

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
ANAHEIM BALLET, ADAM BAHNER, MICHAEL BASSIK, DANE
BOEDIGHEIMER, RAWN ERICKSON, HANK GREEN, JOHN GREEN, THE
LEARNING ABOUT MEDIA PROJECT, INC., KEVIN NALTY, CHARLES TODD,
ALLISON TRIPPY, CHARLES TRIPPY AND BARNETT ZITRON
IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

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

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

2. *Amicus curiae* The Learning About Multimedia Project, Inc. is a New York Domestic Not-For-Profit Corporation organized pursuant to Section 501(c)(3) of the Internal Revenue Code. No parent corporation or publicly held corporation owns 10% or more of the stock of The Learning About Multimedia Project, Inc.

Dated: November 1, 2013
New York, New York

/s/ Ron Lazebnik
Ron Lazebnik

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STATEMENT OF INTEREST OF AMICI CURIAE¹

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

Amici curiae are creative individuals and organizations that post original content on the websites of Appellees YouTube, Inc., YouTube, LLC and Google, Inc. (collectively “YouTube”). Included among *amici* are some of the musicians, comedians, entertainers, educators, political commentators, and institutions that make up YouTube’s community. Thanks to YouTube and similar online service providers (“OSPs”), *amici* have been able to easily disseminate content to the public that would otherwise have been inaccessible. As a direct result, *amici* have gained great notoriety, allowing them to make a living, to entertain, and to spread messages for the public good – feats that would have been impossible without YouTube and similar OSPs. Combined, the videos of *amici* have been viewed over 4.3 billion times on YouTube. *Amici* submit this brief in support of the Appellees.

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

² *Amici* include Anaheim Ballet, Adam Bahner, Michael Bassik, Dane Boedigheimer, Rawn Erickson, Hank and John Green, The Learning About Multimedia Project, Inc., Kevin Nalty, Charles Todd, Allison and Charles Trippy, and Barnett Zitron.

Anaheim Ballet³ is a ballet company based in California. Despite its limited touring capacity, Anaheim Ballet shares dance with people of all ages and socioeconomic backgrounds all over the world because of YouTube. Ballet has traditionally been considered an inspiring but elitist art form accessible only to the privileged and affluent, and OSPs like YouTube allow Anaheim Ballet to expand this art form's reach.

Under the pseudonym "Tay Zonday," Adam Bahner⁴ uploads original songs and performances to YouTube, enabling Mr. Bahner to transform his passion into his career.

Michael Bassik⁵ and Barnett Zitron⁶ participate in political causes and debates and use YouTube as a medium for their free expression. Without OSPs like YouTube, these individuals would not have a means to rally supporters or a forum to raise political issues traditionally ignored.

Dane Boedigheimer,⁷ Rawn Erickson,⁸ Kevin Nalty,⁹ Charles Todd,¹⁰ and Allison and Charles Trippy¹¹ are entertainers who rely on YouTube to share their

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

⁴ <http://www.youtube.com/user/tayzonday>; <http://www.youtube.com/user/tayvox>.

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

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

⁷ <http://www.youtube.com/user/daneboe>; <http://www.youtube.com/user/realannoyingorange>.

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

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

performances with the public. OSPs like YouTube have given them the opportunity to entertain for a living without the need for additional support.

Hank and John Green¹² use YouTube to post entertaining educational content. The Green brothers educate viewers using an innovative format on a myriad of topics such as the health care system, art, science, and safe and healthy sexual practices. Both of the Green brothers have been able to channel their success on YouTube into furthering their respective music and literary careers.

The Learning About Multimedia Project, Inc. (“The LAMP”)¹³ is a non-profit organization dedicated to spreading media literacy to a diverse array of participants, including underprivileged children. Through its educational programs, The LAMP creates fair use content that criticizes and comments on stereotypes that appear in advertisements.

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

¹⁰ Founder of “Improv Everywhere” (<http://www.youtube.com/user/improveverywhere>).

¹¹ <http://www.youtube.com/user/ctfxc>; <http://www.youtube.com/user/trippy>; <http://www.youtube.com/user/charlestrippy>; <http://www.youtube.com/user/alli>.

¹² <http://www.youtube.com/user/vlogbrothers>; <http://www.youtube.com/thehealthcariage>; <http://www.youtube.com/sexplanations>; <http://www.youtube.com/theartassignment>; <http://www.youtube.com/user/crashcourse>.

¹³ <http://www.youtube.com/user/thelampnyc>; <http://youtube.com/thelamplatoon>.

SUMMARY OF ARGUMENT

At stake in this case is the treatment of video content uploaded to the Internet by any member of the public. This material falls into one of three categories: (1) purely original content, (2) content incorporating copyrighted works that is a fair use, and (3) copyright infringing content. Appellants want to reread 17 U.S.C. § 512(c) in a manner that would severely hinder, if not completely prevent, distribution of the first two categories in an attempt to prohibit the third. Essentially, Appellants want to interpret willful blindness into the statute such that OSPs have an affirmative duty to seek out infringing content rather than review content brought to their attention.

The Digital Millennium Copyright Act (“DMCA”) “is designed to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age.” S. Rep. No. 105-190, at 1-2 (1998). Section 512(c) of the DMCA (the “Safe Harbor”) further promotes mass creation and mass distribution “by limiting the liability of service providers, . . . ensur[ing] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.” S. Rep. No. 105-190, at 8 (1998). The statute succeeded. Thanks to OSPs like YouTube who rely on the Safe Harbor, anyone can create content, upload it, and share it with the entire world to be consumed anywhere at any time.

Amici and others like them have been able to share original works through these innovative speech forums and distribution channels. *Cf.* 47 U.S.C. § 230(a)(5) (“Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.”).

Congress acknowledged that “[i]n the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability.” S. Rep. No. 105-190, at 8 (1998). But Congress also recognized that “[t]he Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” 47 U.S.C. § 230(a)(3). In order to foster OSP growth, the Safe Harbor removes OSP liability for users who upload copyright infringing materials as long as the OSP did not have “actual knowledge” of the infringement, and was not “aware of facts or circumstances” from which infringement was apparent. *See* 17 U.S.C. § 512(c)(1)(A).

Through the DMCA, Congress decided that copyright owners should be responsible for policing their copyrights by identifying and requesting the removal of infringing material. Copyright owners are in the best position to know what material they own, what they have licensed, and where they want their works to appear online. As discussed in Part I, *infra*, Appellants urge a reading of willful blindness into the DMCA that would shift the burden to OSPs to investigate

copyright infringement once that OSP has general, rather than actual, knowledge of infringement. Such a willful blindness standard would nullify the DMCA Safe Harbor, forcing OSPs to chill speech to avoid legal liability—the exact opposite result that Congress intended in creating the DMCA.

As discussed in Part II, *infra*, OSPs allow for a more efficient connection between creators and their potential audience. Whereas traditional media's distribution model is a limited fixed schedule, OSPs can publish limitless user-generated content to be consumed at the viewer's leisure. The distribution channels fostered by the Safe Harbor have no gatekeeper to determine what content is or is not made available. Despite these benefits, Appellants want to insert a gatekeeper into content delivery. They do this not because they want to stifle creativity, but because they believe their business is negatively impacted by placing the burden to police content on owners rather than OSPs. Protecting old forms of business, however, is not a valid reason to reinterpret the law.

Finally, as discussed in Part III, *infra*, interpreting the DMCA to require OSPs to investigate all content by implementing a filtering regime will limit fair use, increase the economic burden on OSPs, result in fewer platforms like YouTube, limit the freedom of speech of original content creators, and put OSPs in a role that they are ill-equipped to assume. *Amici* are not in a position to comment on the underlying facts of this case other than to note that they have always

understood YouTube's purpose to be a forum where individuals can share their original works. *Amici* urge this Court to remember the effects the wrong interpretation of willful blindness could have on the tangible benefits websites like YouTube provide. The incentives and burdens placed on OSPs should not be changed in a manner that would likely terminate their existence. For these reasons, and those stated more fully below, *amici* respectfully request the Court affirm the District Court's decision.

ARGUMENT

I. APPELLANTS' WILLFUL BLINDNESS STANDARD WOULD INCORRECTLY SHIFT THE BURDEN OF POLICING COPYRIGHT INFRINGEMENT TO OSPS

Appellants argue that the application of willful blindness to 17 U.S.C. § 512 should be broadened beyond the scope supported by this Court. According to this Court, the DMCA limits the scope of willful blindness to instances where an OSP intentionally avoids "knowledge or awareness of specific instances of infringement." *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 35 (2d Cir. 2012) ("*Viacom IP*"). Appellants and supporting *amici* misread willful blindness to require that an OSP affirmatively seek out infringing activity with knowledge of only a high probability of its existence. *See* Opening Br. for Pls.-Appellants ("*Viacom Br.*") at 51 (July 26, 2013), ECF No. 35; Br. for Motion Picture Assoc. of Am. et al. as *Amici Curiae* Supporting Appellants ("*MPAA Br.*") at 23-24 (Aug.

2, 2013), ECF No. 102. However, under § 512(c)(1)(A), there is no obligation for an OSP to locate the content if it is only made aware of the potential existence of infringement. This is evidenced in two ways depending on where the knowledge or awareness originates. First, an OSP only gains culpable knowledge through notice received from the copyright owner or its agents, when the notice identifies “information reasonably sufficient to permit the service provider to locate the material.” 17 U.S.C. § 512(c)(3)(A)(iii). Absent such compliance, that notice is not “considered under paragraph [§ 512(c)(1)(A)] in determining whether a service provider . . . is aware of facts or circumstances from which infringing activity is apparent.” 17 U.S.C. § 512(c)(3)(B)(i). Second, if the knowledge or awareness comes from a source other than the copyright owner or its agents, that source needs to identify the location of the specific instance of possible infringement because “§ 512(m) is incompatible with a broad common law duty to monitor or otherwise seek out infringing activity based on general awareness that infringement may be occurring.” *Viacom II*, 676 F.3d at 35.

Appellants and supporting *amici* incorrectly interpret willful blindness in at least two ways. First, they equate knowledge of the location of a potentially infringing clip with knowledge of the clip’s infringement. According to their interpretation, an OSP that is aware of the location of potentially infringing clips has actual knowledge of infringement under § 512(c)(1)(A), making willful

blindness superfluous. *See* Viacom Br. at 49; MPAA Br. at 25. This is not true, as an OSP can learn the location of potentially infringing material, yet remain *subjectively* unaware that it is infringing. *See UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1025 (9th Cir. 2013). Instead, willful blindness liability occurs if the OSP “was subjectively aware of facts that would have made the specific infringement ‘objectively’ obvious to a reasonable person.” *See Viacom II*, 676 F.3d at 31. Second, Appellants’ willful blindness interpretation incorrectly relies on *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 109 (2d Cir. 2010), which applies the doctrine in the context of trademarks rather than copyrights. *See* Viacom Br. at 50. Willful blindness cannot be applied in the same way, however, because the doctrine is necessarily limited by § 512(m). *See Viacom II*, 676 F.3d at 35.

Appellants’ reading would effectively shift the burden of policing copyright infringement from copyright holders to OSPs. Such an obligation is contrary to a proper reading of § 512(m) that allows an OSP to exist without creating an affirmative duty to monitor its users. *See* 17 U.S.C. § 512(m)(1). It is also inapposite to the fact that “[c]opyright 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.” *UMG*, 718 F.3d at 1022. Therefore, OSPs should not be punished for

complying with the DMCA which “place[s] the burden of policing copyright infringement . . . squarely on the owners of the copyright.” *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007). *Amici* caution against a reading of willful blindness that would unduly burden OSPs to investigate copyright infringement once an OSP has only general knowledge of infringement, as this would effectively nullify the Safe Harbor. This Court should therefore ignore Appellants’ interpretation and affirm the District Court’s application of willful blindness.

II. THE SAFE HARBOR ALLOWS FOR A GREATER AMOUNT AND VARIETY OF CONTENT OTHERWISE RESTRICTED BY TRADITIONAL AVENUES OF DISTRIBUTION

Traditional forms of content distribution use a gatekeeper to determine what content is made available to the public. This restrictive system is antithetical to the purpose of the Internet as an avenue for free and limitless expression. This is evidenced by the fact that 17 U.S.C. § 512 does not encourage OSPs to act as gatekeepers of user-uploaded content. Appellants’ misinterpretation of willful blindness would alter this by requiring OSPs to occupy such a role. Imposing this role on OSPs threatens the type and availability of content allowed and greatly harms content creators and the viewing public. Furthermore, while it may be true that traditional avenues of distribution will see less revenue with the rise of OSPs, this is not a reason to stunt the growth of OSPs. Market forces shifting the

distribution of revenue from traditional media to newer media is an acceptable result of the advancement of technology. This Court should not interpret the law as Appellants and supporting *amici* desire simply to preserve their business models.

A. The Safe Harbor Allows For An Alternative To Reliance On Gatekeepers And The Resulting Curtailment Of Expression

The Internet has given rise to OSPs that offer an alternative form of media distribution, capable of disseminating a wider variety of content than traditional media. This is largely because the Safe Harbor does not require OSPs to serve as gatekeepers of user-generated content. Instead of media executives, OSP users determine what media is distributed and promoted. This feature unmistakably results in sharing creative content that would not otherwise reach consumers if OSPs mirrored traditional media.

For instance, movie theaters and television networks are inherently limited forms of content distribution. Theaters can only show as many movies as they have screens to display, and television networks have a limited amount of channels and airtime on which to show their programs. Films and shows are therefore chosen to garner high viewership and profits. Thus, only a select portion of the content proposed to theaters or networks is made available to the viewing public and consumers are left to choose from programs made available based on aggregate preferences rather than individual taste.

The nature of theaters and television networks therefore restricts the number and type of content creators that have access to a public audience. Conversely, OSPs act as forums for expressing creative ideas that would otherwise be inaccessible, as anyone can upload content and find viewers. For example, *amicus* Tay Zonday describes his music as “non-mainstream” and strongly believes that his distinctive 1940s sound would have prevented him from recognition by more traditional mediums. Through YouTube, however, he has found a fanbase that has translated to success in traditional media, including being featured in an advertisement for Super Bowl XLIV.

The absence of an OSP gatekeeper is essential to the continued access to seemingly undervalued and unconventional content. Without gatekeepers, artists are not required to pitch their ideas to profit-focused executives. OSPs bypass this traditional media bottleneck by allowing consumers to collectively express and discover content. Consumers hold the power to decide what content is worthy of support by viewing and sharing it with others. An excellent example of the public’s choice of elevating content is the It Gets Better Project.¹⁴ In 2010, after reports of a number of suicides by gay teenagers due to bullying, Dan Savage started an online campaign to help similarly-situated teenagers. Using YouTube as a platform, thousands of videos were submitted that provided support to gay

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

teenagers contemplating suicide.¹⁵ The absence of a traditional gatekeeper role was critical to this project, where anyone, from everyday people to President Barack Obama, were able to share video messages assuring gay youth that suicide is not the answer and that “it gets better.”¹⁶

Amici American Federation of Musicians et al. (“AFM”) argue that OSPs facilitate online theft, which poses a “serious threat . . . to the future creative output of this country.”¹⁷ This proposition is not only unsupported, but also demonstrably false. Through OSPs, creators like *amicus* Charlie Todd are able to avoid traditional media’s obstacles and connect directly with their audience. In 2007, Mr. Todd created a television pilot for NBC, which was ultimately rejected. While traditional media failed to provide Mr. Todd with a platform, his YouTube channel, featuring similar content to that rejected by NBC, has over a million subscribers and more than three hundred million views.¹⁸ Mr. Todd’s success has since lead to recognition in traditional media, with appearances on The Today Show and Good Morning America as well as interviews in publications like the

¹⁵ Brian Stelter, *Campaign Offers Help to Gay Youths*, N.Y. Times (Oct. 18, 2010), <http://www.nytimes.com/2010/10/19/us/19video.html>.

¹⁶ *See, e.g.*, <http://www.youtube.com/watch?v=HzcAR6yQhF8> (President Barack Obama’s contribution to It Gets Better); <http://www.youtube.com/watch?v=D0OeSs870ys> (actor Zachary Quinto’s contribution to It Gets Better); <http://www.youtube.com/watch?v=MxLJd4irg5s> (YouTube user Bernard Charles’ contribution to It Gets Better).

¹⁷ Br. of *Amici Curiae* Am. Fed’n of Musicians et al. in Supp. of Pls.-Appellants & in Supp. of Reversal at 17 (Aug. 2, 2013), ECF No. 97.

¹⁸ *See* <http://www.youtube.com/user/improveeverywhere> (last visited Oct. 4, 2013).

New York Times. Mr. Todd is an example of how OSPs foster, rather than inhibit, creativity relative to traditional media.

Further, musical artists like Macklemore and Justin Bieber became famous by first publishing content on YouTube, allowing them to develop a worldwide network of fans.¹⁹ Macklemore was virtually unknown prior to finding success on OSPs. According to Macklemore, there is no reason to sign with a record label because of “the power of the Internet and the real personal relationship that you can have via social media with your fans.”²⁰ YouTube has been Macklemore’s greatest resource for connecting with fans and expressing his identity and brand to the world.²¹ Artists like Macklemore face fewer obstacles to commercial recognition through OSPs than when relying on traditional media models for funding, promoting and distributing their content. Requiring OSPs to act as gatekeepers would significantly inhibit this rich forum for free expression.

¹⁹ See Jan Hoffman, *Justin Bieber is Living the Dream*, N.Y. Times (Dec. 31, 2009), <http://www.nytimes.com/2010/01/03/fashion/03bieber.html> (“In contrast to stars like Kelly Clarkson, who sprang from ‘American Idol,’ or Disney factory best sellers like Miley Cyrus, Justin, his fans passionately believe, is homemade. Long before he released his EP, ‘My World,’ in mid-November, the YouTube videos attracted millions of views.”).

²⁰ See *Nerdist Podcast: Macklemore*, Nerdist, <http://www.nerdist.com/2013/03/nerdist-podcast-macklemore> (last visited Oct. 29, 2013).

²¹ See *id.*

B. A Gatekeeper Regime Would Constrict The Marketplace Of OSPs

While YouTube has developed into a media giant, there are smaller OSPs that also rely on user-generated content for their business model such as deviantART²² and Flickr.²³ Appellants' and supporting *amici's* demand for a gatekeeper overlooks the fact that smaller OSPs do not have the financial resources to satisfy a broad policing policy. In 2010, video-sharing website Veoh was driven into bankruptcy by a copyright lawsuit.²⁴ Though Veoh ultimately prevailed on summary judgment against Universal Music Group,²⁵ the litigation costs proved too vast an undertaking for the promising start-up.²⁶

Forcing OSPs to adopt a burdensome gatekeeper regime will reduce the number of OSPs available to both users and consumers. A large market of OSPs will promote competition and innovation at the distribution level, an essential aspect to growth in a digital world. For instance, in the motion picture and

²² See *Company Overview of deviantART, Inc.*, Bloomberg Businessweek, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=22872779> (last visited Oct. 29, 2013) (deviantART showcases various forms of user-made artwork).

²³ Flickr, <http://www.flickr.com/about> (last visited Oct. 29, 2013) (Flickr is an image and video hosting website that allows users to share and embed personal photographs).

²⁴ Eliot Van Buskirk, *Veoh Files for Bankruptcy After Fending Off Infringement Charges*, Wired (Feb. 12, 2010, 3:49 PM), <http://www.wired.com/business/2010/02/veoh-files-for-bankruptcy-after-fending-off-infringement-charges>.

²⁵ *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1011 (9th Cir. 2013).

²⁶ Van Buskirk, *supra* note 24.

television industry, an upsurge of mergers over the last decade has produced a consolidation of media.²⁷ Thus, a few megacorporations effectively define American popular culture,²⁸ leaving little to no opportunity for competition and growth in the marketplace.²⁹ Requiring OSPs to act as gatekeepers will result in a similar degradation of competing distribution channels that currently plagues the motion picture and television industry. Contrary to *amici* Copyright Alliance et al.'s ("Copyright Alliance") argument that allowing OSPs safe harbor under the District Court's interpretation will result in "the inevitable cannibalization of legitimate outlets for new works,"³⁰ the protections offered by the DMCA will in fact ensure the continued existence of diversified media outlets.

²⁷ *Media Giants*, Frontline, <http://www.pbs.org/wgbh/pages/frontline/shows/cool/giants> (last visited Oct. 20, 2013).

²⁸ In 2011, 90% of American media was controlled by GE, News Corp., Disney, Viacom, Time Warner, and CBS, leaving 232 media executives controlling the information received by 277 million Americans. See Kevin Allen, *Six Media Giants Control 90 Percent of the Content We Consume (Infographic)*, PR Daily (Dec. 19, 2011), http://www.prdaily.com/Main/Articles/Six_media_giants_control_90_percent_of_the_content_10340.aspx#.

²⁹ See Maurice E. Stucke & Allen P. Grunes, *Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies that Support the Media Sector's Unique Role in Our Democracy*, 42 Conn. L. Rev. 101 (2009) (discussing the dangers media consolidation poses for free speech and democracy, and highlighting the beneficial role the Internet plays in disrupting media consolidation).

³⁰ Br. of *Amici Curiae* The Copyright Alliance et al. in Supp. of Appellants at 3 (Aug. 2, 2013), ECF No. 96.

C. Wider Distribution Of Content Revenue Should Not Be Feared

Amici AFM argue that the alleged theft of copyrighted content on OSPs such as YouTube results in fewer jobs in the entertainment industry.³¹ AFM argues that their industry's financial models and well-being heavily rely on "downstream" revenue,³² and OSPs such as YouTube are encroaching on the potential downstream revenue that can come from Internet exhibition and distribution.³³ AFM's assumption is that reducing post-release revenue sources leads to less investment in new works and fewer jobs in the audiovisual arts.³⁴ As a preliminary matter, *amici* AFM fail to recognize that the loss of revenue by content owners is more closely associated with their restricted means of distribution than the existence of OSPs. Recent studies on infringing activity have shown that content is mainly pirated when it is not legally obtainable by consumers.³⁵ Additionally, while traditional media revenue may have decreased, this is an acceptable

³¹ See Br. of *Amici Curiae* Am. Fed'n of Musicians et al. in Supp. of Pls.-Appellants & in Supp. of Reversal at 8-11 (Aug. 2, 2013), ECF No. 97.

³² Downstream revenue is defined as "revenue from the exploitation of . . . products subsequent to the theatrical release or first television run." *Id.* at 10.

³³ *Id.* at 11.

³⁴ *Id.* at 10.

³⁵ "BitTorrent usage is on the decline in the US largely as a result of consumers having access to legal online content options." Sean Knight, *US BitTorrent Traffic Decline Credited to Legal Alternatives*, TechSpot (May 28, 2012, 2:00 PM), <http://www.techspot.com/news/48770-us-bittorrent-traffic-decline-credited-to-legal-alternatives.html>.

consequence of that revenue being redirected to more independent content creators who would otherwise be unable to fund their projects.

For instance, OSPs help facilitate “crowdfunding,” which allows projects to be financed through raising small amounts of money from large numbers of people, and by serving as platforms that allow creators to upload videos that are “likely to attract more attention or even investors.”³⁶ New media therefore does not require a single source to pay the entire cost of production.³⁷ For example, 10% of the films at the 2012 Sundance Film Festival were funded by the crowdfunding website Kickstarter.³⁸ These films were of equal critical acclaim as those produced by traditional media.³⁹ The amount of money raised to create such films is also comparable to their traditional media counterparts.⁴⁰ The existence of

³⁶ Josef Holm, *6 Tips for Crowdfunding Your Project on YouTube*, PBS (Oct. 10, 2013), <http://www.pbs.org/mediashift/2013/10/6-tips-for-crowdfunding-your-project-on-youtube>.

³⁷ See Tanya Prive, *What Is Crowdfunding and How Does It Benefit the Economy*, Forbes (Nov. 27, 2012, 10:50 AM), <http://www.forbes.com/sites/tanyaprive/2012/11/27/what-is-crowdfunding-and-how-does-it-benefit-the-economy>.

³⁸ *The Best of Kickstarter 2012*, Kickstarter, <http://www.kickstarter.com/year/2012#sundance> (last visited Oct. 29, 2013).

³⁹ “Incident in New Baghdad” became the second Kickstarter-funded film to be nominated for an Academy Award. See John McDermott, *...And the Winner for Best Crowd-Sourced Funding Is...*, Inc. (Feb. 26, 2012), <http://www.inc.com/john-mcdermott/and-winner-for-best-crowd-sourced-film-is.html>.

⁴⁰ Other films, such as “Blue Like Jazz” and “Minecraft: The Story of Mojang” received pledges totaling \$345,992 and \$210,297 from 4,495 and 3,631 individuals respectively. Anthony Kaufman, *The Top 7 Kickstarter Films (and 3 Secrets to Crowdfunding Success)*, Indiewire (June 2, 2011, 8:30 AM), http://www.indiewire.com/article/the_top_10_kickstarter_successes_--

OSPs as facilitators for crowdfunding leads to more diverse creative content, more projects, and as a result, more jobs.⁴¹ Therefore, Appellants' and supporting *amici's* fear of losing control over content distribution is not a sufficient reason to hinder the growth of OSPs by forcing them to be gatekeepers.

III. APPELLANTS' INTERPRETATION OF WILLFUL BLINDNESS WILL RESULT IN OVERBROAD FILTERING OF FAIR USE WORKS THAT WILL CHILL EXPRESSION

Appellants and supporting *amici* believe that YouTube and similar OSPs can prevent copyright infringement if they implement a filtering regime.⁴² This reasoning fails to address whether certain instances of alleged infringement constitute fair use. Fundamental to copyright law is the principle that not all uses of copyrighted material require authorization by the copyright holder. Seeking permission is not required when the use promotes socially beneficial discourse. *See* 17 U.S.C. § 107 (“[U]se of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an

_and_the_3_top_secrets_to_crowdfunding_s. Indeed, the amount of money raised for a film has even reached \$5,702,153 from 91,585 individuals. *See The Veronica Mars Movie Project*, Kickstarter, <http://www.kickstarter.com/projects/559914737/the-veronica-mars-movie-project> (last visited Oct. 29, 2013).

⁴¹ Kickstarter webpages for films make it clear that the money raised goes to costs related to development, filming, and post-production. *See, e.g., The Veronica Mars Movie Project*, Kickstarter, <http://www.kickstarter.com/projects/559914737/the-veronica-mars-movie-project> (last visited Oct. 29, 2013); *Star Trek Continues Webseries*, Kickstarter, <http://www.kickstarter.com/projects/125377036/star-trek-continues-webseries> (last visited Oct. 26, 2013).

⁴² *See* Viacom Br. at 12; Br. of *Amici Curiae* Ronald A. Cass et al. in Supp. of Pls.-Appellants at 26-27 (Aug. 5, 2013), ECF No. 122.

infringement of copyright.”). Shifting the burden to OSPs to monitor for possible infringement would force OSPs to constantly analyze hosted content for fair use. Faced with the threat of liability if analyzed incorrectly, OSPs will err on the side of caution and remove any videos that are potentially infringing. *Cf. Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 335 (2010) (“Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights . . . will choose simply to abstain from protected speech – harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.” (citation omitted)). In essence, OSPs will be compelled to chill speech for fear of liability, causing fair use content creators to suffer unnecessary censorship. Thus, in interpreting 17 U.S.C. § 512, this Court should encourage, rather than chill, speech.

OSPs like YouTube have three options for implementing filters should this Court require them to police copyrights: (1) a technologically driven filtering system; (2) a manual oversight system whereby specialists monitor uploaded content; and (3) a hybrid of both methods. In all three cases, the problems of overbroad filtering remain. Moreover, reading the DMCA to require OSPs to implement filtering may raise constitutional concerns due to the chilling effect it will have on free expression. The DMCA should not be read this way per this Court’s guideline that “[w]here an otherwise acceptable construction of a statute

would raise serious constitutional problems,’ we may ‘construe the statute to avoid such problems.’”⁴³ For example, this Court has previously limited trademark law in favor of protecting expression. *See Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989) (holding the Lanham Act should be construed narrowly when applied to artistic works because the public interest in free expression outweighs that of avoiding consumer confusion). Likewise, the Supreme Court held the chilling effect of libel law required substantive changes in light of the First Amendment because newspaper publishers were unlikely to publish controversial statements for fear of liability. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). To protect free speech and prevent unnecessary silencing of content creators, this Court should affirm the District Court’s interpretation of § 512 and not require OSPs to implement a filtering regime.

A. Filtering Technologies Are Unable To Distinguish Between Copyright Infringement And Fair Use Based Expression

A substantial part of Appellants’ and *amici* Copyright Alliance’s argument is that OSPs should use filtering technology to monitor their entire service platform for infringement.⁴⁴ Appellants go so far as to argue that YouTube’s decision to currently use such technology only when an agreement exists with a content owner

⁴³ *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 144 (2d Cir. 2005) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988)).

⁴⁴ *See* Viacom Br. at 12; Br. of *Amici Curiae* The Copyright Alliance et al. in Supp. of Appellants at 16-17 (Aug. 2, 2013), ECF No. 96.

indicates willful blindness in all other circumstances. *See* *Viacom Br.* at 26. Both Appellants and *amici* Copyright Alliance fail to address the weaknesses in filtering technologies and why YouTube and the public have a legitimate interest in limiting use of these technologies.

Current filtering technology merely compares the uploaded work to a library of known works and determines if any portion of the uploaded work contains known material.⁴⁵ Identification of a clip containing copyrighted material is not, however, the end of the inquiry. Material focused on criticism, comment, news reporting, teaching, scholarship, or research is allowed to make use of, and build upon, copyrighted works. *See* 17 U.S.C. § 107. Demanding that OSPs deploy filtering technology that merely indicates the presence of protected material and does not take fair use factors into consideration risks censoring important expression explicitly protected by copyright law. *See Ass'n of Am. Med. Colls. v. Cuomo*, 928 F.2d 519, 523 (2d Cir. 1991) (Noting that the “fair use doctrine permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” (internal quotations omitted)).

Furthermore, fair use analyses cannot be “simplified with bright line rules.” *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 577 (1984). This Court has

⁴⁵ *See* Michael S. Sawyer, Note, *Filters, Fair Use & Feedback: User-Generated Content Principles and the DMCA*, 24 Berkeley Tech. L.J. 363, 382 (2009).

noted fair use is “an open-ended and context-sensitive inquiry.” *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013); *see also Triangle Publ’ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980) (Reading fair use precedent as having never produced a “definition of fair use that is workable in every case.”). The irreducibility of fair use analysis to simple bright line rules renders it unlikely that computer algorithms will be able to perform the task, as even the most sophisticated computer algorithms fundamentally rely on bright line rules.⁴⁶ Mandating that filtering technologies play a crucial role in copyright enforcement will mean fair use is defined by the capabilities of technology rather than the wisdom of courts.

The shortcomings of relying on filtering technology are apparent from how some content owners use such technology to send takedown notices under the DMCA. On numerous occasions *amicus* The LAMP’s fair use critiques of advertisements have been the subject of takedown notices. In each case The LAMP has sent counter-notifications stating that the videos fall within fair use. In no instance has a copyright owner challenged these counter-notifications, indicating that the initial notice was most likely generated by an automated system rather than a person considering The LAMP’s fair use. While The LAMP has

⁴⁶ *See* Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 Harv. J.L. & Tech. 41, 56 (2001) (“Building the range of possible [fair] uses . . . into computer code would require both a bewildering degree of complexity and an impossible level of prescience.”).

chosen to challenge these automated assertions, other fair users are reluctant to challenge flagged videos for fear that their lay understanding of fair use is incorrect.⁴⁷

B. Manual Oversight By OSPs Will Not Mitigate Fair Use Concerns

The use of manual oversight in lieu of automated filtering technology, or as a supplement to such filtering, will not mitigate the likelihood that fair use expression will be censored. OSPs are in an inefficient position, relative to copyright holders or content creators, to determine the existence of fair use. Fair use requires questioning how much of the work was copied, the harm caused to the market for the work, and whether the use comments, criticizes, or transforms the work. *See Cariou*, 714 F.3d at 705-12. Without sufficient information about the original work, OSPs are unqualified to judge the degree to which an upload deviates in substance or form from the work. OSPs are especially without guidance in determining how much the upload harms the market of any given work. Even courts provided with information relevant to an accurate fair use analysis find the task uniquely challenging. *See Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (noting that fair use is “the most troublesome in the whole law of copyright” due to its inherent ambiguity). Copyright holders are

⁴⁷ For example, *amici* Hank and John Green have let infringement and the resultant censorship of their fair use go unchallenged rather than pursue counter-notifications, depriving the public of educational content.

in the best position to know what material they own and license, and where they want their works to appear. OSPs do not have the knowledge of the copyright holder, making them relatively ill-equipped to assess fair use.

Additionally, under the DMCA, copyright holders face legal penalties if they do not perform fair use analyses prior to requesting the removal of a video, whereas OSPs do not. *See* 17 U.S.C. § 512(f) (Placing liability on those who knowingly materially misrepresent whether content is infringing, if an OSP removes that content in reliance on the misrepresentation. Section 512(f) does not place legal liability on OSPs, as it refers to the submission of takedown notices which OSPs receive rather than submit.). This potential liability forces copyright holders to take fair use analyses seriously, and provides courts an opportunity to clarify the level of protection fair use is afforded. *See Online Policy Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1204-05 (N.D. Cal. 2004) (Finding the copyright holder knowingly misused takedown procedure and “sought to use the DMCA’s safe harbor provisions—which were designed to protect [OSPs], not copyright holders—as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property.”). This is important as infringement claims of online materials are already used to censor speech. *See id.* Such abuses have grave implications for political speakers like *amici* Michael Bassik and Barnett Zitron, who post political content on YouTube, as individuals

could take advantage of this procedure to silence political views with which they disagree. For example, 2010 Nevada senatorial candidate Sharron Angle sent opponent Harry Reid a DMCA takedown notice for re-posting an older version of her website as a political critique.⁴⁸ Under § 512, OSPs do not have the same incentive to be thorough in their fair use analyses as they do not face similar penalties as copyright owners. Shifting copyright determinations to OSPs means that fair use will be interpreted by a party outside judicial review, negatively impacting free expression.

Copyright holders have both the information and incentive to apply fair use analyses to avoid censoring expression that should otherwise be protected by copyright law. Even if OSPs were in a position to detect some instances of infringement, demanding that they take a proactive role in policing *all* potential infringements will overburden them with the responsibility of evaluating what works fit the ambiguous category of fair use. Any benefits to copyright holders as a result of placing such a burden on OSPs pales in comparison to the costs imposed on society by the inevitable narrowing of fair use based expression.

⁴⁸ Eric Kleefeld, *Angle Sends Cease-and-Desist to Reid – For Reposting Her Own Website*, Talking Points Memo (July 5, 2010 6:52PM), <http://tpmdc.talkingpointsmemo.com/2010/07/angle-sends-cease-and-desist-to-reid-for-reposting-her-own-website.php>.

C. Success Of OSPs In Detecting Trademark Infringement Does Not Imply Similar Success In Copyright Infringement

Amicus Copyright Alliance points to eBay as an OSP that successfully implemented a proactive policy to police infringement with the aid of filtering technology and manual oversight, and suggests a similar system be instituted by OSPs like YouTube.⁴⁹ Using eBay as an instructive example is misguided, however, as key differences between the services of the two OSPs make YouTube's application of a similar regime much less desirable and workable. Namely, eBay only polices its service for trademark infringement and not for copyright infringement, and is an online marketplace, not a platform for self-expression. eBay is able to implement its system without consideration of free speech concerns because its service is used to sell commercial goods. Conversely, any filtering regime applied to YouTube must contend with the dangers of censorship.

The different tests employed in the enforcement of trademarks versus copyrights prevent YouTube from implementing eBay's solution as easily as Appellants' supporting *amici* suggest. Trademarks protect the signifiers that identify and distinguish goods or services of one business from another, whereas copyrights protect original creative works. *See Warner Bros., Inc. v. Dae Rim*

⁴⁹ Br. of *Amici Curiae* The Copyright Alliance et al. in Supp. of Appellants at 17-19 (Aug. 2, 2013), ECF No. 96.

Trading, Inc., 677 F. Supp. 740, 760 (S.D.N.Y. 1988) (“There is a great difference between the objective of trademark protection and the objective of copyright protection. The two legal doctrines are distinct, different, and separate.”).

Consequently, fair use plays a different role in each legal realm. Trademark fair use is not focused on the important societal good of free expression, rather it merely allows a protected mark to be used by others “to describe the goods or services” sold by the mark’s owner. *See* 15 U.S.C. § 1115(b)(4). Conversely, copyright fair use serves as a statutory assurance that copyright enforcement does not abridge free speech. *See* 17 U.S.C. § 107. This Court should therefore maintain a heightened sensitivity to the protection of copyright fair use when considering imposing a duty on OSPs to implement a filtering regime similar to that of eBay. Though this Court looked favorably upon implementing trademark filtering in *Tiffany v. eBay*,⁵⁰ a similar system cannot easily meet the challenge of monitoring copyright infringement on OSPs like YouTube.

Furthermore, eBay spent as much as twenty million dollars per year to maintain their filtering and review system.⁵¹ Although such a cost might be manageable for a commercial marketplace like eBay, requiring all OSPs like

⁵⁰ *Tiffany (NJ) Inc. v eBay Inc.*, 600 F.3d 93, 98-99 (2d Cir. 2010) (noting that eBay’s implementation of a “fraud engine” to detect counterfeit merchandise, and their economic incentive to police their service for counterfeit goods weighs against a finding of either direct infringement or willful blindness).

⁵¹ *Id.* at 98.

YouTube to bear a similar cost will result in fewer OSPs and detract from the unique social good that user-generated platforms provide. *See* Part II.B, *supra*. Limiting the number of platforms for free expression may also narrow the diversity of viewpoints represented in public discourse.⁵² It is therefore important to remember that the obligations Appellants and supporting *amici* seek to impose will not only apply to YouTube, but all OSPs regardless of financial means. This Court should not encourage a high barrier of entry into the OSP marketplace, as they benefit the public by creating forums for the expression of ideas.

CONCLUSION

The DMCA Safe Harbor has fostered an environment that enables content creators to educate, entertain, and express political views to audiences around the world through OSPs like YouTube. Appellants' interpretation of willful blindness threatens the existence of these forums for free speech and creative expression. In interpreting the provisions of 17 U.S.C. § 512, *amici curiae* urge this Court to consider the implications that any deviation from the District Court's holding would have on content creators who rely on OSPs as their primary means of

⁵² Maurice E. Stucke & Allen P. Grunes, *Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies that Support the Media Sector's Unique Role in Our Democracy*, 42 Conn. L. Rev. 101, 30 (2009) (discussing the dangers media consolidation poses for free speech and democracy, and highlighting the beneficial role the Internet plays in disrupting media consolidation).

distribution. For the foregoing reasons, *amici curiae* request this Court affirm the District Court's holding.

Dated: November 1, 2013
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A), because it is written in 14-point Times New Roman font, and with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), because it contains 6,911 words, excluding the portions excluded under Fed. R. App. P. 32(a)(7)(A)(iii). This count is based on the word count feature of Microsoft Word.

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CERTIFICATE OF FILING AND SERVICE

I, Ron Lazebnik, hereby certify that on this 1st day of November 2013, I caused a true and correct copy of the foregoing Brief of Amici Curiae Anaheim Ballet et al. in Support of Appellees, to be electronically served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h).

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

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