). *Accord Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1061 (C.D. Cal. 2001), *aff’d in part and rev’d in part on different grounds*, 357 F.3d 1072, 1079 n.10 (9th Cir. 2004).

Taken together, these cases suggest that the right and ability to control under 512(c) is distinct from—and narrower than—the common-law standard.

Indeed, Appellants' view defies logic: "If the safe harbors from vicarious and contributory liability were available only to providers who were not vicariously or contributorily liable, a service provider could only qualify for the safe harbor when it didn't need one, and any provider needing the safe harbor would be ineligible." Band & Schruers, *supra*, at 305.

As with the knowledge disqualifier, Appellants' analysis of the statute with regard to secondary liability contravenes the language and purpose of the DMCA, threatening to reintroduce an unacceptable level of legal uncertainty for online services. *Amici* urge the Court to reject it.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to affirm the decision of the district court and preserve the legal protections that have facilitated the emergence of new platforms for expression and innovation.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32**

I certify, pursuant to Fed. R. App. P. 32 that the attached Brief of *Amici Curiae* comports with Fed. R. App. P. 32, in that it is proportionally spaced and has a typeface of 14 points, and with Fed. R. App. P. 32(a)(7)(B) and 29(d), in that it contains 6,979 words (based on Microsoft Word for Mac 2011, the word processing system used to prepare the brief), exclusive of the tables, certificates, and cover.

Dated: April 7, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen Moore