

10-3270-CV

10-3342-CV

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,
(caption continued on inside cover)

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

**BRIEF FOR NATIONAL CONSUMERS LEAGUE,
CONSUMERS UNION OF UNITED STATES, INC., CONSUMER
ACTION AND UNITED STATES STUDENT ASSOCIATION
AS AMICI CURIAE SUPPORTING APPELLEES**

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Union of United States, Inc.,
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Student Association*

April 7, 2011

—against—

YOUTUBE, INC., YOUTUBE, LLC, GOOGLE, INC.,

Defendants-Appellees.

THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED, 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, ALLEY MUSIC CORPORATION, X-RAY DOG MUSIC, INC., FEDERATION FRANCAISE DE TENNIS, THE MUSIC FORCE MEDIA GROUP LLC, SIN-DROME RECORDS, LTD., MURBO MUSIC PUBLISHING, INC., STAGE THREE MUSIC (US), INC., THE MUSIC FORCE, LLC,

Plaintiffs-Appellants,

—against—

YOUTUBE, INC., YOUTUBE, LLC, and GOOGLE, INC.,

Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure:

The National Consumers League certifies that it is a privately held 501(c)(3) non-profit corporation organized for the benefit of its members, that it has no parent or subsidiary corporations, and that no publicly held company owns 10% or more of its stock.

Consumers Union of United States, Inc., certifies that it is a privately held 501(c)(3) non-profit corporation organized for the benefit of its members, that it has no parent or subsidiary corporations, and that no publicly held company owns 10% or more of its stock.

Consumer Action certifies that it is a privately held 501(c)(3) non-profit corporation organized for the benefit of its members, that it has no parent or subsidiary corporations, and that no publicly held company owns 10% or more of its stock.

United States Student Association certifies that it is a privately held 501(c)(3) non-profit corporation organized for the benefit of its members, that it has no parent or subsidiary corporations, and that no publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*

Amici curiae the National Consumers League (“NCL”), Consumers Union of United States, Inc. (“Consumers Union”), Consumer Action, and the United States Student Association (“USSA”) respectfully submit this brief in support of appellees.¹

NCL is the nation’s oldest consumer organization, representing consumers and workers on marketplace and workplace issues since its founding in 1899 by two of the nation’s pioneering social reformers, Jane Addams and Josephine Lowell. Its mission is to protect and promote social and economic justice for consumers and workers in the United States and abroad. To that end NCL provides government, businesses, and other organizations with the consumer’s perspective on a wide range of important concerns including developments in technology.

Founded in 1936 when advertising first flooded the mass media, Consumers Union is an expert, independent, nonprofit organization whose mission is to work for a fair, just, and safe

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Second Circuit Rule 29.1(b), *amici* state that no counsel for a party has written this brief in whole or in part; and that no person or entity, other than the *amici*, the members of *amici*, or counsel for *amici* has made a monetary contribution that was intended to fund the preparation or submission of this brief.

marketplace for all consumers and to empower consumers to protect themselves. Consumers Union's own publications, including *Consumer Reports*, as well as product review information freely available on the internet further its mission by providing consumers with a reliable source of information to help distinguish hype from fact, and good products from bad.

Consumer Action is a nonprofit organization that has championed the rights of underrepresented consumers nationwide since 1971. Throughout its history, the organization has dedicated its resources to promoting financial literacy and advocating for consumer rights in both the media and before lawmakers in order to promote economic justice for all. Among a wide range of other initiatives, Consumer Action works to promote policies to ensure that consumers have access to a fast, affordable and open internet that provides a level playing field for all websites and internet technologies.

USSA is the country's oldest, largest, and most inclusive national student-led organization. Its mission is to develop current and future leaders, and to amplify the student voice at the local, state, and national levels by mobilizing grassroots power on student issues. User-generated websites play a critical role in facilitating that mission, allowing students to speak directly to each other and to decision-

makers.

The workers, consumers, and students that *amici* represent, and for whom they advocate, depend on the internet as a free and fair marketplace both for commerce and the exchange of ideas. In this age of rapidly advancing technology, user-generated content websites like YouTube have become an indispensable forum for the review and critique, by and for consumers and citizens alike, of products, services, and entertainment. These sites play a vital role in ensuring that workers, consumers, and students have ready access to complete and accurate information about the goods and services offered in the marketplace, a core policy goal of *amici*. Thus the viability of safe harbors for internet and online service providers such as YouTube, is an issue of critical interest to *amici*, their members, and their constituents.

Amici and their members, then, have a significant interest in the Court's resolution of this case and particularly its interpretation the Copyright Act, 17 U.S.C. §§ 101 *et seq.* and the Digital Millennium Copyright Act provisions codified at Section 512 (the "DMCA" or the "Act"). *Amici* strongly support the district court's decision, which correctly interprets the DMCA in a manner that gives affect to the plain intent of Congress to preserve the internet as a fair and

functional marketplace while balancing the rights and needs of both copyright holders and internet users.

ARGUMENT

It is not an overstatement to suggest that this case has the potential to decide whether the internet continues to be the transformational forum for the exchange of ideas and the conduct of commerce that it is today. Since they were enacted just over a decade ago, the DMCA's safe harbor provisions have become by far the Act's most important provisions.² Described by some as "the Magna Carta for Web 2.0,"³ these provisions establish the practical boundaries of copyright for virtually all commercial websites in the U.S. that involve user-generated or third-party content.⁴ And there is a consensus that, to date, the DMCA safe harbors have been successful at achieving their central goal: "ensuring that the efficiency of the Internet will continue to improve and that the variety and quality of

² See Edward Lee, *Decoding the DMCA Safe Harbors*, 32 Colum. J.L. & Arts 233, 233-34 (2008).

³ See *id.* at 260. "Web 2.0" is commonly understood to refer to the next generation of internet design which emphasized decentralized "participatory information sharing, interoperability, user-centered design, and collaboration" examples of which include social networking sites, blogs, wikis, video sharing sites, and hosted services. See, e.g., Wikipedia, *Web 2.0*, http://en.wikipedia.org/wiki/Web_2.0 (last accessed Apr. 7, 2011).

⁴ See *id.* at 233-34.

services on the Internet will continue to expand.”⁵ Because this case will decide how safe the DMCA safe harbor provisions really are,⁶ it will also decide the future viability of the participative, interactive internet as it exists today.

Amici include the nation’s oldest and most active champions of workers, consumers, and students. Together they share a strong interest in maintaining the clarity and effectiveness of the safe harbor provisions and, with them, the strength of the internet as an open and interactive forum. Today’s internet is not just about movies and music. It is a crucial engine of the nation’s economy and, thus, a marketplace not just for ideas and expression, but for meaningful commerce as well.⁷

In order for consumers to participate in the market, however,

⁵ *Id.* at 260 (quoting S. Rep. No. 105-190, at 8 (1998)); Jerome H. Reichmann, Graeme B. Dinwoodie & Pamela Samuelson, *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyright Works*, 22 Berkeley Tech. & L.J. 981, 994 (2007).

⁶ Reichmann, Dinwoodie & Samuelson, *supra*, at 994.

⁷ See Allison Enright, Internet Retailer, “E-commerce glows in final holiday wrap-up reports” (Jan. 5, 2011), <http://www.internetretailer.com/2011/01/05/e-commerce-glows-final-holiday-wrap-reports> (last accessed Apr. 7, 2011); Stephanie Clifford, New York Times, B1, “Retail Sales Rebound, Beating Forecasts” (Dec. 27, 2010) *available at* <https://www.nytimes.com/2010/12/28/business/28shop.html> (last accessed Apr. 7, 2011).

they must trust it. That trust is built, in large part, when consumers have ready access to complete and accurate information about the goods and services the market offers. In today's world, the internet is a critical source of such information. The internet generally, and user-generated websites such as YouTube in particular, have become an indispensable forum for the review and critique, by and for consumers, of products, services, and entertainment.

It is with that perspective that *amici* urge the Court to uphold the district court's ruling which properly interprets the plain language of Section 512 of the DMCA.

I. CONGRESS INTENDED THE DMCA TO STRIKE A BALANCE THAT PROTECTS CONSUMERS AS WELL AS COPYRIGHT HOLDERS.

Repeatedly during its consideration of the bills that became the DMCA, Congress stressed the need to strike a balance that would protect not only copyright holders but, also, the nation's consumers. In this respect *amici* and Congress share similar goals for, and a similar understanding of, the DMCA.

Without question, the revolutionary aspect of new digital technologies was at the forefront of Congress's consideration when it passed the DMCA. And it recognized the direct impact this revolution has on the lives of consumers and the operations of the

commercial marketplace:

Much like the agricultural and industrial revolutions that preceded it, the digital revolution has unleashed a wave of economic prosperity and job growth. Today, the information technology industry is developing versatile and robust products to enhance the lives of individuals throughout the world, and our telecommunications industry is developing new means of distributing information to these consumers in every part of the globe. In this environment, the development of new laws and regulations will have a profound impact on the growth of electronic commerce and the Internet.

H.R. Rep. No. 105-551 (“House Report”), pt. 2, at 28 (1998).

Congress recognized the need in this new environment for new legal mechanisms not only to protect authors and copyright holders from license infringement but also, to “protect consumers from misinformation.” *See* House Report, pt. 1, at 10-11. To that end, the DMCA was intended as a modernization that would “extend[] into the digital environment the bedrock principle of ‘balance’ in American intellectual property law for the benefit of both copyright owners and users.” House Report, p. 2, at 32. And Congress understood the need for that modernization to include “rules that ensure . . . consumers have a stake in the growth in electronic commerce.” *See id.*

The legislative history of the DMCA demonstrates bi-partisan support for the notion that the Act was intended to strike a balance that expressly recognized, included, and protected the nation’s

consumers: “Whatever protections Congress grants should not be wielded as a club to thwart consumer demand for innovative products, consumer demand for access to information, consumer demand for tools to exercise their lawful rights, and consumer expectations that the people and expertise will exist to service these products.” House Report, pt. 2 at 87 (Additional comments of Rep. Scott Klug of Wisconsin and Rep. Rick Boucher of Virginia).

II. THE CONTINUED VIABILITY OF DMCA’S SAFE HARBORS IS OF CRITICAL IMPORTANCE TO CONSUMERS.

A. YouTube Provides an Important, Readily Accessible Forum for Consumer Reviews of Products and Services.

Given the commercial strength and visibility of the entertainment industry as litigants in notable internet-related copyright litigation, it would be easy to overlook how valuable the internet is as a resource for important, non-commercial communication. As long-time advocates for workers, consumers, and students, however, *amici* are particularly aware of the role that user-generated content—and particularly that hosted by YouTube—plays in the larger world of consumer review, critique, and education.

YouTube is an important forum for consumers to publish their own reviews of products and services across the entirety of today’s

commercial market. As a rough gauge, a search for the term “consumer review” on YouTube returns on the order of 18,000 hits; similar searches for the terms “product review” and “movie review” return approximately 100,000 and 1,430,000 hits respectively.⁸ That volume of consumer review content reflects the fact that, even more than traditional consumer review sources (*e.g.*, print or word-of-mouth), user-generated content can be published on YouTube by consumers themselves, virtually free of cost, and made available almost instantaneously and world-wide. And where such reviews involve, or directly target, copyrighted material, the importance of the DMCA’s balanced structure becomes apparent

A quick search on YouTube reveals countless user-generated consumer reviews that include, or directly target, copyrighted material in their review of a product or service. For example, numerous reviews that comment on the effectiveness of prescription drugs involve the re-broadcast, in part or in its entirety, of one or more of the drug manufacturer’s television advertisements.⁹ Others that review consumer products include, as part of product demonstrations,

⁸ See <http://www.youtube.com> (last accessed Apr. 7, 2011).

⁹ See, *e.g.*, HealthRanger, *Vytorin Scientific Fraud and Parody Cholesterol Ad*, <http://www.youtube.com/watch?v=rwendcLch-4> (last accessed Apr. 7, 2011).

the re-broadcast of copyrighted on-line material.¹⁰ And some include the re-broadcast of copyrighted material (e.g., video game software, movies, or music) because it is the direct subject of their review and commentary.¹¹ There are countless other examples.

Although most likely protected by the fair use doctrine, which must be considered by copyright holders in issuing take-down notices, *see, e.g., Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008), such reviews would likely disappear from the internet in the absence of strong and clear safe harbor provisions. They would most likely either be removed proactively by internet or online service providers, as appellants' argument suggests they should be, or have no readily-available forum as, out of an abundance of caution, service providers refused to host such potentially infringing user-generated material.¹²

¹⁰ *See, e.g.,* The Digital Lifestyle, *tDL Product Review: Nike Plus Sport Kit*, <http://www.youtube.com/watch?v=V5f6YoEN01E> (last accessed Apr. 7, 2011).

¹¹ *See, e.g.,* Machinima.com, *Video Game Review: Dante's Inferno: Video Game Review (8.5/10) S02E11*, <http://www.youtube.com/watch?v=iNu-FiQd5TE> (last accessed Apr. 7, 2011); Indy Mogul, *Beyond the Trailer: Battle Los Angeles Movie Review*, <http://www.youtube.com/watch?v=9WcTDICtqp8&list=SL> (last accessed Apr. 7, 2011).

¹² Although the fair use of copyrighted material for critique is well established, it can only be raised after the fact as a defense, and is the subject of a multi-prong, variably-applied interpretive test. *See, e.g.,*

B. In the Absence of Strong Safe Harbor Provisions, User-Generated Content Websites May Cease to Exist as a Forum for Consumer Review.

The DMCA safe harbor provisions exist in order to address a specific dual-use technology problem. While service providers, like YouTube, that welcome and facilitate user-generated content can become unwitting intermediaries for the infringing acts of others, they also provide a valuable service for copyright holders themselves as well as those—like consumers and students—who are engaging in the fair use of copyrighted materials.¹³ There is a consensus that these provisions have achieved a “relatively balanced and workable solution” to that problem.¹⁴

Copyright owners have incentives to monitor Internet sites for infringing materials and to provide appropriately detailed information to [service providers] so that the infringing material can be taken down. . . . [service providers] have incentives to cooperate with copyright owners in the notice and takedown process and to terminate repeat infringers lest they forfeit the safe harbors provided by the DMCA.¹⁵

Appellants’ argument threatens that workable balance because,

Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1163-68 (9th Cir. 2007).

¹³ See Reichmann, Dinwoodie & Samuelson, *supra*, at 938, 989-994.

¹⁴ *Id.* at 994; Lee, *supra*, at 260.

¹⁵ Reichmann, Dinwoodie & Samuelson, *supra*, at 993-94.

if adopted, it would render the DMCA safe harbors a nullity.¹⁶ As “[v]irtually all [service providers] that host third-party content . . . host such content so that it can be shared,” if service providers lose the DMCA’s protections for storing material “at the direction of the user,” websites like YouTube almost certainly will be forced to shut down as the cost and burden of policing user-generated content became commercially unsustainable.¹⁷ That result would be devastating to the nation’s consumers, students and others, who rely on the internet as an important resource for sharing critical information about products, services, and entertainment.

C. The Loss of User-Generated Sites like YouTube Would Be Devastating for Consumers and the Market.

In addition to the potential loss of YouTube as an important forum for consumer review of products, services, and entertainment, the loss of user-generated sites in general would have a more generalized and widespread impact on consumers and the market.

Websites like YouTube have revolutionized the media by democratizing it. There is no doubt that this revolution has benefited

¹⁶ See Lee, *supra*, at 261 (favorably analyzing *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099 (C.D. Cal. 2009), which was expressly discussed by the district court in this case).

¹⁷ See Lee, *supra*, at 261, 267.

independent authors, film-makers, and musicians whose success is now determined more by talent and popularity than by the whim of media-outlet gatekeepers. But this democratization of the media has also directly and undoubtedly benefited their audience—the workers, consumers, and students that *amici* represent.

A few minutes of searching the internet generally, or user-generated sites like YouTube specifically, confirms the vast array of content now available for general consumption. The breadth of subjects and tastes addressed is, quite simply, stunning. Outside of the realm of consumer review and critique, these sites provide a wide-ranging forum for product-related communication, such as “do-it-yourself” maintenance and repair,¹⁸ as well as product-related recreational expression, like crowd-sourced movie reviews, and entertainment- and sports-related fan sites.¹⁹ *Amici* strongly believe

¹⁸ Lee Waterman, *iPhone 3G / 3GS Glass Digitizer Replacement Repair HD Tutorial DIY Complete*, <http://www.youtube.com/watch?v=4mboB8p-sdw> (last accessed Apr. 7, 2011); Richpin, *Windshield Wiper Arm Repair*, <http://www.youtube.com/watch?v=b5mh-OrFdnc> (last accessed Apr. 7, 2011); Uncleharrytech, *Kenmore Washer Repair*, <http://www.youtube.com/watch?v=FNRd04vwc4Y> (last accessed Apr. 7, 2011).

¹⁹ See, e.g., Fan Sites Network, *Hosted Sites*, <http://www.fan-sites.org/hosted-sites> (indicating over 1,600 hosted entertainment and sports celebrity, movie, music, and television show fan sites) (last accessed Apr. 7, 2011).

that their constituents—the nation’s workers, consumers, and students—benefit directly from such a broad and deep range of choice.

Thus, because the loss of DMCA’s clear and effective safe harbor provisions would likely result in the widespread loss of user-generated content websites,²⁰ it would likely also have a devastating impact on consumers and other internet users, far beyond the realm of fair-use review and commentary.

CONCLUSION

In addition to those of the parties, the Court’s decision in this case will directly impact the interests of millions of workers, consumers, and students across the nation. User-generated websites such as YouTube are an indispensable forum for the rapid, low-cost exchange of information by and for consumers, including the public dissemination of review and critique of products, services, and entertainment. In this regard, these websites help to ensure, in a material way, that workers, consumers, and students have ready access to complete and accurate information about the goods and services offered in the marketplace.

In passing the DMCA, Congress recognized the social and

²⁰ See Lee, *supra*, at 261, 267.

economic value of such websites. *See* House Report, pt. 2, at 28. It also recognized the need to ensure continued consumer participation in the digital revolution. *Id.* at 32. As a result, it sought to create a balanced and workable system that would allow such sites to flourish while protecting the rights of copyright holders. There is a consensus that the safe harbor provisions at issue have successfully achieved that balance.

On behalf of its member and on behalf of the nation's workers, consumers, and students, *amici* urge the Court to ensure that balance is maintained. Judge Stanton properly interpreted both Section 521 and relevant case law and their application to the facts of this case. The opinion of the district court should be affirmed.

Dated: April 7, 2011

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32 of the Federal Rules of Appellate Procedure, I certify that:

1. This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 3,019 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Word 2002 in 14-point Times New Roman.

Dated: April 7, 2011

/s/ Anthony P. Schoenberg
ANTHONY P. SCHOENBERG

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2011, a true and correct copy of the foregoing Brief for National Consumers League, Consumers Union of United States, Inc., Consumer Action, and United States Student Association as *Amici Curiae* Supporting Appellees was served on all counsel of record in this appeal via CM/ECF pursuant to Second Circuit Rule 25.1(h)(1)-(2).

Dated: April 7, 2011

/s/ Anthony P. Schoenberg
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