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United States Court of Appeals

for the

Second Circuit

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

**BRIEF OF *AMICI CURIAE* NATIONAL ALLIANCE FOR MEDIA ART AND
CULTURE, THE ALLIANCE FOR COMMUNITY MEDIA, AND
KARTEMQUIN FILMS IN SUPPORT OF DEFENDANTS-APPELLEES AND IN
SUPPORT OF AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Amici curiae submit the following disclosures pursuant to Fed. R. App. P. 26.1 and 29(c)(1):

1. The National Alliance of Media Arts Centers Inc., doing business as the National Alliance for Media Art and Culture (“NAMAC”), is a non-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 NAMAC.

2. The Alliance for Community Media (the “ACM”) is a non-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 ACM.

3. Kartemquin Films is a non-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 Kartemquin Films.

STATEMENT OF INTEREST

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

The National Alliance for Media Art and Culture (“NAMAC”) consists of 225 organizations that serve over 300,000 artists and media professionals nationwide.¹ Members include community-based media production centers and facilities, university-based programs, museums, media presenters and exhibitors, film festivals, distributors, film archives, youth media programs, community access television, and digital arts and online groups. NAMAC’s mission is to foster and fortify the culture and business of the independent media arts. NAMAC believes that all Americans deserve access to create, participate in, and experience art. NAMAC co-authored the Documentary Filmmakers’ Statement of Best Practices in Fair Use and has advocated for orphan works reform.

The Alliance for Community Media (the “ACM”) provides critical support services for community media centers—the public, educational, and governmental (“PEG”) access cable television stations that enrich communities across the country—and for the primarily volunteer staff that keep these electronic outposts

¹ **Amici** hereby state pursuant to Fed. R. App. P. 29(c)(5) and Rule 29.1 of the United States Court of Appeals for the Second Circuit that none of the parties to this case nor their counsel authored this brief in whole or in part; nor did any party or any party’s counsel contribute money intended to fund preparing or submitting the brief; nor did anyone else other than **Amici** and their counsel contribute money that was intended to fund preparing or submitting this brief.

of democracy in operation. The ACM's activities in providing technical assistance, grassroots organizing, and opportunities to share experiences promote the broader goals of supporting our nation's communities and families and promoting effective communication through community use of media.

Kartemquin Films is a home for independent media makers who seek to create social change through film. Kartemquin has been nurturing emerging talent and acting as a leading voice for independent media for over 45 years. Focusing on people whose lives are most directly affected by social and political change and who are often overlooked or misrepresented by the media, Kartemquin's films open up a dialogue, both in communities and between the general public and policymakers.

The artists and creators represented by amici and amici's member organizations rely on both traditional media platforms such as television, and online platforms such as YouTube, along with a host of smaller platforms, to reach audiences. In their day-to-day work, amici also rely on the protective rights granted to them under copyright, and on the limitations to copyright that support creative work, such as fair use.

Amici therefore have a strong interest in laws that appropriately balance copyright protection, innovation, and creative expression, and that support both traditional and Internet-based platforms. Amici are independent charitable

organizations, have no interest in any party to this litigation, and have no financial stake in its outcome. Their sole interest in this case is the correct interpretation of the Digital Millennium Copyright Act's ("DMCA") safe harbors for online service providers ("OSPs"). NAMAC and the ACM filed an *amicus* brief when this case was last before this Court explaining the importance of a wide variety of online media platforms to independent artists. *Viacom Int'l Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012) (*Viacom II*). The issues presented in this appeal also call into question the availability of these platforms; as such, the issues before this Court remain critical to independent media artists' ability to reach audiences.

SUMMARY OF ARGUMENT

Online media platforms like YouTube offer independent media artists new opportunities for creativity and the chance to reach new audiences, both national and global. They have revolutionized both how artists and creators reach audiences and who can reach wide audiences. From minority youth, often represented negatively in mainstream media, becoming empowered and telling their real-life stories about the struggles of growing up, to service men and women offering personal accounts of their experiences and forming online support communities, to citizens around the globe demanding rights from oppressive regimes, online platforms can give voice to all—but this is especially true for those neglected by or underrepresented in mainstream media. Online platforms have also revolutionized

the way creators and audiences interact, removing geographic and temporal barriers and allowing for communication and collaboration on everything from art projects to international political movements.

Before online platforms, artists and creators were subject to the physical limitations and editorial gatekeepers of traditional media outlets—movie theaters, television, radio, and the like—which often limited their reach. This was especially true for underrepresented voices.

Online platforms changed this equation. By dramatically lowering the barriers to media dissemination and by giving artists, rather than gatekeepers, the power to decide what information is worthy of broadcast, online platforms make room for diverse and previously unrepresented voices.

The DMCA's safe harbors have made this shift possible by giving OSPs the certainty they need to innovate and provide beneficial technologies such as online platforms. Weakening the safe harbors as Viacom Int'l Inc., Comedy Partners, Country Music Television, Inc., Paramount Pictures Corp., and Black Entertainment Television, LLC (hereinafter "Viacom") press this Court to do would undermine these advances and harm artists by re-creating the legal uncertainty OSPs faced before Congress passed the DMCA, preventing OSPs from providing truly open platforms.

Specifically, were this Court to accept Viacom's interpretation of willful blindness, OSPs would face a dramatic increase in potential liability, which would pressure them to over-police their services. Such pressure, coupled with the practical difficulty of determining the difference between lawful and illegal content, would likely lead OSPs to filter or otherwise restrict content. Because it is difficult to know when a copyrighted work is being used unlawfully, this would acutely harm independent artists, who often make fair or licensed uses of copyrighted material that are at risk of being ensnared in overbroad gatekeeping efforts.

Further, in contravention to Congress' goals for section 512, Viacom's proposed rule would chill innovative and emerging online platforms instead of encouraging them, thus reducing competition in the online platform market and severely limiting the ability of independent media artists to reach a wide range of audiences. Ultimately, such a result would greatly diminish the richness and diversity of expression currently available to the public via the Internet.

Under the district court's proper interpretation of section 512, independent artists and creators will continue to thrive online. Yet, Viacom asks this Court to reverse this course and rewrite the DMCA, applying the willful blindness doctrine to establish liability when an OSP has a generalized knowledge that some infringing content may reside on its platform and fails to take steps to investigate

that infringement. But the district court, following section 512's text, the Second Circuit's guidance, relevant case law, and Congressional intent, correctly held that YouTube is protected by the safe harbors and that "what disqualifies the service provider from the DMCA's protection is blindness to 'specific and identifiable instances of infringement.'" *Viacom Int'l Inc. v. YouTube, Inc.*, No. 07-cv-02103 (S.D.N.Y. Apr. 18, 2013), slip op. at 12 (*Viacom III*) (quoting *Viacom II*).

As such, the district court properly granted summary judgment in YouTube's favor; YouTube fulfilled its responsibilities under section 512 of the DMCA, and lacked the knowledge required to lose the protections of the safe harbor. But more important for artists and creators, the district court rejected Viacom's attempt to erode the safe harbors' clear protections, which, by giving a wide variety of OSPs the certainty needed to provide online platforms, redound to the benefit of independent media artists and the public. For these reasons and others stated below, amici urge that the district court's decision be affirmed.

ARGUMENT

I. Independent Media Artists Marshal Open Online Platforms to Reach Global Audiences, Present Diverse Perspectives, and Enhance Societal Participation in Discourse.

Independent artists and creators have harnessed online platforms—including YouTube, Veoh, Vimeo, Livestream, blip.tv, and many others—to redefine the distribution of art and media and to engage global audiences in collaboration and

conversation. These platforms empower artists and other speakers to broadcast important issues that would otherwise go unheard and undiscussed. **Amici** care deeply about the proper interpretation of section 512, which protects these voices by giving OSPs the certainty they need to build innovative services that do not require conservative policing and gatekeeping. This allows creativity and expression to flourish and diverse voices to be heard, including expression that may have little potential for commercial success or distribution via traditional media platforms but that nonetheless exemplifies our societal free expression values.

This is the case because Internet-based platforms provide powerful, low-barrier tools for disseminating media. These services allow individuals, amateur artists, and media professionals alike to share information and find audiences in ways not possible through traditional broadcast models, which by their nature are constrained in how much and what kind of material they can carry. Further, the barriers to entry for new online platforms—like GroupStream, discussed below—are presently relatively low, compared to traditional media. This allows new entrants, creating further capacity to support less-represented or specialized voices as well as the possibility of rapid innovation in the ways that media artists can reach audiences. As such, online platforms, directly supported by the robust protections section 512 provides to the OSPs that develop them, have enabled

countless creators and speakers to publish their works and contribute their voices to the creative community and to public discourse.

a. Internet-Based Platforms Dramatically Lower Barriers Facing Independent Artists and Creators, Enabling Them to Reach Global Audiences.

Internet-based platforms give independent creators and individual speakers a unique opportunity to expand their reach to global audiences because they present far fewer barriers to entry than traditional platforms. Many independent voices lack access to traditional broadcast media, which are limited in capacity by physical and regulatory constraints. For example, the scarcity of radiofrequency spectrum necessarily restricts over-the-air broadcast television channels. *F.C.C. v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 799 (1978) (“The physical limitations of the broadcast spectrum are well known. ... [A] finite number of frequencies can be used productively; this number is far exceeded by persons wishing to broadcast to the public.”). These channels are in turn owned by only a handful of companies, further limiting the number of slots available for programming. *See* U.S. Gov't Accountability Office, GAO-10-369, *Factors Influencing the Availability of Independent Programming in Television and Programming Decisions in Radio* (2010). The programming that airs on traditional broadcast networks generally holds some promise of a return on investment; many independent producers are unable to offer that certainty, making it difficult for them to find a voice on

traditional broadcast platforms. *See id.*; Yochai Benkler, *The Wealth of Networks, How Social Production Transforms Markets and Freedom* 197 (2006) (noting limits caused by traditional networks' need to maximize advertising revenues). Cable television and mainstream film distribution present similar barriers, as they are physically limited by cable transmission capacity and the number of available cinema screens, and even by the number of hours in the day in which content can be scheduled.

Online platforms do not face these same constraints—with sufficient bandwidth, OSPs can provide nearly unlimited broadcast capability. This major shift has created a veritable explosion of discussion and creativity. YouTube users alone upload 100 hours' worth of video content every minute and YouTube viewers watch 6 billion hours of video each month. YouTube Press Statistics, <https://www.youtube.com/yt/press/statistics.html> (last visited Oct. 16, 2013). In the online world, many can speak, and many can listen and respond.

These key features of online platforms—low financial and procedural barriers—are especially important to independent media professionals, whose works require capital in the form of equipment, human resources, and time, but whose voices have limited outlet in traditional media. Today, the ability of NAMAC, the ACM, and Kartemquin's members to use online platforms as primary or supplemental distribution tools is critical to their success in reaching

audiences and supporting independent voices that would not find space on crowded traditional platforms. Further, many of NAMAC and the ACM's member organizations provide education and outreach to their constituents on very limited budgets. Online platforms sweep these hurdles away, giving reach and effect to the support amici provide to independent voices.

For example, NAMAC member Bay Area Video Coalition (“BAVC”), *see* Bay Area Video Coalition, <http://www.bavc.org/about/mission>, is a non-profit media arts organization that uses YouTube in its work to make video technologies and their use more accessible to independent media artists, including youth. Three “Aha!” Moments With BAVC’s Factory Program, <http://www.bavc.org/bavc-blog-16> (describing BAVC’s youth filmmaking program, which uses online platforms and open-source software to equip teenagers with video tools they can use in their own documentaries). Another NAMAC member, non-profit Media That Matters, uses YouTube to broaden the reach of its film festival for independent short films—on contemporary issues “from gay rights to global warming”—far beyond its physical festival location in New York City. And by using online platforms to extend their reach, the ACM’s member public, educational, and governmental access channels further their mission to educate, deliver critical local programming, and serve as local anchor institutions. Because they distribute content through channels that depend upon agreements between cable operators

and franchising authorities, ~~see~~ 47 U.S.C. § 531 (2011), it is especially important for community media centers to have supplemental platforms. Overall, independent artists and organizations alike have discovered myriad ways to use low-cost online platforms in fulfilling their missions.

b. In Contrast to Traditional Media Models with Gatekeepers, Artists and Creators Decide What Content to Distribute via Online Platforms, Making Room for a Wide Variety of Viewpoints.

In addition to dramatically increasing independent expression overall by lowering barriers of physical access and cost, online platforms give voice to those unheard in traditional media. Prior to the development of online platforms, a speaker's ability to reach a wide audience was limited by access to traditional platforms governed by gatekeepers. Because of the need for content that will be widely accepted and consumed, the range of issues and perspectives presented on traditional platforms is limited. ~~See~~ Benkler, *supra*, at 197 (noting that traditional media programming is focused on catering to majority preference). Online platforms, however, empower each artist, creator, or other speaker to independently decide what content he or she wants to make available to audiences. Member organizations of NAMAC and the ACM and Kartemquin's filmmakers, among many other independent media artists, have been able to take advantage of this feature of online platforms to offer a diversity of perspectives, including differing or marginalized viewpoints.

Media That Matters uses online streaming, including its YouTube channel, to disseminate films that tell stories from a wide variety of perspectives. YouTube - mediathatmatters's Channel, <http://www.youtube.com/user/mediathatmatters> (last visited Oct. 22, 2013). For example, 16-year-old Kiri Davis' film "A Girl Like Me" won the Media That Matters Diversity Award in 2006 for its portrayal of young African American girls struggling with negative self-image because of their race. Media That Matters Press Release, Mar. 5, 2007, http://www.mediathatmattersfest.org/pdf_materials/MTM7_press_release_3.05.07.pdf (describing how the film went "viral" and exposed hundreds of thousands of viewers to racial issues in the 21st century). Last year, Media That Matters worked to illuminate diverse voices and new points of view regarding criminal justice issues. To that aim, Media That Matters distributed Jeremy Robins' film "Echoes of Incarceration," a documentary produced by teens with incarcerated parents documenting the effect of the prison system on children, and Sean Strub's film "HIV is Not a Crime," featuring stories of the impact of HIV-related laws on HIV testing, disclosure, and treatment.

The National Black Programming Consortium ("NBPC") is another NAMAC member organization that uses online media—integrating Kaltura and YouTube video players on its website—to collect and distribute a diverse range of stories. NBPC focuses on developing, producing, and funding a diverse array of

content about contemporary black experiences. The Official Website of the National Black Programming Consortium, <http://blackpublicmedia.org/about> (last visited Oct. 22, 2013). For example, to catalyze broad and honest conversations about African American Muslims—a group that is routinely overlooked in discussions about Islam in America—NBPC created a web series where questioners ask Black Muslims in the United States questions about Islam. And, in a past project, NBPC collected web videos uploaded by users through YouTube to create a multi-media portal of stories about Haiti after the 2010 earthquake.

Similarly, BAVC's Next Generation program works with over 100 low-income, underrepresented young people through after-school programs, seeking to empower diverse voices in media and to help students preserve their own stories and the stories of their communities. About Next Gen Programs, Bay Area Video Coalition, <http://www.bavc.org/tracks> (last visited Oct. 22, 2013). For example, in 2006, Next Generation participants Jazmin Jones and Nick Parker learned of the Apollos, a group of students at Oakland Tech High School in the late 1970s whose efforts led to the passage of a California bill recognizing Martin Luther King Jr.'s birthday as a state holiday. Justin Berton, **Student Film Tells of Drive for King Holiday**, S.F. Chron., July 16, 2008, at E1. Jones and Parker were inspired to make the award-winning documentary "The Apollos" to preserve the story after they were unable to find information online about the Apollos. Next Generation student

films are made available through the Internet platform blip.tv and on BAVC's YouTube channel.

c. Independent Artists, Creators, and Individual Speakers Use Online Platforms to Interact with Audiences, Form Communities, Foster Discourse and Collaboration, and Build Movements.

Beyond allowing for individual voices and diverse viewpoints, many online platforms, including YouTube, allow for more than mere dissemination—they also create the possibility of two-way communication, participatory interaction, and community-building. In traditional media, content is distributed to audiences in a top-down manner from a limited number of broadcast organizations, and audience members are passive recipients. By contrast, online platforms give audience members the power to determine which content is relevant to them and the opportunity to engage with that content. See, e.g., Jason Potts et al., *Consumer Co-creation and Situated Creativity*, 15 *Indus. and Innovation* 459, 467 (2008). Artists, creators, and speakers use these features to connect with identity-based communities, to co-create media, and to disseminate information on local events in a way that would not be possible in traditional media.

i. Creators Use Online Platforms to Reach Beyond Geographic Barriers to Connect Identity-Based Communities.

Online platforms allow creators to reach out directly to identity-based communities and for community members to build connections by creating, discussing, and sharing content. Artists, creators, and speakers with diverse

backgrounds can share stories and foster discussion, increasing public discourse on topics that may not otherwise be covered in traditional media. See Jean Burgess & Joshua Green, *YouTube: Online Video and Participatory Culture* 80 (2009) (discussing how the ability to share individual thoughts with a public audience allows social boundaries and pre-existing assumptions to be questioned and refashioned).

For example, in September 2010, author Dan Savage and his husband Terry Miller created a YouTube video in response to a number of news reports of lesbian, gay, bisexual, and transgender (“LGBT”) students taking their own lives after being bullied in school. YouTube - Itgetsbetterproject’s Channel, <http://www.youtube.com/user/itgetsbetterproject> (last visited Oct. 16, 2013). Savage and Miller invited LGBT supporters from around the world to make and upload videos to their YouTube channel. Supporters were asked to speak directly to LGBT youth, telling them that they are not alone and explaining how the speakers’ own lives have improved in the years since high school. Within two months, the “It Gets Better Project” turned into a worldwide movement, inspiring more than 50,000 user-created videos that have been viewed over 50 million times. The videos ranged from the homemade to the professionally produced and featured everyone from private individuals, to celebrities such as Anne Hathaway and Ellen DeGeneres, to public officials such as President Barack Obama and Secretary of

State Hillary Clinton—all reaching out to LGBT youth to tell them that that life will get better in adulthood.

Similarly, “Returning Home,” a project funded in part by NAMAC member organizations BAVC and Independent Television Service (“ITVS”), collects content from veterans, service men and women, and their friends and family, including YouTube videos. Returning Home, <http://www.returninghomeproject.org/> (last visited Oct. 16, 2013). Returning Home is designed to open up lines of communication between service men and women and their supporters, helping veterans and service members to heal and feel connected to their communities.

Online platforms also allow close-knit but far-flung groups to unite community members in a centralized electronic space. Minneapolis Telecommunication Network (MTN), Welcome to MTN, <http://www.mtn.org/> (last visited Oct. 15, 2013), is a public access television station and a member of both NAMAC and the ACM. Through online platforms, MTN’s community users can connect to a far wider audience than can be reached through MTN’s cable channels alone. “Somali TV of Minnesota” is an MTN community production that reaches well beyond the range of Minneapolis public access cable by using Livestream and YouTube to connect local Somali-Americans with the broader Somali diaspora and to provide far-flung members of the community with content that is relevant and

responsive to their interests. Somali TV of Minnesota, <http://www.somalitv.org/> (last visited Oct. 15, 2013); Somali TV of Minnesota, <http://www.livestream.com/somalitvofmn> (last visited Oct. 15, 2013).

In these and many other examples, independent voices use online platforms to overcome local isolation and to build discussion and community far beyond local borders.

ii. Independent Artists and Creators Harness the Interactive Nature of Online Platforms to Innovate and Co-create Media.

Online platforms also allow creators to connect and share resources globally, facilitating the co-creation of media by a worldwide network of users. For example, collaborators use online platforms to request and collect material, bringing diverse and distributed viewpoints together in a single project. Both the “It Gets Better Project” and the “Returning Home” project show that many voices can collaboratively contribute to the discussion of important societal issues.

Independent media organizations go even further in their use of online platforms to support the co-creation of integrated works. For example, NAMAC member ITVS marshaled the collaborative features of online platforms to collect over 1,500 videos, images, and blog posts from participants in an alternative reality online game “World Without Oil.” World Without Oil, <http://worldwithoutoil.org/default.aspx?week=1> (last visited Oct. 15, 2013). The work comprises a rich, complex collective imagination of living without oil and

has sparked insight about oil dependency and energy policy. Over 60,000 active observers watched the collaborative work unfold over 32 days. The game is now archived online and has 6,000 unique visitors per month.

Similarly, “18DaysInEgypt” is a project that uses the new collaborative-storytelling online platform GroupStream to document the 2011 Egyptian Revolution using media that was created by those who were in Egypt during the first 18 days of the uprising. 18DaysInEgypt, <http://beta.18daysinegypt.com/> (last visited Oct. 15, 2013).

GroupStream is a prime example of the kind of ongoing rapid innovation that supports new voices. Users upload their video, photographs, texts, tweets, and Facebook updates created during the uprising and invite their friends to add their stories and media, thus building a more complete story of their shared experience. This innovative approach allows for each story to be told from multiple perspectives and gives the audience additional insight into events of the 2011 revolution.

iii. Speakers Use Online Platforms to Spotlight Local Events for Global Audiences, Generating International Discussion and Building Movements.

Independent voices also use online platforms to galvanize societal participation and change, on issues of local to global concern. As dramatically exemplified by during the Arab Spring of 2011, online platforms put the power in

the hands of the censored and oppressed, giving them the ability to speak their minds and highlight their struggles, on their terms, and in their words. In giving a voice to activists, online platforms have helped democratic movements to grow, to influence public perception, and to gain the global recognition and support needed to transform political systems.

Where citizens' views are suppressed in traditional local media and international media is restricted or censored, user-generated content can be a primary source of information on global news. For example, while Libya was largely closed off to foreign media during the 2011 uprising, Libyan citizens have provided video footage of what is happening within the nation's borders. For example, a member of the "One Day on Earth" community used the site's Vimeo plug-in to share video of a mass grave in Tripoli. The film was later aired on CNN. Crowdsourced Documentary Project Yields Footage Out of Libya, <http://www.cloudcamb.org/services/crowdsourced-documentary-project-yields-footage-out-of-libya> (Mar. 18, 2011).

This positive democratic effect is robust and ongoing. More recently, Syrian activists posted videos on YouTube of chemical weapons attacks in Syria, prompting President Obama to urge every member of Congress as well American citizens to view the videos. Remarks by the President in Address to the Nation on

Syria, <http://www.whitehouse.gov/photos-and-video/video/2013/09/10/president-obama-addresses-nation-syria#transcript> (Sept. 10, 2013).

These examples and a great many others flow directly from the protection that section 512's safe harbors have given OSPs, allowing them to provide options that dramatically lower the barriers to independent voices reaching audiences. By, as Congress intended, protecting platform providers from having to act as *ex ante* gatekeepers, the safe harbors likewise shelter and support a chorus of diverse voices and allow creators to find audiences, build communities, and foster discussion.

II. Independent Artists Would Be Harmed if the Willful Blindness Doctrine Were Used to Establish Liability Absent Knowledge or Awareness of Particular Infringing Activity.

Viacom's interpretation of willful blindness would harm independent media artists by reinstating the legal uncertainty Congress intended to obviate with the statute. Specifically, if liability is assigned to OSPs through the willful blindness doctrine absent knowledge or awareness of particular infringing activity, OSPs will be pressured to reduce their levels of innovation and restrict the breadth and depth of content they carry. Appellant's Br. (Viacom) 51. As the district court properly acknowledged, "the DMCA recognizes that service providers who do not locate and remove infringing materials that they do not specifically know of should not suffer the loss of safe harbor protection." *Viacom III*, No. 07-cv-02103 (S.D.N.Y.

Apr. 18, 2013), slip op. at 14 (quoting *UMG Recordings v. Shelter Capital Partners, LLC*, No. 10-55732, slip op. at 12 (9th Cir. Mar. 14, 2013)). Liability based on a blindness to a probability of infringement, rather than on blindness to specific, identified infringements, is likely to cause OSPs to adopt conservative gatekeeping practices, harming independent voices.

Knowing this, Congress appropriately placed the initial burden for policing infringement on those in the best position to do so—copyright holders—and balanced this responsibility with OSPs’ responsibilities to take down infringing material. To upset Congress’ balance would greatly increase the burden on OSPs, exposing them to uncertainty and fear of high statutory damages or even injunctive relief against their services. Where OSPs now know their responsibilities under section 512—for example, to respond to takedown notices or other evidence of specific and identifiable infringements—liability based on a generalized knowledge of infringement and a failure to take steps to limit or investigate that infringement as pressed by Viacom would likely push OSPs to police content prior to allowing it on their platforms. This would mean that service providers, not creators, would make choices about what content to distribute.

a. Liability Absent Knowledge or Awareness of Particular Infringing Activity Would Harm Independent Artists by Pressuring Platforms to Over-Police Their Services and to Engage in Overbroad Gatekeeping.

Independent artists and creators are likely to be acutely harmed if an OSP’s generalized knowledge that infringing material may be present on its service, combined with a failure to take steps to limit or investigate the suspected infringement, is sufficient to establish liability through the willful blindness doctrine. This is because such increased pressure—combined with the difficulty of determining if a particular posting is an infringement or a lawful use—will lead OSPs to engage in overly conservative policing of their platforms out of fear that they could be wrong about the legal status of a work. Possible copyright infringements are often markedly difficult to evaluate. 3 Nimmer § 12B.04[A][1] (discussing the difficulty of determining infringement, “from proper ownership . . . to lack of license . . . to the perennially murky issue of fair use, and beyond.”). Examples of this problem abound in this very case. ~~See~~ e.g., Mem. of Law in Supp. of Def.’s Mot. for Summ. J., 37-44 (describing challenges in evaluating copyright status, including how several clips at issue in the litigation are either so short or contain such limited content as to be nearly unrecognizable, while other clips are distributed to the public in a way that intentionally obscures who created the video, as in the case of some of Viacom’s viral marketing campaigns). Yet the strong remedies available for copyright infringement create a high downside risk to

incorrectly concluding that a use is noninfringing. Faced with such pressure, OSPs would likely employ overbroad gatekeeping methods or takedowns, severely limiting the ability of independent artists to make legitimate uses of other works.

i. Liability Absent Knowledge or Awareness of Particular Infringing Activity on a Platform Would Pressure Platforms to Disallow Material Making Fair Use of Copyrighted Works.

The acute example of the harms caused by overbroad gatekeeping is the detrimental impact it would have on fair use. Amici believe that a robust fair use doctrine is a critical feature of the copyright regime. A great many creators depend upon it, including independent media professionals. Courts have long recognized that fair use is key to creativity and free expression. *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574-575 (1994) (“From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose.”).

At the same time, materials making fair uses of copyrighted works are particularly susceptible to being removed or screened by platforms because of the fact-specific analysis required by the fair use doctrine and the high risk such works represent if they are found to not be fair use. For example, film critic Kevin B. Lee found his entire account removed from YouTube in response to takedown notices complaining of clips Lee used in the criticism he posted there. *See* Nate Anderson, *What fair use? Three strikes and you’re out... of YouTube*, Ars Technica, (Jan. 15,

2009) <http://arstechnica.com/tech-policy/news/2009/01/what-fair-use-three-strikes-and-youre-out-of-youtube.ars> (describing Lee's dispute with YouTube). While Lee's account was eventually reinstated, Lee's story is emblematic of the problems speakers face when overbroad policing ensnares works that make fair use of copyrighted material. See, e.g., Center for Democracy & Technology, **Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech**, http://www.cdt.org/files/pdfs/copyright_takedowns.pdf (describing how broadcasters sent DMCA takedown notices to remove political ads from a number of campaigns without considering fair use and finding that such removal chilled political speech); **update on Warner Music (UPDATED)(AGAIN)**, (Apr. 30, 2009), http://www.lessig.org/blog/2009/04/update_on_warner_music.html (describing how YouTube removed a lecture by Prof. Lawrence Lessig that in his opinion made fair use of copyrighted material, and which was later reinstated).

Yet if policing content becomes the norm for online platforms fearful of their infringement liability, fair use may be far less available to creators, similar in many ways to the realities independent artists—for example, documentary filmmakers—encounter in distributing their works in more traditional media, where decisions are made *ex ante* by gatekeepers. In that world, the uncertainty of fair use can keep meritorious and important stories from being seen. See, e.g., Patricia Aufderheide & Peter Jaszi, **Untold Stories: Creative Consequences of the**

Rights Clearance Culture for Documentary Filmmakers, Center for Social Media Report, 9 (Nov. 2004),

http://www.centerforsocialmedia.org/sites/default/files/UNTOLDSTORIES_Report.pdf.

ii. Requirements or Strong Pressure for Online Platform Providers to Adopt Filtering Technology Would Exacerbate the Harms Caused to Independent Artists by Overbroad Policing.

The ability of independent artists to distribute works that incorporate other copyrighted works could be severely hampered if uncertainty caused by applying the willful blindness doctrine to establish liability based on a generalized knowledge of infringement pushed OSPs to adopt filtering technology as a de facto requirement. Further, Viacom’s amici argue that a decision not to use filters is consistent with a desire to encourage copyright violations, “the linchpin for contributory infringement.” See Br. Amici Curiae Ronald A. Cass, Raymond T. Nimmer, and Stuart N. Brotman in Support of Appellants 26-27.

Filtering technology is clearly not required by section 512. See 17 U.S.C. § 512(m) (2011) (applicability of the safe harbors does not depend on a service provider “monitoring its service”); *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1111 (C.D. Cal. 2009) (holding that the DMCA does not require service providers to “implement filtering technology at all”). Moreover, holding otherwise would harm all artists who incorporate other works into their

own because filtering technology is wholly inadequate at determining if copyright infringement has occurred.

The acute case is again fair use. Determining whether a use is fair requires the careful weighing of at least four factors, *see* 17 U.S.C. § 107 (2011), including critically important inquiries into the purpose of the use and its effect on the market for the copyrighted work. Filtering technology, however, is capable of evaluating only **one** of the four factors—“the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” *Id.* This dramatically unbalances the traditional fair use analysis and ignores precedent finding fair use when a significant—even the entire—portion of the copyrighted work is used. *See, e.g., Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006) (holding that even when the entire portion of the plaintiff’s copyrighted material was used in the new work, it did not count against fair use); *Blanch v. Koons*, 467 F.3d 244, 258 (2d Cir. 2006) (holding that the defendant’s use of a substantial portion of the plaintiff’s copyrighted work was reasonable); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1167-68 (9th Cir. 2007) (holding that use of an entire photographic image was reasonable in light of the purpose of a search engine). Because filtering technologies focus on only one of the four fair use factors, they have the potential to ensnare legitimate transformative uses without conducting a complete fair use analysis.

Beyond its failure at judging fair use, filtering technology can also fail to identify permissioned use. For example, the current filtering technology used by YouTube, Content ID, screens new uploaded material against a database to see if there is a match. See “Audio ID and Video ID” at <http://www.youtube.com/t/contentid> (last visited Oct. 23, 2013). But Content ID can miss information about whether the use of matched material is by permission. See, e.g., Greg Sandoval, *YouTube users caught in Warner Music spat*, CNET, (Jan. 27, 2009), http://news.cnet.com/8301-1023_3-10150588-93.html?tag=mncol (describing how users who had permission to use material copyrighted by Warner Music in videos nonetheless had their content pulled from YouTube).

While OSPs are certainly free to use filtering software, H.R. Conf. Rep. 105-796, at 73 (1998) (“Courts should not conclude that the service provider loses eligibility for limitations on liability under section 512 solely because it engaged in a monitoring program”), the broad screening of creative works that would come with a de facto requirement to filter would almost certainly result in overbroad gatekeeping and fewer options for independent artists, resulting in less expression reaching the public.

b. Viacom’s Attempt to Erode Section 512’s Protections Would Harm Artists by Decreasing Available Online Services and by Increasing Barriers to Entry for Emergent Online Platforms.

Moreover, accepting Viacom’s requested revisions to the safe harbors would raise barriers to entry for new platform providers, and possibly even pressure existing OSPs to forego some of the services independent artists rely upon today. Service providers assume significant capital, opportunity, and legal risks in developing their platforms and services. *See e.g.*, Google, *How Google Fights Piracy*, (September 2013) at 3, available at <http://googlepublicpolicy.blogspot.com/2013/09/report-how-google-fights-piracy.html> (stating that Google has invested “tens of millions of dollars” in tools and systems to address copyright infringement on its platforms, including YouTube); *Br. Amici Curiae Ebay Inc., Facebook, Inc., IAC/Interactive Corp., Tumblr, Inc., and Yahoo! Inc. in Support of Defendants-Appellees* (hereinafter “*Br. Amici Curiae Ebay*”) (describing the importance of bright lines and consistent legal outcomes to OSPs in light of the risk of extremely large statutory damages for copyright infringement).

Increasing OSPs’ liability risk and demanding *ex ante* policing would undermine the protection Congress sought to provide to innovators through the DMCA. *See* S. Rep. 105-190, at 8 (1998) (stating that by clarifying and limiting the liability of OSPs, the “DMCA ensures that the variety and quality of services

on the Internet will continue to expand”). Increasing OSPs’ liability risk would raise costs for existing platforms significantly.

Such a burden, placed upon emerging or smaller platform services that lack the financial resources and technical sophistication of YouTube, could be insurmountable. While large service providers like Google and Facebook may be able to absorb the “tens of millions of dollars” and some additional policing cost, new entrants and smaller competitors likely simply could not. Google, *supra*, at 3; *see e.g.* Br. Amici Curiae Ebay (describing the serious practical problems OSPs would face if Viacom’s incorrect interpretation of the DMCA prevailed).

This would lead to a reduction in the number or usefulness of services available to independent artists, limiting competition and exacerbating the effects of overbroad filtering or other policing that the larger platforms might feel bound to implement were Viacom’s preferred standard adopted.

Maintaining the DMCA’s robust safe harbors is thus essential if independent media artists are to effectively reach audiences, now, and to ensure a robust marketplace for new platforms in the future. Exposing OSPs to the uncertainty that would arise if Viacom’s arguments prevail would severely limit OSPs’ ability to maintain and develop beneficial online platforms, harming amici’s constituencies and leading to less content being available for the public.

III. This Court Should Affirm the District Court’s Decision in Order to Ensure the Continued Vitality of Online Platforms for Independent Media and the Public.

The district court properly rejected Viacom’s arguments that YouTube was liable for its users’ infringements based on application of the willful blindness doctrine absent knowledge or awareness of specific clips-in-suit and despite YouTube’s prompt removal of identified infringing material. *Viacom III*, No. 07-cv-02103 (S.D.N.Y. Apr. 18, 2013), slip op. at 10. The district court’s decision is consistent with the Second Circuit’s guidance, relevant case law and Congressional intent.

Following the Second Circuit’s guidance in *Viacom II*, the district court properly held that willful blindness requires a showing of willful blindness to specific infringements of clips-in-suit. *Viacom III* slip op. at 10. The Second Circuit’s guidance was also followed in *Capitol Records v. Vimeo*, where the court refused to impute knowledge without the proof of willful blindness tailored to specific instances on infringement at issue in the litigation. *Capitol Records v. Vimeo*, No. 09-cv-10101 (S.D.N.Y. Sept. 18, 2013), slip op. at 62-63 (stating that to hold otherwise would swallow the Second Circuit’s requirement that actual or red flag knowledge be specific to sued-upon content).

The district court’s decision also carefully follows Congressional intent. Importantly, Congress placed the initial “burden of policing copyright

infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of the copyright.” **Perfect 10, Inc. v. CCBill LLC**, 488 F.3d 1102,1113 (9th Cir. 2007); ~~see also~~ 17 U.S.C § 512(m) (2011) (stating that the safe harbor does not require “monitoring [a] service or affirmatively seeking facts indicating infringing activity”). At the same time, Congress sought to balance responsibilities and encourage cooperation between OSPs and copyright owners through section 512’s notice-and-takedown provision. ~~See~~ 17 U.S.C. § 512(c)(1)(C) (2011) (preserving applicability of safe harbors when OSPs respond to a notice that complies with 512(c)(3) by expeditiously removing the material claimed to be infringing).

Viacom, however, presses an application of the willful blindness doctrine that seeks to recalibrate Congress’ careful balance. Under Viacom’s application of the willful blindness doctrine, OSPs with “at most information that infringements were occurring with particular works, and occasional indications of promising areas to locate and remove them,” would be required to search for the specific items and investigate their provenance before taking down any content. **Viacom III**, No. 07-cv-02103 (S.D.N.Y. Apr. 18, 2013), slip op. at 9. Viacom’s interpretation would create substantial uncertainty for OSPs and likely force them engage in overbroad policing of their platforms.

Beyond harming independent artists, this would contravene Congress' goals. In drafting section 512, Congress foresaw and responded to the need to provide OSPs the certainty required for investment and innovation in online services. *See* H.R. Conf. Rep. No. 105-796, at 72 (1998), reprinted in 1998 U.S.C.C.A.N. 649. Recognizing 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. 105-190, at 8 (1998), Congress feared that without a safe harbor, OSPs “may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet.” *Id.* With the safe harbors in place, Congress hoped OSPs would invest in new Internet technologies and services. *See* S. Rep. 105-190, at 8 (1998). Re-creating the very uncertainty that Congress intended to alleviate would undermine the safe harbors' essential purpose.

This Court should not allow Viacom to rewrite section 512, undermining Congress' intent in passing the DMCA and eroding the necessary protections that the statute's safe harbors provide to OSPs. Not only would it harm OSPs, it would also harm independent media artists, who rely both on copyright protection and on access to online platforms.

CONCLUSION

For the above reasons, amici NAMAC, the ACM, and Kartemquin Films respectfully request that the Court affirm the judgment below.

Dated: November 1, 2013

Respectfully submitted,

/s/ Jennifer M. Urban

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,942 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(iii).
2. 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point font.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 1st day of November, 2013, I electronically filed the foregoing Brief of *Amici Curiae* NAMAC, the ACM, and Kartemquin Films in support of Defendants-Appellees with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served with a Notice of Docket Activity, pursuant to Second Circuit Rule 25.1 by the appellate CM/ECF system.

Dated: November 1, 2013

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