

13-1720-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,

v.

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

Defendants-Appellees.

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

**BRIEF OF AMICI CURIAE 31 INTELLECTUAL PROPERTY AND
INTERNET LAW PROFESSORS IN SUPPORT OF
DEFENDANTS-APPELLEES AND URGING AFFIRMANCE**

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STATEMENT OF INTEREST

Amici curiae submit this brief pursuant to Federal Rule of Appellate Procedure 29(a). All parties have consented to the filing of this brief.¹

Amici curiae are law professors who teach and write about copyright law and Internet law at law schools, colleges, and universities throughout the United States and Canada. We have no personal stake in the outcome of this case; our interest is in seeing that copyright law is applied in a manner most likely to fulfill its Constitutional mandate “to promote the Progress of Science,”² taking into account both the protections afforded to and the obligations imposed upon copyright holders and users of copyrighted works.

SUMMARY OF ARGUMENT

Section 512 of the Copyright Act represents a remarkably successful legislative achievement, one that has helped to promote unprecedented growth and diversity in user expression on the Internet while simultaneously providing copyright holders with efficient and effective procedures for remedying infringements of their protected content. Appellants and their *amici* would have

¹ Pursuant to Local Rule 29.1 of the United States Court of Appeals for the Second Circuit, *amici* hereby certify that no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money intended to fund preparing or submitting the brief; and no person other than *amici* contributed money intended to fund preparing or submitting the brief.

² U.S. Const. art. I, § 8, cl. 8.

this Court disrupt the fundamental balance embodied in the statutory provisions, through a combination of inappropriately restrictive interpretations of the statute’s protections for service providers and inappropriately broad interpretations of the pre-conditions for obtaining those protections. The district court’s holding that the common law doctrine of willful blindness extends only to purposeful ignorance of item- and location-specific information finds strong support in the statutory text, structure, and purpose. Appellants’ attempts to distort the safe harbor provisions to *create* liability for service providers that have “generalized awareness” of infringing content would render meaningless many of the statute’s carefully wrought protections for insuring an equitable balance among copyright holders, service providers, and ordinary Internet users, and they should be rejected by this Court (as they have been rejected by others).

ARGUMENT

I. The Court Should Reject Appellants’ Attempts to Distort the Balance that Congress Successfully Crafted in the Section 512(c) Safe Harbor

In the Online Copyright Infringement Liability Limitation Act (Title II of the Digital Millennium Copyright Act (the “DMCA”), now codified at 17 U.S.C. § 512), Congress attempted to strike a balance among the rights and obligations of three separate constituencies, each holding substantial, and often conflicting, interests in regard to the distribution of copyright-protected works on the Internet:

copyright holders, fearing massive infringement of their protected works;³ online service providers, concerned with uncertain and potentially astronomical liability under ordinary principles of direct and secondary copyright liability;⁴ and Internet users, seeking to participate in a growing Internet containing content “as diverse as human thought,”⁵ a rich array of entertainment, information, goods, services, and ideas that was becoming, as described by the Supreme Court, “a unique and wholly new medium of worldwide human communication.”⁶

Over the last fifteen years, the scheme that Congress implemented in the DMCA, as interpreted by the federal courts in a number of significant and high-profile cases (including this one), has been resoundingly successful at forging an equitable balance among these conflicting interests. Website operators and providers of innovative online services have a clear and straightforward set of ground rules to follow, allowing them to conform their operations to the law and, thereby, avoid the specter of potentially crushing liability. At the same time, copyright holders, through the notice-and-takedown process spelled out in 17

³ See S. Rep. No. 105-190, at 8 (1998).

⁴ See *id.* (“[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.”).

⁵ *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997) (internal quotation marks and citation omitted).

⁶ *Id.* at 850 (internal quotation marks and citation omitted).

U.S.C. § 512(c), have simple and cost-effective means to curtail large numbers of unauthorized and infringing uses of their protected expression.

Internet users—i.e., the public—have reaped profound benefits from this compromise. Along with its companion provision in federal law, 47 U.S.C. § 230,⁷ which similarly provides service providers with a safe harbor from claims arising from their users’ activities, the DMCA has fueled extraordinary and unprecedented growth in innovative Internet services based entirely on user expression. This explosion of participatory (often referred to as “user-generated content,” or “Web 2.0”) online services and applications has, in turn, fueled the growth and evolution of the Internet itself as a truly global communications platform, one that has become, as daily news headlines remind us, a powerful tool for grass roots democratic movements around the world.⁸ Thousands of Internet businesses, many

⁷ 47 U.S.C. § 230(c)(1) protects “provider[s] [of] interactive computer service(s)” against claims arising from “any information provided by another information content provider,” and has been applied to immunize service providers against a wide range of federal and state law claims. *See, e.g., Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008); *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). By its express terms, however, § 230 does not encompass any intellectual property claims, *see* 47 U.S.C. § 230(e)(2)—precisely the gap that Congress filled in 1998 in Title II of the DMCA.

⁸ *See, e.g., Jennifer Preston, While Facebook Plays a Star Role in the Revolts, Its Executives Stay Offstage*, N.Y. Times, Feb. 15, 2011, at A10 (describing role of

of which are now household names across the globe—e.g., Facebook, Twitter, YouTube, Blogger, Craigslist, Myspace, Tumblr, Flickr, and many others—have emerged over the past fifteen years sharing one common characteristic: they provide virtually no content of their own (copyrightable or otherwise), but rely entirely on users to make the sites valuable, engaging, and attractive for others. Internet users have responded to the Web 2.0 phenomenon in truly breathtaking numbers.⁹

It is difficult, if not impossible, to imagine this development in the absence of strong DMCA safe harbors. It is no coincidence, we believe, that *all* of the service providers listed in the preceding paragraph are based here in the United States, where Congress had the foresight in the early days of the Internet to

Facebook and “social media” websites, including YouTube, in the uprising in Egypt).

⁹ Google estimated in 2010 that users upload over 35 hours of video to YouTube each minute, “more video content each month than the combined output of all three major U.S. television networks for the past 60 years,” and that the YouTube audience views approximately 2 *billion* videos each day. *See* Google Comments to the Department of Commerce, *Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy*, Docket No. 100910448-0448-01 (emphasis omitted and added), *available at* <http://www.ntia.doc.gov/comments/100910448-0448-01/comment.cfm?e=6BDC88CD-BD11-4506-9196-220C54FB87>. More recent estimates show uploads of 100 hours of video per minute. *See* YouTube Statistics, <http://www.youtube.com/yt/press/statistics.html>. Estimates for other Google-owned sites are similarly immense, e.g., Blogger.com users upload 250,000 words every minute of every day. And there are dozens, if not hundreds, of non-Google-affiliated sites offering similar user-oriented uploading capabilities.

understand that unlimited or uncertain liability for third-party conduct would have drastic, negative consequences for the realization of the Internet's full economic and cultural potential.¹⁰ Without the limitations on liability provided by the DMCA's safe harbors, the legal exposure for a service provider relying upon vast numbers of users freely exchanging content with one another would be entirely unmanageable;¹¹ a business built on such a foundation could hardly have attracted financing in any rational marketplace, given the astronomical scope of the potential liability.

At the same time, the DMCA safe harbors provide copyright holders with a direct, efficient, and effective remedy against infringing conduct on the massive scale made possible by participatory media platforms. Through the notice-and-

¹⁰ See S. Rep. No. 105-190, at 40 (1998) (noting that the "liability of online service providers and Internet access providers for copyright infringements that take place in the online environment has been a controversial issue" and that Title II of the DMCA was designed to "provide[] greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities").

¹¹ A copyright holder is entitled to "an award of statutory damages for all infringements [of] any one work, . . . in a sum of not less than \$750 or more than \$30,000 as the court considers just," which can be increased at the court's discretion to \$150,000 in cases involving willful infringement. 17 U.S.C. § 504(c)(1), (2). At the scale and volume at which YouTube and other user-generated content websites operate, *see supra* note 9, the potential infringement liability for a day's worth of activity can mount into the millions or billions of dollars.

takedown procedures set forth in § 512(c), millions of infringing works have been quickly removed from circulation over the Internet through a process that avoids costly and time-consuming adjudication while simultaneously providing due consideration of the interests of all parties involved.¹²

This is, we believe, a significant and substantial legislative achievement. There may be no better illustration of the manner in which the Copyright Act can satisfy the Constitutional command to “promote the Progress of Science”¹³—serving the “ultimate aim [of] stimulat[ing] artistic creativity for the general public good”¹⁴—than the balance that Congress struck in Title II of the DMCA.

Appellants and their *amici* put forward several arguments directed to questions regarding the scope of the § 512(c) safe harbor that are contrary to both the letter and the spirit of the DMCA. In the aggregate, these arguments threaten to

¹² See *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 524 (S.D.N.Y. 2010) (“*Viacom I*”) (noting that “the present case shows that the DMCA notification regime works efficiently: when Viacom over a period of months accumulated some 100,000 videos and then sent one mass takedown notice on February 2, 2007, by the next business day YouTube had removed virtually all of them”). While it is impossible to accurately ascertain the total number of successful § 512(c) takedown notices since enactment of the DMCA, Google, the operator of several popular user-generated content sites (including the Appellee’s), has estimated that it disabled access to approximately three million URLs during 2010. See Google Comments, *supra* note 9.

¹³ U.S. Const. art. I, § 8, cl. 8.

¹⁴ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

distort the DMCA's careful balance through a combination of inappropriately restrictive interpretations of the statute's protections for service providers and inappropriately broad interpretations of the pre-conditions for obtaining those protections.

II. The District Court Correctly Rejected Appellants' Argument that Failure to Act on Generalized Knowledge or Awareness of Infringement Constitutes Willful Blindness to Red Flags

Appellants did not prevail below or in this Court when they argued that the "red flag" provision of the DMCA is triggered whenever a service provider has general knowledge or awareness of infringements occurring on its system.¹⁵ Rejecting that argument, this Court held that both actual knowledge and red flag knowledge under the DMCA "apply only to specific instances of infringement."¹⁶ Failure to act in the face of generalized knowledge therefore does not cause a service provider to forfeit the DMCA's safe harbor. In a related (and equally unpersuasive) argument, Appellants urge this Court to hold that YouTube is disqualified from the DMCA's safe harbor because it willfully blinded itself to red

¹⁵ See *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012) ("*Viacom II*") (affirming the district court's conclusion that there is a "specificity requirement" inherent in § 512(c)(1)(A) and that generalized knowledge therefore does not amount to "facts or circumstances from which infringing activity is apparent").

¹⁶ *Id.*

flags by failing to filter all user uploads in the face of a generalized knowledge that some of them were infringing.¹⁷ Having failed in their bid to import an affirmative duty to monitor into the DMCA through the red flag provision in § 512(c)(1)(A), Appellants now urge this Court to do so through the common law doctrine of willful blindness. For the same reason that Appellants' interpretation of the red flag provision failed, its argument about common law willful blindness must also fail: It is fundamentally inconsistent with the structure and intent of the DMCA.

YouTube's election not to implement filtering technology to prescreen all uploads for infringing content does not constitute willful blindness to red flags of infringement and cannot deprive YouTube of the § 512(c) safe harbor. Appellants incorrectly claim that the district court on remand ignored this Court's instruction to expressly address the principle of willful blindness and its relationship to the DMCA safe harbors.¹⁸ On the contrary, the district court fully considered the question of willful blindness and concluded, following this Court's guidance, that

¹⁷ See Opening Brief for Plaintiffs-Appellants at 26 (asserting that YouTube demonstrated willful blindness to red flags and that its "many deliberate efforts to avoid learning of specific instances of infringement . . . most notably include [its] refusal to deploy [filtering] technologies [for Appellants] that [it] was already using for other select content owners").

¹⁸ *Id.* at 19 ("Ignoring willful blindness, which Viacom had emphasized in its briefing, the district court found as a matter of law that Defendants never obtained such disqualifying knowledge, other than through takedown notices, to which—in the court's view—Defendants responded adequately.").

willful blindness cannot be given the scope Appellants suggest without impermissibly reading into the DMCA a broad common law duty to monitor.¹⁹ As this Court stated, the common law doctrine of willful blindness is not altogether abrogated by § 512(m), but “§ 512(m) is incompatible with a broad common law duty to monitor . . . based on *general awareness* that infringement may be occurring.”²⁰ Appellants argue that “filtering technology would have detected and blocked illegal clips automatically,” and that YouTube should lose safe harbor protection for “refusing to deploy filtering technology” for Appellants’ benefit.²¹ Failure to filter cannot be tantamount to willful blindness in the context of the DMCA, however, because the DMCA expressly does *not* condition safe harbor on a service provider’s affirmatively monitoring for infringement.²²

To give effect to both the common law doctrine of willful blindness and the DMCA’s rule that service providers have no affirmative duty to monitor, this Court

¹⁹ See *Viacom Int’l Inc. v. YouTube, Inc.*, No. 07 Civ. 2103(LLS), 2013 WL 1689071, at *4 (S.D.N.Y. Apr. 18, 2013) (“*Viacom III*”) (acknowledging that the willful blindness doctrine is not abrogated by § 512(m) but emphasizing that “[a]pplying the doctrine . . . requires attention to its scope” in order to avoid “input[ing] more knowledge [to the service provider] than the [willfully disregarded] fact conveyed”).

²⁰ *Viacom II*, 676 F.3d at 35 (emphasis added).

²¹ Opening Brief for Plaintiffs-Appellants at 23, 32.

²² See 17 U.S.C. § 512(m) (stating that “[n]othing in this section shall be construed to condition [safe harbor] on . . . a service provider monitoring its service or affirmatively seeking facts indicating infringing activity”).

fashioned a rule that the district court on remand conscientiously followed: “[T]he willful blindness doctrine may be applied, in appropriate circumstances, to demonstrate knowledge or awareness of *specific instances of infringement* under the DMCA.”²³ The DMCA thus limits the reach of the common law willful blindness doctrine to service providers that purposefully ignore red flags of *specific instances of infringement*. When the common law willful blindness doctrine is appropriately bounded by § 512(m), it becomes clear that a service provider that fails to filter or otherwise monitor in the face of a *general awareness of infringement* cannot be summarily expelled from the DMCA’s safe harbor. Under the sensible rule this Court adopted in *Tiffany (NJ) Inc. v. eBay Inc.* and extended to the DMCA in this case, YouTube’s failure to globally filter user uploads does not amount to a wrongful attempt to “shield itself from learning of . . . *particular infringing transactions*.”²⁴ Declining to pore over 24 hours of video uploaded per minute²⁵ to screen for infringing content is not the equivalent of deliberately turning a blind eye to item- and location-specific red flags of infringement.

²³ *Viacom II*, 676 F.3d at 35 (emphasis added).

²⁴ *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 109 (2d Cir. 2010) (holding that “[w]hen [a service provider] has reason to suspect that users of its service are infringing a protected mark, it may not shield itself from learning of *the particular infringing transactions* by looking the other way”) (emphasis added).

²⁵ *See Viacom I*, 718 F. Supp. 2d at 518. That number has since quadrupled to 100 hours of video per minute. *See supra* note 9.

Inasmuch as Appellants strategically ignore the DMCA’s “no-duty-to-monitor” policy, which relieves service providers of the burden of scouring their services 24-7-365 for infringing activity, Appellants *themselves* are willfully blind—to the meaning of § 512(m) and the crucial role it plays in the balance of duties that Congress struck in the DMCA.²⁶

The suggestion that the willful blindness doctrine operates to deprive a service provider of safe harbor if the service provider fails to monitor when it acquires a general awareness of infringing activity flies in the face of Congress’s very clear and specific limitations on the affirmative action service providers are required to take to qualify for safe harbor. Section 512(m) expressly provides that

*Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on . . . a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of [§ 512(i).]*²⁷

²⁶ Appellants’ amici are equally guilty of willful blindness on this point, arguing that “[w]hile the DMCA does not impose an affirmative monitoring obligation . . . , it also does not bar a requirement for ISPs to filter for infringing material.” Brief of *Amici Curiae* Stuart N. Brotman, Ronald A. Cass, and Raymond T. Nimmer in Support of Plaintiffs-Appellants at 27. Filtering user uploads for infringing material is indisputably a form of affirmative monitoring that the DMCA does not require.

²⁷ 17 U.S.C. § 512(m) (emphasis added).

The only stated exception to this “no-duty-to-monitor” principle refers to the service provider’s obligation under § 512(i) to “accommodate[]” and to “not interfere” with “standard technical measures,”²⁸ defined as “technical measures that are *used by copyright owners* to identify or protect copyrighted works”²⁹ that “do not impose substantial costs on service providers or substantial burdens on their systems or networks.”³⁰

Appellants’ suggestion that § 512(c) somehow obligates service providers to implement and deploy matching or filtering technology to detect infringing activity is directly contrary to the express terms of §§ 512(i) and (m). Read together, § 512(m) and § 512(i) clearly establish that Congress intended for the burden of actively monitoring online services for infringing content to fall on the holders of the rights in that content—not on service providers.³¹ The statute contemplates an Internet on which *copyright holders* develop and deploy protective technical measures, which service providers must “accommodate” if they wish to invoke

²⁸ 17 U.S.C. § 512(i)(1)(B).

²⁹ 17 U.S.C. § 512(i)(2) (emphasis added).

³⁰ *Id.*

³¹ As this Court has said, “[r]efusing to accommodate or implement a ‘standard technical measure’ exposes a service provider to liability; refusing to provide access to mechanisms by which a service provider affirmatively monitors its own network has no such result.” *Viacom II*, 676 F.3d at 41.

§ 512(c) or any other DMCA safe harbor.³² Service providers are not required to deploy any particular technical measures *of their own*, nor are they required to make “discriminating judgments about potential copyright infringement,”³³ in order to qualify for any of the safe harbors. The enforcement role that Congress established for service providers seeking safe harbor under the DMCA was deliberately limited so as not to overburden providers with responsibilities collateral to those entailed in the operation of their services. The DMCA safe harbors and the complementary provisions of § 512 establish a coherent statutory framework pursuant to which primary responsibility for enforcing copyrights online resides with copyright holders.³⁴

³² The overall structure of the DMCA also reflects this Congressional plan. Title I (the WIPO Treaties Implementation Act) contains numerous provisions, now codified at 17 U.S.C. §§ 1201 and 1202, to assist *copyright holders* in deploying technical protective measures, making it unlawful both to “circumvent a technological measure that effectively controls access to a work protected under this title,” and to “traffic in” devices primarily designed to enable such circumvention. 17 U.S.C. § 1201(a). Title II built upon this foundation; it gave service providers substantial incentives not to interfere with or disrupt the effective function of these tools.

³³ H.R. Rep. No. 105-551 (II), at 58 (1998).

³⁴ *Accord UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1022 (9th Cir. 2013) (“Congress made a considered policy determination that the DMCA notification procedures [would] place the burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of the copyright.”) (internal quotation marks and citation omitted); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d

The district court’s holding is consistent not only with the express language of the statute, but also with the internal structure of § 512(c), whose interlocking provisions make consistent reference to *copyright holders’* identification and location of specific infringing content. Even after receiving notification of infringement from the copyright holder, a service provider can still invoke the safe harbor *without* having removed or disabled access to the infringing content, if the notification “fails to comply substantially”³⁵ with the requirements set forth in § 512(c)(3)(A), requirements that include “[i]dentification of the copyrighted work claimed to have been infringed,”³⁶ “[i]dentification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled,”³⁷ and “information reasonably sufficient to permit the service provider to locate the material.”³⁸ Any notice that does not provide this item-specific and location-specific information “shall *not* be

1102, 1113 (9th Cir. 2007) (“declin[ing] to shift a substantial burden from the copyright owner to the provider”); *Perfect 10, Inc. v. Google, Inc.*, No. CV 04-9484 AHM (SHx), 2010 WL 9479059, at *10 (C.D. Cal. July 26, 2010) (following *CCBill*); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1101 (W.D. Wash. 2004) (stating that service providers under the DMCA “need not make difficult judgments as to whether conduct is or is not infringing”) (internal quotation marks and citation omitted).

³⁵ 17 U.S.C. § 512(c)(3)(B)(i).

³⁶ 17 U.S.C. § 512(c)(3)(A)(ii).

³⁷ 17 U.S.C. § 512(c)(3)(A)(iii).

³⁸ *Id.*

considered . . . in determining whether a service provider . . . is aware of facts or circumstances from which infringing activity is apparent.”³⁹ It would be curious indeed for Congress to have permitted service providers to invoke the safe harbor even after they had been notified of the existence of infringing material on their system (when the notice failed to provide precise item- and location-specific information) while simultaneously denying them safe harbor when they had merely “generalized knowledge of infringing activity.”

Finally, § 512 implements an intricate scheme for protecting *users’ rights in their own expression* that would be disrupted and overturned by Appellants’ expansive application of the willful blindness doctrine. In particular, §§ 512(f) and (g) indicate deep Congressional concern with the implications of the notice-and-takedown system for ordinary Internet users, who could easily find themselves caught between overly assertive copyright holders on the one hand and overly risk-averse service providers on the other.

Section 512(g) protects service providers against claims arising from their “good faith disabling of access to, or removal of, material or activity claimed to be infringing.”⁴⁰ In the case of removals pursuant to the notice-and-takedown

³⁹ 17 U.S.C. § 512(c)(3)(B)(i) (emphasis added).

⁴⁰ 17 U.S.C. § 512(g)(1).

procedures, this protection applies *only* if the service provider has both provided notice of the removal to the users responsible for posting the material⁴¹ and afforded those users an opportunity to provide a “counter notification” stating their “good faith belief that the material was removed or disabled as a result of mistake or misidentification.”⁴² If the service provider receives such a counter notification, it can invoke the safe harbor only if it (a) “promptly provides . . . a copy of the counter notification” to “the person who provided the [takedown] notification”⁴³ (i.e., the copyright holder who initiated the takedown), and (b) “replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice,”⁴⁴ unless, in that intervening period, the copyright holder has informed the service provider that it has “filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider’s system or network.”⁴⁵ Finally, § 512(g) provides that service providers that *replace* infringing material in compliance with the counter notice are, like those that

⁴¹ 17 U.S.C. § 512(g)(2)(A).

⁴² 17 U.S.C. § 512(g)(3).

⁴³ 17 U.S.C. § 512(g)(2)(B).

⁴⁴ 17 U.S.C. § 512(g)(2)(C).

⁴⁵ *Id.*

remove infringing material in compliance with the original takedown notice, not liable for any claims arising from that action.⁴⁶

Section 512(f), for its part, helps to ensure that all of the information being provided as part of this complex notice-and-counter-notice scheme is accurate and reliable. It imposes liability on anyone who “knowingly materially misrepresents . . . that material or activity is infringing” (in the copyright holder’s takedown notice) or that “material or activity was removed or disabled by mistake or misidentification” (in the user’s counter notice).⁴⁷

The scheme is carefully wrought and finely balanced. It contemplates a world in which copyright holders initiate infringement remediation through § 512(c)(1)(C) takedown notices, knowing that they will be responsible for any material misrepresentations contained therein.⁴⁸ Service providers, relying on the information provided in the takedown notice, may remove the material so identified and inform the users responsible for uploading the material that they have done so. If the service provider receives a counter notice from a user (who is

⁴⁶ See 17 U.S.C. § 512(g)(4) (A service provider’s compliance with the procedures set forth in § 512(g)(2) “shall not subject the service provider to liability for copyright infringement with respect to the material identified in the [takedown] notice provided under [§ 512(c)(1)(C)].”).

⁴⁷ 17 U.S.C. § 512(f).

⁴⁸ See *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1154-55 (N.D. Cal. 2008).

likewise subject to the § 512(f) prohibition on material misrepresentations) informing the service provider that the user has a good faith belief that the material is *not* infringing, the service provider informs the copyright holder of the counter notice and restores the material in question, unless the copyright holder chooses to file suit to protect its rights. In that case, the service provider leaves the disputed material offline.

The goal Congress was pursuing in §§ 512(f) and (g) is clear: Infringing material should be rapidly and permanently removed, but *non*-infringing material should remain available and accessible. Users and copyright holders are charged with acting in good faith in declaring works to be in one category or the other. If service providers respond to notices and counter notices within the parameters laid out by the statute, they are effectively insulated from having to adjudicate what are, in the end, disputes between copyright holders and users. By carrying out their duties, service providers can be assured of protection against claims that they are infringing copyright (when they replace material that has been removed) and against claims that they are violating the contractual rights of their users (when they remove material at the direction of copyright holders).

Appellants' attempt to condition eligibility for the § 512(c) safe harbor on the systematic prescreening of user-uploaded content is disruptive and destructive

of Congress' purposes in adopting §§ 512(f) and (g). This intricately fashioned notice-and-counter-notice system is predicated on and presupposes the identification by copyright holders of specific infringing content on the service provider's system. If service providers remove or block material based on only their "general awareness" that material on their system is infringing, nothing requires them to inform the affected users that they have done so, and those users will have no practical or legal recourse when risk-averse service providers err on the side of over-removal. Without notice, counter notice, and counter-counter-notice forming the basis for service providers' actions with respect to the removal or blocking of user-uploaded content, the well-wrought protections that Congress provided for users against possible overreaching by copyright holders would be rendered entirely ineffective.

III. The District Court's Decision Is Fully Consistent with the Principle that the "Least Cost Avoider" Should Be Responsible for Mitigating Infringement

Appellants' *amici* assert that their overbroad interpretation of the scope of secondary liability for online intermediaries is sound policy inasmuch as it places the burden of policing for infringements on Internet service providers (ISPs), who are the "least cost avoiders," or the "most efficient risk bearers," with respect to

copyright infringing activity on their sites.⁴⁹ This principle, they assert, supports the denial of the statutory safe harbor in this case, because YouTube—not individual copyright owners—was in the better position to avoid or limit harm from massive copyright infringements and to meet the requisites for liability.

Appellants’ claim that service providers are, in general, better positioned than copyright holders when it comes to enforcing copyrights online is demonstrably false; copyright holders, and *only* copyright holders, have access to critical information about whether or not any particular use of their copyright-protected material is infringing.⁵⁰ This is precisely why Congress constructed the notice-and-takedown system as carefully as it did. It is the copyright holder who is better positioned to determine whether or not infringement is taking place, and it is therefore the copyright holder, not the service provider, who is better positioned to identify, and to limit the harm from, infringement.⁵¹

⁴⁹ See Brief of *Amici Curiae* Stuart N. Brotman, Ronald A. Cass, and Raymond T. Nimmer in Support of Plaintiffs-Appellants at 3.

⁵⁰ See *Shelter Capital*, 718 F.3d at 1022 (“Copyright holders know precisely what materials they own, and are thus better able to efficiently identify infringing copies than service providers . . . , who cannot readily ascertain what material is copyrighted and what is not.”).

⁵¹ Cf. *Tiffany*, 600 F.3d at 98-107 (rejecting attempt by trademark owners to impose liability on service providers based on their “generalized knowledge” of infringements).

To see why this is so, consider first the ease with which copyright attaches to works of authorship under the Copyright Act. The instant that an “original work[] of authorship” is “fixed in any tangible medium of expression,” copyright “subsists” in it.⁵² Nothing other than fixation is required for copyright protection to attach to an original work. There is no requirement that the author register the copyright or provide notice of copyright on publicly distributed copies of the work.⁵³ Originality, in turn, means “little more than a prohibition on actual copying,”⁵⁴ requiring only “independent creation plus a modicum of creativity.”⁵⁵

As a consequence of this generous standard, the vast majority of the millions of user-uploaded videos at a site like YouTube are copyright-protected works. Indeed, YouTube’s admission (as quoted in Appellants’ brief⁵⁶) that over 70% of the most-viewed videos on YouTube “has copyrighted material” is almost certainly *too low*; with the exception of video clips of works that have fallen into the public domain through the passage of time and the expiration of their copyrights, *virtually*

⁵² 17 U.S.C. § 102(a).

⁵³ See 17 U.S.C. § 302(a) (“Copyright in a work created on or after January 1, 1978, subsists from its creation[.]”), *id.* § 101 (“A work is ‘created’ when it is fixed in a copy or phonorecord for the first time[.]”).

⁵⁴ *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951) (internal quotation marks and citation omitted).

⁵⁵ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

⁵⁶ See Opening Brief for Plaintiffs-Appellants at 10.

every video posted to YouTube—every home video of performing cats or singing children or dancing college students, every rock band performance, every clip of Lionel Messi’s latest exploits on the soccer field, every clip of portions of yesterday’s “Daily Show with Jon Stewart” —contains copyright-protected expression.

At the same time, of course, a substantial portion of that material is not *infringing*, for the simple reason that its use has been authorized by the copyright holder(s). This is the case not only for the immense quantity of “amateur content” posted to YouTube—where the creator of the video is likely to be both the holder of the copyright in the work and the person responsible for its distribution on YouTube—but for much of the commercially-developed content available on YouTube as well. As this case amply demonstrates, many motion picture studios, record labels, television production companies, cable programming providers, and the like upload large quantities of their own copyright-protected content onto YouTube for promotional or other purposes.⁵⁷ The marketing department of Plaintiff-Appellant Viacom, in fact, so actively uploaded copyright-protected

⁵⁷ See YouTube’s Memorandum of Law in Support of Defendant’s Motion for Summary Judgment (*Viacom I*), at 39-44 (describing the enormous quantity of content uploaded to YouTube by commercial content providers, including many plaintiffs in this action, as part of their marketing efforts).

content to YouTube that its legal department sent numerous takedown notices to YouTube demanding removal of the ostensibly infringing content, its account privileges were suspended by YouTube on the grounds that it was a “repeat infringer,” and it was forced—twice—to amend its Complaint in this action to remove from the list of allegedly infringing user uploads references to works that *it* had uploaded.⁵⁸

Appellants argued in the prior appeal that this mix-up is of “no moment,” because “YouTube indisputably was aware that *most* of Viacom’s works on YouTube were infringing.”⁵⁹ But that is incorrect; it is of great moment, because it so perfectly illustrates the inefficiency of the scheme Appellants are proposing, and because it so clearly demonstrates how service providers are *not* the “least-cost avoiders” when it comes to detecting infringement. Even assuming *arguendo* that YouTube was aware that most of Viacom’s works on YouTube were infringing, YouTube could not possibly determine *which uses of which works* were infringing and which were not, because it did not have, and could not obtain without an

⁵⁸ *See id.* at 42 (referring to Viacom’s takedown notices identifying content that Viacom itself had uploaded); *see also* “Notice of Dismissal of Specified Clips With Prejudice” (Case No. 1:07-CV-02103-LLS, Feb. 26, 2010) (referring to the hundreds of video clips that Viacom had initially identified as “infringing” but which were subsequently withdrawn from the list of works in suit).

⁵⁹ Opening Brief for Plaintiffs-Appellants (*Viacom II*), at 25 n.2 (emphasis added).

investigation that is virtually impossible under the circumstances (and one that is expressly *not* required by the DMCA⁶⁰), the information necessary to determine whether or not the copyright holder had authorized any particular use. It is the copyright holder only—*i.e.*, Viacom—who has this information, or can obtain it at reasonable cost,⁶¹ and it is therefore the copyright holder, not the service provider, who is better positioned to limit harm from infringement.⁶²

Furthermore, many *unauthorized* uses of copyright-protected works are also not infringing, because they are covered by exceptions or defenses provided in the Copyright Act, most notably the defense that the user is making “fair use” of the protected expression.⁶³ The fair use inquiry is notoriously fact- and context-

⁶⁰ See 17 U.S.C. § 512(m).

⁶¹ The notion that YouTube is the “least cost avoider” here because it can somehow readily distinguish between authorized and unauthorized uses of Viacom’s copyright-protected content is manifestly absurd given that Viacom itself, *see supra* note 58, had such substantial difficulties doing so.

⁶² However effective filtering and matching technologies may be at identifying the presence of identical copies of specific works, these technologies *cannot* determine whether or not any particular use of a copyright-protected work has been authorized by the copyright holder, or whether it is covered by a defense (*e.g.*, fair use).

⁶³ The Register of Copyrights noted the following in a recent rulemaking: “[A] significant number of [noncommercial videos] reproduce short excerpts of motion pictures for purposes of criticism and commentary. Such uses fall within the favored purposes referenced in the preamble of Section 107 and therefore are likely to be fair uses . . . In the case of noncommercial videos, clips from motion pictures may make a point about some perceived theme or undercurrent in the

dependent,⁶⁴ and here again it is the copyright holder, not the service provider, who possesses (or can obtain) the facts necessary to make the determination of whether the use is or is not infringing. The fair use doctrine requires an assessment, *inter alia*, of both “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,”⁶⁵ and the “effect of the use upon the potential market for or value of the copyrighted work.”⁶⁶ As to the former, the service provider does not possess, and cannot reasonably be expected to obtain, any information whatsoever about the “copyrighted work as a whole” from which any particular use may have been excerpted, and therefore cannot determine how large (or small) a portion of that work has been used in any specific case. Such information is obviously more readily available to the copyright holder(s) involved. As to the latter, the complex and subtle analysis of existing and potential markets for the copyright-protected works involved, including consideration of

subject works, for example, violence against women. In other situations . . . clips . . . make political statements about matters of public policy.” Recommendation of the Register of Copyrights, *Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention* 126-27 (Oct. 12, 2012) (footnotes omitted).

⁶⁴ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1258 (2d Cir. 1986); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 447 (1984).

⁶⁵ 17 U.S.C. § 107(3).

⁶⁶ 17 U.S.C. § 107(4).

both “traditional” and “likely to be developed” markets for licensed derivatives,⁶⁷ again requires item-specific information that the service provider does not have and cannot reasonably be expected to obtain for each of the copyright-protected works involved.

Given this information imbalance, it is clearly the copyright holder who is in a far better position than the service provider to determine whether any particular use of a specific copyright-protected work is infringing, non-infringing because authorized, or non-infringing because it is a “fair use” of the underlying work. In light of both the sheer quantity of copyright-protected material at issue and the impossibility, from the service providers’ standpoint, of determining which uploads infringe, the argument that service providers are the “least cost avoiders” of infringement in regard to material that users upload to services like YouTube is unsustainable. In the district court’s words:

The problem is clearly illustrated on the record in this case, which establishes that . . . site traffic on YouTube had soared to more than 1 billion daily video views, with

⁶⁷ See *Campbell*, 510 U.S. at 590, 592 (fair use inquiry “must take account not only of harm to the original but also of harm to the market for derivative works,” which includes those markets that “creators of original works would in general develop or license others to develop”) (internal quotation marks and citation omitted); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 926, 930 (2d Cir. 1994) (requiring analysis of “impact [of defendant’s use] on potential licensing revenues for traditional, reasonable, or likely to be developed markets”).

more than 24 hours of new video uploaded to the site every minute, and the natural consequence that no service provider could possibly be aware of the contents of each such video. . . . If, as plaintiffs’ assert, neither side can determine the presence or absence of specific infringements because of the volume of material, that merely demonstrates the wisdom of the legislative requirement that it be the owner of the copyright . . . who identifies the infringement by giving the service provider notice.⁶⁸

Moreover, even if it were not the case that service providers are significantly less well-situated than copyright holders to bear the costs of online copyright enforcement, Congress spoke directly to the cost allocation question when it enacted the DMCA: § 512(m) expressly requires that § 512 *not* be interpreted to condition safe harbor for service providers on their assuming the costs of “monitoring . . . or affirmatively seeking facts indicating infringing activity.”⁶⁹ If Appellants gainsay the wisdom of that cost allocation, their “least cost avoider” argument should be directed to Congress, not the courts.

CONCLUSION

Appellants in this case advocate an interpretation of the safe harbor provision in § 512(c) of the DMCA that would eviscerate the protections Congress afforded both to ISPs that store material at the direction of their users and to those

⁶⁸ *Viacom III*, 2013 WL 1689071, at *2, *3 (internal quotation marks and citation omitted).

⁶⁹ 17 U.S.C. § 512(m).

users themselves. Appellants' self-serving reading of the statute distorts its text, structure, and legislative history in an effort to readjust the balance of competing interests that Congress so clearly and carefully struck when it enacted the statute fifteen years ago (and which courts have effectively implemented in the years since the statute's enactment). If Appellants' distorted reading of the DMCA prevails, tomorrow's Internet will almost assuredly be less innovative, less dynamic, and less participatory than today's, as developers of new, user-driven services and applications—and the people who invest in them—reassess the risks and costs of doing business online.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for *amici curiae* Intellectual Property and Internet Law Professors certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,991 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

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