

10-3270-CV

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.

(For Continuation of Caption See Inside Cover)

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

BRIEF OF *AMICI CURIAE*

**ADVANCE PUBLICATIONS, INC., ASSOCIATION OF AMERICAN PUBLISHERS,
ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, THE ASSOCIATED PRESS, THE
CENTER FOR THE RULE OF LAW, GANNETT CO., INC., ICBC BROADCAST HOLDINGS,
INC., INSTITUTE FOR POLICY INNOVATION, THE LADIES PROFESSIONAL GOLF
ASSOCIATION, THE MCCLATCHY COMPANY, THE MEDIA INSTITUTE, MINORITY
MEDIA & TELECOMMUNICATIONS COUNCIL, INC., NATIONAL ASSOCIATION OF
BLACK OWNED BROADCASTERS, THE NATIONAL FOOTBALL LEAGUE, NEWSPAPER
ASSOCIATION OF AMERICA, PICTURE ARCHIVE COUNCIL OF AMERICA,
PROFESSIONAL PHOTOGRAPHERS OF AMERICA, RADIO TELEVISION DIGITAL NEWS
ASSOCIATION, ROSETTA STONE LTD., THE E.W. SCRIPPS COMPANY, SPORTS RIGHTS
OWNERS COALITION, THE WASHINGTON POST, AND ZUFFA, LLC
IN SUPPORT OF APPELLANTS AND REVERSAL**

MARY E. RASENBERGER
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000

CLIFFORD M. SLOAN
CHRISTOPHER G. CLARK
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Attorneys for Amici Curiae

10-3342-CV

THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED, on behalf of themselves and all others similarly situated, BOURNE CO., CAL IV ENTERTAINMENT, LLC, CHERRY LANE MUSIC PUBLISHING COMPANY, INC., NATIONAL MUSIC PUBLISHERS' ASSOCIATION, THE RODGERS & HAMMERSTEIN ORGANIZATION, EDWARD B. MARKS MUSIC COMPANY, FREDDY BIENSTOCK MUSIC COMPANY, DBA BIENSTOCK PUBLISHING COMPANY, ALLEY MUSIC CORPORATION, X-RAY DOG MUSIC, INC., FEDERATION FRANCAISE DE TENNIS, THE MUSIC FORCE MEDIA GROUP LLC, SIN-DROME RECORDS, LTD., on behalf of themselves and all others similarly situated, MURBO MUSIC PUBLISHING, INC., STAGE THREE MUSIC (US), INC.,
THE MUSIC FORCE LLC,

Plaintiffs-Appellants,

ROBERT TUR, d/b/a LOS ANGELES NEWS SERVICE,
THE SCOTTISH PREMIER LEAGUE LIMITED,

Plaintiffs,

– v. –

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

Defendants-Appellees.

**CORPORATE DISCLOSURE STATEMENTS PURSUANT
TO FEDERAL RULE OF APPELLATE PROCEDURE 26.1**

ADVANCE PUBLICATIONS, INC.

Advance Publications, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

ASSOCIATION OF AMERICAN PUBLISHERS

Association of American Publishers (“AAP”) certifies that it is a non-profit trade association incorporated as a Section 501(c)(6) organization under the Internal Revenue Code. AAP has no parent entity and issues no stock, thus no publicly held company holds any stock in AAP.

ASSOCIATION OF AMERICAN UNIVERSITY PRESSES

Association of American University Presses (“AAUP”) is an association of 131 nonprofit scholarly publishers. AAUP has no parent corporation and no publicly held corporation owns 10% or more of its stock.

THE ASSOCIATED PRESS

The Associated Press is organized as a not-for-profit, membership cooperative, and is owned by its U.S. daily newspaper members.

THE CENTER FOR THE RULE OF LAW

The Center for the Rule of Law has no parent corporation and no publicly held corporation owns 10% or more of its stock.

GANNETT CO., INC.

Gannett Co., Inc. is a publicly traded company and has no affiliates or subsidiaries that are publicly owned. JPMorgan Chase & Co. owns more than 10% of Gannett Co., Inc.’s stock.

ICBC BROADCAST HOLDINGS, INC.

The parent corporation of ICBC Broadcast Holdings, Inc. is Inner City Media Corporation. No publicly held corporation owns 10% or more of ICBC Broadcast Holdings, Inc.' stock.

INSTITUTE FOR POLICY INNOVATION

Institute for Policy Innovation ("IPI") certifies that it is an independent, non-profit corporation organized under Section 501(c)(3) of the Internal Revenue Code. IPI has no parent corporation and no publicly held corporation owns 10% or more of IPI's stock.

THE LADIES PROFESSIONAL GOLF ASSOCIATION

The Ladies Professional Golf Association ("LPGA") has no parent corporation and no publicly held company owns 10% or more of the LPGA's stock.

THE MCCLATCHY COMPANY

The McClatchy Company is a Delaware corporation which is publicly traded. Bestinver Gestion, a Spanish Company, owns 10% or more of the stock of The McClatchy Company.

THE MEDIA INSTITUTE

The Media Institute certifies that it is a nonprofit, non-stock corporation organized under Section 501(c)(3) of the Internal Revenue Code. The Media Institute has no parent entity and no publicly held company owns stock in The Media Institute.

**MINORITY MEDIA &
TELECOMMUNICATIONS COUNCIL, INC.**

Minority Media & Telecommunications Council, Inc. ("MMTC") certifies that it is a nonprofit, non-stock corporation organized under Section 501(c)(3) of the Internal Revenue Code. MMTC has no parent corporation and no publicly held company owns stock in MMTC.

**NATIONAL ASSOCIATION
OF BLACK OWNED BROADCASTERS**

The National Association of Black Owned Broadcasters, Inc. (“NABOB”) is a non-profit, non-stock corporation. NABOB has no parent corporation and no entity owns stock in NABOB.

THE NATIONAL FOOTBALL LEAGUE

The National Football League (“NFL”) has no parent corporation and no publicly held company owns 10% or more of the NFL’s stock.

NEWSPAPER ASSOCIATION OF AMERICA

Newspaper Association of America (“NAA”) is a non-stock corporation with no parent corporation, and no publicly held company owns 10% or more of any form of interest in NAA.

PICTURE ARCHIVE COUNCIL OF AMERICA

Picture Archive Council of America (“PACA”) is a non-profit trade association, has no parent entity, and no publicly held company owns stock in PACA.

PROFESSIONAL PHOTOGRAPHERS OF AMERICA

Professional Photographers of America (“PPA”) is a 501(c)(6) professional association. PPA has no parent corporation and no publicly held company owns 10% or more of its stock.

RADIO TELEVISION DIGITAL NEWS ASSOCIATION

Radio Television Digital News Association (“RTDNA”) is a professional association. RTDNA has no parent corporation and no publicly held company owns 10% or more of its stock.

ROSETTA STONE LTD.

Rosetta Stone Ltd. certifies that it is A wholly-owned subsidiary of Rosetta Stone Inc., a publicly-traded corporation.

THE E.W. SCRIPPS COMPANY

The E.W. Scripps Company, a publicly traded company, has no parent corporations and no publicly held corporation owns 10% or more of its stock.

SPORTS RIGHTS OWNERS COALITION

The Sports Rights Owners Coalition (“SROC”) is an informal group of representatives of international and national sports bodies with a particular focus on rights issues. SROC has no parent entity and no publicly held company owns stock in SROC.

THE WASHINGTON POST

The Washington Post is a wholly-owned subsidiary of The Washington Post Company, a publicly-held corporation. Berkshire Hathaway, Inc. has a 10% or greater ownership interest in The Washington Post Company.

ZUFFA, LLC

Zuffa, LLC (“Zuffa”) certifies that it has no parent corporation and no publicly held corporation owns 10% or more of Zuffa’s stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF AMICI CURIAE..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT1

ARGUMENT5

I. THE DISTRICT COURT’S DECISION
HAS DANGEROUS IMPLICATIONS FOR
CONTENT OWNERS BECAUSE IT CONFERS SAFE
HARBOR PROTECTION ON BUSINESSES BUILT ON PIRACY7

II. THE DISTRICT COURT’S DECISION
ERRONEOUSLY NARROWS SECTION 512(c)(1)
TO A NOTICE-AND-TAKEDOWN PROVISION 11

A. The Structure of Section 512(c)(1)..... 13

B. Actual Knowledge..... 15

C. “Red Flags” Knowledge..... 19

III. THE DISTRICT COURT’S DECISION
ERRONEOUSLY NARROWS THE SECTION 512(c)(1)(B)
“RIGHT AND ABILITY TO CONTROL” REQUIREMENT23

A. The District Court’s Reasoning Ignores The Plain Language
Of The Statute, The Legislative History, And Instructive Caselaw ...24

B. Section 512(c)(1)(B) Should Be Interpreted
As Incorporating The Vicarious Liability Standard.....26

CONCLUSION29

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<u>A&M Records, Inc. v. Napster, Inc.</u> , 239 F.3d 1004 (9th Cir. 2001)	17, 23, 26, 27
<u>ALS Scan, Inc. v. Remarq Communities, Inc.</u> , 239 F.3d 619 (4th Cir. 2001)	13, 14
<u>Artista Records LLC v. USENET.com, Inc.</u> , 633 F. Supp. 2d 124 (S.D.N.Y. 2009)	18, 19, 27
<u>Bilski v. Kappos</u> , 561 U.S. ___, 130 S.Ct. 3218 (2010)	16
<u>Columbia Pictures Industries, Inc. v. Fung</u> , No. CV 06-5578, 2009 WL 6355911 (C.D. Cal. Dec. 21, 2009).....	21
<u>Corbis Corp. v. Amazon.com, Inc.</u> , 351 F. Supp. 2d 1090 (W.D. Wash. 2004)	14, 21
<u>Ellison v. Robertson</u> , 189 F. Supp. 2d 1051 (C.D. Cal. 2002)	27
<u>FDIC v. Meyer</u> , 510 U.S. 471 (1994).....	16
<u>Fonovisa, Inc. v. Cherry Auction, Inc.</u> , 76 F.3d 259 (9th Cir. 1996)	17, 18, 23
<u>Hendrickson v. Ebay, Inc.</u> , 165 F. Supp. 2d 1082 (C.D. Cal. 2001)	27
<u>Gershwin Publishing Corp. v. Columbia Artists Management, Inc.</u> , 443 F.2d 1159 (2d Cir. 1971)	17
<u>In re Aimster Copyright Litigation</u> , 334 F.3d 643 (7th Cir. 2003)	17, 23

<u>In re Aimster Copyright Litigation</u> , 252 F. Supp. 2d 634 (N.D. Ill. 2002).....	17
<u>Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.</u> , 545 U.S. 913 (2005).....	3, 23, 25, 27
<u>Montclair v. Ramsdell</u> , 107 U.S. 147 (1883).....	14
<u>Neder v. United States</u> , 527 U.S. 1 (1999).....	16, 25
<u>Perfect 10, Inc. v. Amazon.com Inc.</u> , 508 F.3d 1146 (9th Cir. 2007).....	27
<u>Perfect 10, Inc. v. CCBill LLC</u> , 488 F.3d 1102 (9th Cir. 2007).....	25, 26
<u>Perfect 10, Inc. v. Cybernet Ventures Inc.</u> , 213 F. Supp. 2d 1146 (C.D. Cal. 2002).....	27
<u>Perfect 10, Inc. v. Visa International Service Ass’n</u> , 494 F.3d 788 (9th Cir. 2002).....	25
<u>UMG Recordings, Inc. v. Veoh Networks Inc.</u> , 665 F. Supp. 2d 1099 (C.D. Cal. 2009).....	27
<u>United States v. Long Island Lighting Co.</u> , 912 F.2d 13 (2d Cir. 1990).....	14

STATUTES

PAGE(S)

17 U.S.C. § 512(c)(1)(A).....	<i>passim</i>
17 U.S.C. § 512(c)(1)(B).....	<i>passim</i>
17 U.S.C. § 512(c)(1)(C).....	<i>passim</i>
17 U.S.C. § 512(d).....	21
17 U.S.C. § 512(m).....	22

<u>OTHER AUTHORITIES</u>	<u>PAGE(S)</u>
Fed. R. App. P. 29	1
2d Cir. L. R. 29.1	1
H.R. Rep. No. 105-551 (Part I) (1998)	15, 20
H.R. Rep. No. 105-551 (Part II) (1998)	21, 22
S. Rep. No. 105-190 (1998)	<i>passim</i>
144 Cong. Rec. 9242 (1998)	10
144 Cong. Rec. 18770-71 (1998)	10
144 Cong. Rec. 18778 (1998)	10
<u>The Copyright Infringement Liability of Online and Internet Service Providers: Hearing on S. 1146, 105th Cong. (1997)</u>	10
Transcript of Oral Argument, <u>Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.</u> , 545 U.S. 913 (2005) (No. 04-480), 2005 WL 832356	4
Jane C. Ginsburg, <u>User-Generated Content Sites and Section 512 of the US Copyright Act, in Copyright Enforcement and the Internet</u> (Irimi A. Stamatoudi ed., 2010)	20, 22
Alfred C. Yen, <u>Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment</u> , 88 Geo. L.J. 1833 (2000)	14

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae have a deep interest in the legal regime governing intellectual property in digital media. Amici either create quality content which they make available online, or they represent or support individuals, companies and entities that create quality content which they make available online. A more detailed description of each amicus curiae is set forth on the attached Schedule A.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether a business that knowingly builds an audience through stolen content is immune from copyright liability as long as it does one thing—comply with formal “takedown” notices it receives under the Digital Millennium Copyright Act (“DMCA”). At issue is whether each statutory requirement of the DMCA safe harbors should be given independent force and effect; at stake is nothing less than the ability of copyright owners to enforce their copyrights on the Internet against entities that rely on copyright infringement as a business model.

¹ Pursuant to Fed. R. App. P. 29 and Local Rule 29.1, amici curiae state that a party’s counsel did not author this brief in whole or in part, a party or a party’s counsel did not contribute money that was intended to fund preparing or submitting this brief, and no person other than amici curiae, its members or its counsel contributed money that was intended to fund preparing or submitting this brief. Amici curiae further state that all parties have consented to the filing of this brief.

Specifically, this Court must decide whether the District Court erroneously held that a safe harbor created by the DMCA, codified at Section 512(c) of the Copyright Act, 17 U.S.C. § 512(c), immunizes an Internet business that intentionally relied on the facilitation of copyright infringement to grow its business. Amici respectfully submit that this is not—and cannot be—the result Congress intended and enacted in the DMCA.

The District Court’s decision, if allowed to stand, will effectively rewrite the Section 512 safe harbors Congress carefully crafted and will cripple content owners’ ability to enforce their rights against even the most flagrant forms of piracy on the Internet. The District Court acknowledged that “a jury could find that the defendants not only were generally aware of, *but welcomed*, copyright-infringing material being placed on their website.” (District Court Order And Opinion at 6) (emphasis added) (cited as “Opinion at __”). The summary judgment record evidence demonstrates:

- One YouTube founder objected to the removal of “obviously copyright infringing stuff” by noting that 80% of YouTube’s user traffic depended on infringing videos. He emphasized that “if you remove the potential copyright infringements . . . site traffic and virality will drop to maybe 20% of what it is.” (Docket No. 214-55.)

- The same YouTube founder responded to a concern about “steal[ing] . . . movies” by saying, “we need to attract traffic. . . [T]he only reason why our traffic surged was due to a video of this type.” (Docket No. 214-63.)
- Another YouTube founder exhorted his colleagues to “concentrate all of our efforts in building up our numbers as aggressively as we can through whatever tactics, *however evil.*” (Docket No. 214-32. (emphasis added).)
- In response to the Supreme Court’s Grokster decision (Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005)), which highlighted liability for inducement of copyright infringement, YouTube’s founders adopted a plan in which some infringing clips would be taken down, but many would not: “That way, the perception is that we are concerned about this type of material and we’re actively monitoring it. [But the] actual removal of this content will be in varying degrees *That way . . . you can find truckloads of . . . copyrighted content . . . [if] you [are] actively searching for it.*” (Docket No. 214-70 (emphasis added).)

- A YouTube senior official commented to another colleague that “the truth of the matter is probably 75-80% of our views come from copyrighted material.” (Docket No. 214-35.) The same senior official noted that “the fact that I started like 5 [YouTube] groups based on copyrighted material probably isn’t so great.” (Docket No. 214-37.)

In the face of these undisputed facts, the District Court nevertheless held that YouTube qualified for complete immunity from monetary damages for copyright infringement. As Justice Kennedy observed during oral argument in Grokster, “from an economic standpoint and a legal standpoint, [it] sounds wrong” to suggest “that unlawfully expropriated property can be used by the owner of the instrumentality as part of the startup capital for his product.” Transcript of Oral Argument at 36, available at 2005 WL 832356. The District Court’s decision permits precisely that—the use of stolen content as “startup capital” for a website to build a massive audience and thereby achieve a lucrative sale price.

Amici are concerned that allowing the District Court’s erroneous interpretation of Section 512 to stand would sanction a deeply disturbing business model. It would authorize—and, by its economic logic, encourage—enterprises to exploit infringing copyrighted content in order to attract traffic and create value for

their sites to the detriment of content owners, as long as the enterprises respond to formal “takedown” notices.

To be clear, this is not a case about the ability of user-posted content sites generally to protect themselves under the DMCA safe harbors against liability for infringing acts of rogue users. It is agreed that the safe harbors were enacted to protect the innocent service provider (if all statutory requirements are met), and serve a valuable and important goal in doing so. Nor should the Court view this case as pitting content owners against Internet companies. Indeed, many of the present Amici are content owners that also publish popular online sites which permit users to post content and feature robust user engagement. Rather, this case relates solely to the ability of copyright holders to ensure that their basic rights—in accordance with the most fundamental principles of copyright law—may be enforced against entities that knowingly and intentionally encourage, and materially contribute to, infringing activities on their services for a commercial benefit. Upholding the District Court’s opinion will turn copyright on its head by vesting sites consciously built on infringement with a broad shield of legal immunity.

ARGUMENT

Section 512(c)(1) enumerates several independent statutory requirements, all of which a service provider must satisfy to obtain safe harbor

immunity. The District Court’s flawed interpretation of these statutory provisions creates massive loopholes for bad-actor businesses, and does violence to the plain language of the statute and established canons of statutory interpretation.²

Amici will focus on two of the most conspicuous—and troubling—errors of the District Court’s decision. First, although Section 512(c)(1) explicitly requires takedown if a service provider either (1) has actual knowledge of infringement, (2) has awareness of facts and circumstances from which infringing activity is apparent (known as “red flags” knowledge), or (3) receives a formal, DMCA-compliant takedown notice, the District Court decision effectively eliminates the “actual knowledge” and “red flags” provisions, and makes them redundant with the notice provision.

Second, Section 512(c)(1) separately requires, for safe harbor protection, that a service provider not receive a financial benefit “directly attributable” to the infringing activity if the provider has the “right and ability to control” the infringement. The District Court incorrectly eviscerated this provision by making “item-specific” knowledge a predicate to the “right and ability to control.”

² In this litigation, Viacom is challenging YouTube’s practices only in the period before 2008. (Opening Brief For Plaintiffs-Appellants Viacom International, Inc. et al. at 1, 45.) Amici similarly address only the issues raised by those practices and by the District Court’s decision.

I. THE DISTRICT COURT’S DECISION HAS DANGEROUS IMPLICATIONS FOR CONTENT OWNERS BECAUSE IT CONFERS SAFE HARBOR PROTECTION ON BUSINESSES BUILT ON PIRACY

This case will have far-reaching, nationwide implications on the ability of creators and distributors of copyrighted works—books, newspapers, music, movies, television programs, computer games, software, and much more—to enforce their rights and curtail the volume of infringing activity that occurs on the Internet. If this Court allows the District Court’s decision to stand, it will leave rights holders without any practical ability to assert their basic rights on the Internet and will encourage mass-scale copyright infringement—a result contrary to both the letter and intent of the Section 512 safe harbors.

First, the District Court’s decision provides a road map for new enterprises to adopt an “infringe now, answer questions later” strategy and build a business founded on intentional piracy: design a website or service that will attract a flood of infringing user-posted content; welcome the massive infringement that results; remain willfully blind to specific, individual infringing postings; and remove infringing postings when a content owner is able to send a takedown notice identifying specific, individual infringing postings. Under the District Court’s standard, such an enterprise is entitled to absolute immunity for monetary damages for copyright infringement.

Second, the District Court's decision creates a perverse incentive for website operators to dismantle infringement prevention technologies, such as filtering software, that might give rise to knowledge of specific acts of infringement.³ Indeed, if knowledge and affirmatively "welcoming" pervasive infringement does not foreclose a service provider from obtaining safe harbor protection even if it does nothing to stop the infringement (as the District Court posits), then service providers have every incentive to shield themselves from obtaining knowledge of specific instances of infringement. This is precisely the type of "willful blindness" that Congress sought to prevent, and that other courts have found to constitute knowledge (both for finding contributory liability and finding inapplicability of the Section 512 (c) safe harbor). See infra Part II.C.

Third, the takedown-notice-only copyright enforcement regime the District Court created is inefficient and grossly inadequate to meaningfully combat infringement on the Internet. As an initial matter, takedown notices can be sent only after infringing material is posted, meaning that infringement havens such as YouTube (in its start-up phase) will be able to profit off of others' copyrighted

³ For example, the summary judgment record in this case demonstrates that YouTube disabled community flagging of copyright infringements, and selectively implemented copyright protection technology for content owners who agreed to license their content to YouTube. (Docket No. 186 at 36.)

works for at least a short period of time.⁴ Such a rule of law incentivizes—rather than deters—the encouragement and facilitation of copyright infringement. Moreover, it is virtually impossible (logistically and financially) for content owners to identify every infringing post, much less keep up with the postings, given that popular “premium” content is often reposted immediately after being taken down.⁵ The District Court’s rule places the onus on copyright owners to ferret out new infringement havens, decipher a variety of file types, and overcome complex technological barriers (such as virtual “cyberlockers” or file hosting services that are not searchable by third parties, computer programs that prevent multiple searches, and software that blocks automated filtering tools). This is simply unworkable—and pirate sites know it.⁶

⁴ See, e.g., Docket No. 214-64 (YouTube email discussing handling of video from CNN: “[I] really don’t see what will happen. . . . [S]omeone from cnn sees it? [H]e happens to be someone with power. [H]e happens to want to take it down right away. [H]e gets in touch with cnn legal. 2 weeks later, we get a cease & desist letter. [W]e take the video down.”).

⁵ For example, shortly after Viacom formally notified YouTube of 100,000 infringing videos and YouTube took those videos down, Viacom identified many other newly posted infringing videos on YouTube. (See Docket No. 225-16.)

⁶ The consequences of the District Court’s decision are especially harsh for content owners and providers without extensive resources, including startup web publications, small publishers, and minority media enterprises.

In sum, the District Court’s decision effectively confers blanket immunity on service providers that remain willfully blind to pervasive copyright infringement on their services, and in doing so invites the creation of a whole new tranche of Grokster-like entities across all media—from video, to film, to magazines, news and books—that unlawfully exploit valuable content owned by others for their own gain. This is directly contrary to one of Congress’s primary purposes in enacting the DMCA: “Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy.” S. Rep. No. 105-190, at 8 (1998).⁷ The District Court’s decision instead ensures that copyright owners will be left defenseless against massive piracy.

⁷ During congressional deliberations and floor debates, members of Congress repeatedly highlighted the significant damages copyright holders suffer each year—billions of dollars in lost revenue—due to piracy as they expressed their support for the DMCA. E.g., 144 Cong. Rec. 18778 (Rep. Foley) (“What has been plaguing this huge and important industry is piracy, the outright theft of copyrighted works. Not piracy on the high seas, it is today’s version, piracy on the Internet. American companies are losing nearly \$20 billion yearly because of the international piracy of these copyrighted on-line works, and that is what this bill helps to stop.”); 144 Cong. Rec. 18770-71 (Rep. Coble) (“While digital dissemination of copies will benefit owners and consumers, it will unfortunately also facilitate pirates who aim to destroy the value of American intellectual property.”); 144 Cong. Rec. 9242 (Sen. Thompson) (“Unscrupulous copyright violators can use the Internet to more widely distribute copyrighted material without permission. To maintain fair compensation to the owners of intellectual

II. THE DISTRICT COURT’S DECISION ERRONEOUSLY NARROWS SECTION 512(c)(1) TO A NOTICE-AND-TAKEDOWN PROVISION

The District Court’s flawed interpretation of the Section 512(c)(1) safe harbor effectively eliminates “actual knowledge” and “red flag” knowledge as separate statutory requirements.⁸ This statutory shrinkage has no basis in the language and structure of the statute, contradicts the legislative history, and upends the purpose and intent of Section 512 as a whole.

property, a regime for copyright protection in the digital age must be created.”). See also, e.g., The Copyright Infringement Liability of Online and Internet Service Providers: Hearing on S.1146, 105th Cong. 1-2 (1997) (Sen. Hatch) (emphasizing the need to “combat the risk of copyright infringement facing content providers on the Internet”).

⁸ Section 512(c)(1) requires that an entity seeking safe harbor protection must establish, among other requirements, that:

- (A) it does not have “actual knowledge” of infringing activity on its service; it is not “aware of facts or circumstances from which infringing activity is apparent”; “upon obtaining such knowledge or awareness,” it “acts expeditiously to remove, or disable access to, the material”; **and**
- (B) it “does not receive a financial benefit directly attributable to the infringing activity, in a case in which [it] has the right and ability to control such activity”; **and**
- (C) upon receiving a takedown notice from a copyright holder, it “responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”

17 U.S.C. §§ 512(c)(1)(A)-(C).

The District Court’s construction effectively equates both the Section 512(c)(1)(A) actual knowledge and red flags requirements with the Section 512(c)(1)(C) notice-and-takedown requirement. The District Court found no actual knowledge and no “red flags” knowledge—even though it concluded that a jury could find that YouTube “welcomed” copyright-infringing content, and even though the record revealed abundant evidence of a deliberate business model based on infringement, including knowledge that 80% of site traffic resulted from unauthorized copyrighted content. (See, e.g., *supra* pages 3-4.) It reached this conclusion by grafting onto the Section 512(c)(1)(A) actual knowledge and red flags standards a requirement of specific knowledge of each individual infringing copy, including its precise location, and the work infringed—in other words, the type of knowledge a site would receive from a highly specific DMCA compliant takedown notice under Section 512(c)(1)(C). (See Opinion at 15-16, 29.)⁹

Drawing an overly polarized dichotomy between “general” knowledge and “specific” knowledge—which is nowhere found in the DMCA—the District Court states that “[g]eneral knowledge that infringement is ‘ubiquitous’

⁹ Indeed, the District Court’s requirements for actual knowledge and red flags knowledge are actually more onerous than the information required in a formal DMCA takedown notice. For example, it is sufficient for a DMCA notice to include “a representative list” of infringing works at a site, and for the copyright holder to provide information “reasonably sufficient to permit the service provider to locate the material.” 17 U.S.C. §§ 512(c)(1)(C)(3)(ii), (iii).

does not impose a duty on the service provider to monitor or search its services.” (Id. at 20.) Even record evidence establishing YouTube’s knowledge of specific infringing videos did not sway the District Court to find actual knowledge or “red flags” awareness—presumably because, in the District Court’s view, even that knowledge was not sufficiently specific.¹⁰

Amici respectfully submit that the language and structure of Section 512(c)(1), the legislative history, and the understanding of “knowledge” and “awareness” in established case law confirm that Congress did not mandate the highly restricted knowledge of “specific and identifiable infringements of particular individual items” that the District Court reads into the separate actual knowledge and red flags requirements of 512(c)(1)(A). (See Opinion at 15.) Accordingly, this Court should reverse the District Court.

A. The Structure of Section 512(c)(1)

In Section 512(c)(1), Congress enacted three separate requirements (among others) in three separate subsections (described at page 11 n.8), all three of which must be satisfied for a service provider to obtain safe harbor immunity. See ALS Scan, Inc. v. Remarq Cmtys., 239 F.3d 619, 623 (4th Cir. 2001) (“to qualify

¹⁰ See, e.g., Docket No. 214-77 (memorandum to YouTube board from YouTube founder: “As of today episodes and clips of the following well-known shows can still be found: Family Guy, South Park, MTV Cribs, Daily Show, Reno 911, Dave Chapelle. This content is an easy target for critics who claim that copyrighted content is entirely responsible for YouTube’s popularity”; refers to referenced videos as “presumptively illegal content”).

for this safe harbor protection, the Internet service provider must demonstrate that it has met all three of the safe harbor requirements” (emphasis added)); Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1106 (W.D. Wash. 2004) (a defendant must “meet the three conditions for liability protection set forth in § 512(c)(1)(A)-(C)” (emphasis added)); Alfred C. Yen, Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment, 88 Geo. L. J. 1833, 1882 (2000) (“One must first note [Congress’s] use of the conjunctive ‘and’ to link subsections (A), (B), and (C). All three requirements must be satisfied for the safe harbor to apply.” (emphasis added)).

Under the most fundamental principles of statutory construction, each provision of a statute must be interpreted to have independent meaning and significance, unless otherwise expressly stated in the statute. Montclair v. Ramsdell, 107 U.S. 147, 152 (1883) (Harlan, J.) (“It is the duty of the court to give effect, if possible to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”); United States v. Long Island Lighting Co., 912 F.2d 13, 16 (2d Cir. 1990) (reasoning that if a statutory term “means the same in ¶(4)(A) as it does in ¶(4)(B), then its use in ¶(4)(A) would be superfluous. . . . [t]he rule of construction that effect must be given, if possible, to every clause and word of a statute, counsels against such an interpretation” (internal citation omitted)).

In Section 512(c)(1)(A), moreover, Congress specifically created two separate knowledge requirements, both distinct from the Section 512(c)(1)(C) requirement to take down infringing content in response to a DMCA notice: (1) “actual knowledge” of infringing material and (2) “aware[ness]” of “facts or circumstance from which infringing activity is apparent.” 17 U.S.C.

§ 512(c)(1)(A).¹¹

Separate consideration of the actual knowledge provision and the “red flags” provision underscores that each provision is crafted to have a separate and distinct mission.

B. Actual Knowledge

The language of the actual knowledge provision straightforwardly requires that a service provider “not have actual knowledge that the material or an activity using the material on the system or network is infringing.” 17 U.S.C.

§ 512(c)(1)(A). Nothing in the language requires that such knowledge of infringing material or activity be tethered, for example, to a specific infringing copy or URL (the specific webpage). Instead, the knowledge must simply be

¹¹ The legislative history confirms that a site’s takedown obligation does not depend on receiving a DMCA-compliant notice: “Section 512 does not require use of the notice and takedown procedure. A service provider wishing to benefit from the limitation on liability under subsection (c) must ‘take down’ or disable access to infringing material residing on its system or network of which it has actual knowledge or that meets the ‘red flag’ test, even if the copyright owner or its agent does not notify it of a claimed infringement.” S. Rep. No. 105-190 at 45; H.R. Rep. No. 105-551 (Part I) at 54 (1998) (emphasis added).

“actual”—i.e., genuine or authentic knowledge about the infringing activity. The District Court’s limitation represents a gloss, and a contraction of statutory coverage, that is nowhere found in the statutory text. Had Congress intended “actual knowledge” in the context of Section 512(c)(1)(A) to have the constricted meaning the District Court adopted, it would have said so in the carefully crafted statutory language. See Bilski v. Kappos, 561 U.S. ___, 130 S.Ct. 3218, 3226 (2010) (stating that “in all statutory construction, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary meaning” (internal quotation marks omitted)); FDIC v. Meyer, 510 U.S. 471, 476 (1994) (holding that in the absence of a specific statutory definition, a statutory term is construed “in accordance with its ordinary or natural meaning”).

Moreover, in accordance with basic principles of statutory construction, knowledge under section 512(c)(1)(A) should be construed consistent with the long-standing meaning attributed to knowledge in the context of contributory liability. Neder v. United States, 527 U.S. 1, 21 (1999) (Based on the “well-established rule of construction” that “[w]here Congress uses terms that have accumulated settled meaning under common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of those terms.” (internal quotation marks omitted) (alteration in original)). In this case, the term “actual knowledge” has a well-settled meaning in

the law of contributory liability in copyright and other contexts, and it is this meaning that should be adopted in any analysis under Section 512. See, e.g., Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262, 264 (9th Cir. 1996); Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162-63 (2d Cir. 1971).

In the contributory infringement context, other Courts of Appeals have found that a defendant possessed actual knowledge where it knew it was hosting large amounts of infringing content. See, e.g., A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1020 n.5 (9th Cir. 2001) (finding “actual knowledge” where the defendant service provider knew of significant amounts of infringing files on its server and evidence demonstrated that executives were aware that users were engaging in the unauthorized transfer of copyrighted music). Similarly, the Seventh Circuit affirmed a district court’s conclusion that the defendant had “knowledge” of infringing activity and material where the service predominantly hosted infringing content, even though the defendant deliberately attempted to avoid obtaining specific knowledge of infringement by using encryption software. See In re Aimster Copyright Litig., 334 F.3d 643, 655 (7th Cir. 2003).¹² In a

¹² See also In re Aimster Copyright Litig., 252 F. Supp. 2d 634, 651 (N.D. Ill. 2002) (“Defendants’ encryption argument, clever though it may be, does not convince us that they lack actual knowledge of infringement. It may be true that, due to Aimster’s encryption scheme, Defendants are unaware of the actual specific

similar case in a bricks and mortar context, Fonovisa, Inc. v. Cherry Auction, Inc., the Ninth Circuit held the defendant, a swap meet operator, had the requisite knowledge for contributory liability where it intentionally provided the environment for counterfeit recording sales to thrive and knew generally that thousands of infringing cassettes were being sold at booths on its site—not because it could identify exactly which counterfeit recordings were being sold at which booths on any given day. 76 F.3d at 262. But that is exactly what the District Court is demanding in this case.

In an instructive case, one district court in this Circuit reached a similar conclusion about the “knowledge” of a service provider in the contributory liability context. In Arista Records LLC v. USENET.com, the district court expressly declined to require specific knowledge of infringing content on the defendant’s service, holding that “knowledge of specific infringements is not required to support a finding of contributory infringement.” 633 F. Supp. 2d 124, 154 (S.D.N.Y. 2009) (emphasis added). As the court explained, it was “beyond peradventure that the defendants knew or should have known of infringement by

transfers of specific copyrighted music between specific users of the Aimster system. However, there is absolutely no indication in the precedential authority that such specificity of knowledge is required in the contributory infringement context.”), aff’d 334 F.3d 643.

its users” in that defendants were aware that the services were used primarily to obtain copyrighted entertainment media. Id. at 155.¹³

Consistent with the plain language of the statute, as well as the established meaning of “knowledge” in the copyright context, Amici respectfully submit that this Court should reverse the District Court’s erroneous conclusion that the Section 512(c)(1)(A) actual knowledge standard requires knowledge of each infringing act with the specificity associated with a 512(c)(1)(C) takedown notice.¹⁴

C. “Red Flags” Knowledge

As a separate and independent requirement, the Section 512(c) safe harbor requires that a service provider not have “red flags” knowledge—that it not “be aware of facts or circumstances from which infringing activity is apparent.” 17 U.S.C. § 512(c)(1)(A).

¹³ The District Court concludes that USENET has “little application” because it “involved peer-to-peer file-sharing networks” and does not “mention the DMCA.” (Opinion at 21.) The District Court ignores the fact that the actual “knowledge” standard applied is the same in both contexts (because there is no indication that Congress intended to depart from the settled meaning in the DMCA), and therefore the learning in USENET is instructive.

¹⁴ As noted, actual knowledge means genuine knowledge, not speculation. The record of knowledge of massive infringement in this case clearly qualifies as actual knowledge requiring takedown. See supra pages 2-4.

As the plain language and structure of the statute indicates, the “red flags” standard means something different from actual knowledge (as well as something different from the DMCA takedown notice in Section 512(c)(1)(C)).¹⁵ Once again, the statutory language says nothing about “specificity,” but refers simply to “aware[ness]” (not generally associated with specific knowledge) of “facts or circumstances from which infringing activity is apparent.” See Jane C. Ginsburg, *User-Generated Content Sites and Section 512 of the US Copyright Act*, in *Copyright Enforcement and the Internet* 190, 193 (Irina A. Stamatoudi ed., 2010) (“‘Apparent’ does not mean ‘in fact illegal,’ nor does it mean ‘conclusively exists.’”).

The legislative history confirms that the “red flags” provision should not be given the District Court’s limiting construction. In adopting the red flags provision, Congress expressly stated that when “the infringing nature” of the site “would be apparent from even a brief and casual viewing, safe harbor status . . . would not be appropriate.” H.R. Rep. No. 105-551 (Part I). Similarly, in

¹⁵ Congress’s intentional creation of two distinct knowledge standards is further evidenced by legislative history referring to those standards in the disjunctive. See, e.g., S. Rep. No. 105-190 at 45 (a service provider must expeditiously remove infringing content once it “obtains actual knowledge or awareness of facts or circumstances from which infringing material or activity on the service provider’s system or network is apparent” (emphasis added)).

describing the application of the identical language under Section 512(d) (the safe harbor for search engines and other linking services), Congress explained:

The common-sense result of this “red flags” standard is that online editors and catalogers would not be required to make discriminating judgments about potential copyright infringement. If, however, an Internet site is obviously pirate, then seeing it may be all that is needed for the service provider to encounter a “red flag.” A provider proceeding in the face of such a red flag must do so without the benefit of the safe harbor.

S. Rep. No. 105-190 at 49; H.R. Rep. No. 105-551 (Part II) at 58 (1998). Also in connection with the Section 512(d) safe harbor, Congress observed that although “a service provider would have no obligation to seek out copyright infringement, [] it would not qualify for the safe harbor if it had turned a blind eye to ‘red flags’ of obvious infringement.” S. Rep. No. 105-190, at 48 (emphasis added).

Consistent with the statutory language and legislative intent, courts have not construed the “red flags” provision of the DMCA to require knowledge of specific acts of infringement. One district court explained that the test for “red flags” awareness is “whether the service provider deliberately proceeded in the face of blatant factors of which it was aware.” Corbis, 351 F. Supp. 2d at 1108-09; see also Columbia Pictures Indus., Inc. v. Fung, No. CV 06-5578, 2009 WL 6355911, at *16-17 (C.D. Cal. Dec. 21, 2009) (Where evidence showed that 90-95% of content available through the site “was likely to be copyright infringing,” Defendants were certainly “aware of a ‘red flag’ from [the] infringing activity.”).

In this case, the summary judgment record demonstrates that at the time in suit YouTube “welcomed” and knowingly allowed massive amounts of infringement to occur on its service—conduct that, at a minimum, necessarily involves turning a blind eye to infringement. (See Opinion at 6.) As the record below demonstrates, YouTube knew of infringing copies of Viacom’s content and others’ content, even posted some infringing content to user groups itself, and encouraged the continued posting of popular infringing content.¹⁶ (See supra pages 3-5.) This is precisely the “aware[ness]” that Congress warned would result in disqualification if no action were taken. See S. Rep. 105-190, at 44. If not, then the “red flags” provision is meaningless.¹⁷

¹⁶ As the summary judgment record confirms, YouTube represents a paradigmatic example of an entity described in the legislative history as not entitled to DMCA immunity—it “turn[ed] a blind eye” to “obviously pirate” content, and refused to take any action to remove it because the content drove users to its site. See S. Rep. 150-190 at 48-49; H.R. Rep. 105-55 (Part II) at 57-58; see also supra pages 2-4. YouTube’s failure to take action in these circumstances is fundamentally different from the innocent service provider that occasionally might have user-posted infringing content on its site. The latter does not, without more, have “red flags” knowledge requiring it to take action to find and remove such content.

¹⁷ The District Court relied in part on Section 512(m), which provides that a service provider need not “monitor[] its service or affirmatively seek[] facts indicating infringing activity.” 17 U.S.C. § 512(m). There is, however, an obvious difference between imposing an obligation to “monitor” or “seek” in the absence of actual knowledge or red flags knowledge, which Section 512(m) prohibits, and an obligation to follow up on actual knowledge or red flags knowledge of infringement, which Section 512(c)(1)(A) explicitly requires. See Ginsburg, User-Generated Content, at 193 (“By the same token, Section 512(m)’s dispensation of

Amici urge this Court not to adopt an artificially narrow “red flags” standard effectively authorizing websites to launch a business based on users’ infringement “in the face of such a red flag” and adopt an “ostrich-like refusal to discover the extent to which [their] system[s] [were] being used to infringe copyright.” See In re Aimster Copyright Litig., 334 F.3d at 655. This is not the rule of law Congress intended and enacted. It flies in the face of almost a century of jurisprudence articulating when one is responsible for the infringing acts of another.¹⁸ Section 512 did not sanction such behavior.

III. THE DISTRICT COURT’S DECISION ERRONEOUSLY NARROWS THE SECTION 512(c)(1)(B) “RIGHT AND ABILITY TO CONTROL” REQUIREMENT

The District Court’s decision also incorrectly refused to interpret Section 512(c)(1)(B) as incorporating the common law vicarious liability standard, even though the plain text of the statute, the legislative history, and case law confirm that the statute codifies (and was intended to codify) the vicarious liability standard. Instead, the District Court—in a one-paragraph analysis of Section 512(c)(1)(B) that does not cite a single case or address the instructive legislative

service providers from ‘affirmatively seeking facts indicating infringing activity,’ should not entitle the service provider to passive-aggressive ignorance.”).

¹⁸ A long line of cases has recognized the commonsense rule that one who knowingly or intentionally provides the means for others to commit copyright infringement is liable, whether that infringement occurs online or in the bricks and mortar world. See, e.g., Grokster, 545 U.S. 913; In re Aimster Copyright Litig., 334 F.3d 643; Napster, 239 F.3d 1004; Fonovisa, 76 F.3d at 262, 264.

history—incorrectly holds that a “‘right and ability to control’ the activity requires knowledge of it, which must be item-specific.” (See Opinion at 25-26.) This novel “plus knowledge” interpretation is unsupported by legal authority, and is a separate and independent basis for reversal.¹⁹

A. The District Court’s Reasoning Ignores The Plain Language Of The Statute, The Legislative History, And Instructive Caselaw

Pursuant to the plain language of Section 512(c)(1)(B), a service provider loses the Section 512(c) limitation on liability when it receives “a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.” 17 U.S.C. § 512(c)(1)(B). Nothing in the statutory language refers to “item-specific” knowledge. Once again, the District Court has added a statutory limitation that Congress did not.

¹⁹ The District Court did not address the financial benefit prong of the Section 512(c)(1)(B) analysis, except to state that “[t]here may be arguments whether revenues from advertising, applied equally to space regardless of whether its contents are or are not infringing, are ‘directly attributable to’ infringements, but in any event the provider must know of the particular case before he can control it.” (Opinion at 25-26.) In light of the District Court’s scant treatment of this element, this brief will not address the financial benefit prong beyond stating that, as discussed above, a business model founded and dependent on the use of extensive amounts of stolen content for personal profit necessarily confers a financial benefit “directly attributable to” infringing content. See *supra* pages 2-4 (explaining the YouTube founders’ deliberate use of infringing content to attract traffic, thereby raising the value of the company before selling it for a lucrative price to defendant Google).

In contrast, the statutory language used by Congress tracks—verbatim—the elements of the common law vicarious liability standard: (1) “a financial benefit directly attributable to the infringing activity” and (2) “the right and ability to control such activity.” See Grokster, 545 U.S. at 930 n.9 (stating that a vicarious liability theory “allows imposition of liability when the defendant profits directly from the infringement and has a right and ability to supervise the direct infringer”); Perfect 10, Inc. v. Visa Int’l Serv. Ass’n, 494 F.3d 788, 805 (9th Cir. 2007) (stating that “[f]or vicarious liability to attach, [] the defendant must have the right and ability to supervise and control the infringement”). As with the statutory language itself, nothing in the vicarious liability doctrine that the statutory language codifies refers to “item-specific” knowledge as a predicate.

Even if the plain language of the statute were not clear on its face—which it is—bedrock principles of statutory construction dictate that where Congress uses a term in a statute that has a settled meaning in the common law, that settled meaning must be adopted unless the statute expressly states otherwise. See, e.g., Neder v. U.S., 527 U.S. at 21. The District Court’s creation of a new vicarious liability “plus knowledge” (or “item-specific” knowledge) interpretation of Section 512(c)(1)(B) violates this core principle and justifies reversal.

Other courts have readily concluded that Section 512(c)(1)(B) reflects the common law standard for vicarious liability. See, e.g., Perfect 10, Inc. v.

CCBill LLC, 488 F.3d 1102, 1117 (9th Cir. 2007) (recognizing that the “direct financial benefit” element “should be interpreted consistent with the similarly-worded common law standard for vicarious copyright liability”). The District Court’s unwarranted departure from these sources of authority, and its creation of a new standard under Section 512(c)(1)(B) unsupported by the text of the statute, legislative history or case law warrants reversal.

B. Section 512(c)(1)(B) Should Be Interpreted As Incorporating The Vicarious Liability Standard

This Court should hold that Section 512(c)(1)(B) incorporates the common law vicarious liability standard, as the Ninth Circuit has done. CCBill, 488 F.3d at 1117. Under the same reasoning, the “right and ability to control” prong must be interpreted in accordance with the well-established meaning ascribed to it in the vicarious liability standard.

Other courts analyzing the right and ability to control prong of Section 512(c) have interpreted it consistent with the vicarious liability standard. In A&M Records, Inc. v. Napster, Inc., the Ninth Circuit held that “[t]he ability to block infringers’ access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise.” 239 F.3d at 1023. In assessing Napster’s right and ability to control infringing activity, the Ninth Circuit emphasized the technological capabilities available to Napster, including its “ability to locate infringing material listed on its search indices” and Napster’s

express policy providing it the “right to refuse service and terminate accounts” at its discretion including for infringement. Id. at 1023-24.

In a later decision, the Ninth Circuit again interpreted the right and ability to control prong of Section 512(c) and held (consistent with the Supreme Court’s intervening holding in Grokster, 545 U.S. at 920) that a service provider “exercises control over a direct infringer when he has both a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so.” Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1173 (9th Cir. 2007); see also USENET, 633 F. Supp. 2d at 157 (finding evidence of the right and ability to control where “Defendants expressly reserve[d] the right, in their sole discretion, to terminate, suspend, or restrict users’ subscriptions, thereby limiting their access to uploading or downloading content to or from Defendants’ servers”).²⁰

²⁰ One line of district court cases in the Ninth Circuit has erroneously held that a copyright holder must establish “something more” than the vicarious liability standard to demonstrate that a service provider has the “right and ability to control” infringing activity. See, e.g., UMG Recordings, Inc. v. Veoh Networks Inc., 665 F. Supp. 2d 1099 (C.D. Cal. 2009), appeal docketed, No. 09-56777 (9th Cir. Nov. 10, 2009); Perfect 10, Inc. v. Cybernet Ventures, 213 F. Supp. 2d 1146 at 1181-82; Ellison v. Robertson, 189 F. Supp. 2d 1051 (C.D. Cal. 2002), rev’d in part, aff’d in part, 357 F.3d 1072 (9th Cir. 2004); Hendrickson v. Ebay, Inc., 165 F. Supp. 2d 1082, 1093-94 (C.D. Cal. 2001). In light of the plain text of the statute, the legislative history, and the persuasive reasoning of another Court of Appeals, there is no sound basis to justify this “something more” standard. Nevertheless, even under such a heightened standard, the record amply demonstrates that YouTube had the “right and ability to control” infringing activity. (See supra pages 2-4, 13 n.10.)

In sum, this Court should reverse the District Court and hold that Section 512(c)(1)(B) should be applied consistent with the longstanding vicarious liability standard.

* * *

The District Court’s opinion erroneously eliminates actual knowledge and red flags knowledge as meaningful independent requirements apart from notice-and-takedown; it does the same with the “right and ability to control” requirement. The District Court’s decision is a roadmap for start-up enterprises to consciously build an audience and a lucrative business based on the unauthorized use of copyrighted content of others. Such a result is contrary to the language and purpose of the DMCA, and to the future of a robust Internet.

In contrast, enforcing the DMCA as Congress wrote it—giving the statutory requirements for actual knowledge, red flags knowledge, and “right and ability to control” their ordinary meaning and distinct functions—fosters a healthy online environment in which creativity and innovation, rather than theft and piracy, can flourish.

CONCLUSION

For the foregoing reasons, the District Court's decision should be reversed.

Dated: December 10, 2010
Washington, D.C.

Respectfully submitted,

s/Clifford M. Sloan

Clifford M. Sloan
Christopher G. Clark
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Mary E. Rasenberger
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000

Counsel for Amici Curiae

**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)**

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type-Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,786 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(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 2003 in Times New Roman, 14 point.

Dated: December 10, 2010

s/Christopher G. Clark
Christopher G. Clark

SCHEDULE A

1. *Advance Publications, Inc.* is a privately held communications company that, directly or through subsidiaries, publishes daily newspapers in over 20 cities and weekly business journals in over 40 cities throughout the United States. It also, directly or through subsidiaries, owns Condé Nast, Fairchild Fashion Group, and Parade Publications, which together publish over 20 magazines with nationwide circulation, including such magazines as *The New Yorker*, *Vanity Fair*, *Vogue*, and *Architectural Digest*, and many Internet sites that are associated with its print publications as well as stand-alone sites.

2. *Association of American Publishers* (“AAP”) is the national trade association of the book publishing industry in the United States. Its membership of over 300 companies and other organizations includes most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books and journals in every field of human interest, including textbooks and other transactional materials for the elementary, secondary, and postsecondary educational markets; reference works; and scientific, technical, medical, professional and scholarly books and journals. They also publish e-books and computer programs, and produce a variety of other multimedia products and services. Adequate copyright protection and effective

copyright enforcement, both in the United States and abroad, are critical to the success of AAP member publishers.

3. *Association of American University Presses* is an association of 131 nonprofit scholarly publishers affiliated with universities and non-degree granting research institutions, including scholarly societies, museums and foundations. Collectively they publish about 10,000 books a year and over 800 journals in a variety of print and electronic formats. They publish in every field of academic and scholarly endeavor, and their publications are widely used by scholars doing their own research, for teaching in post-secondary education, and by general readers seeking peer-reviewed, high-quality information. Their ability to manage the copyrights in what they publish efficiently and to combat piracy effectively is fundamental to the performance of their critical social mission.

4. *The Associated Press* (“AP”), founded in 1846, is the oldest and largest news agency in the world, serving as the gold standard for news gathering and reporting. On any given day, more than half the world’s population sees news from AP. AP serves thousands of newspapers, radio and television stations around the world. AP has won 49 Pulitzer Prizes, more than any news organization for categories in which AP is entitled to compete. AP employs an editorial staff that is unparalleled in the news business. It has over 3,700 editorial, communications and administrative employees working worldwide in more than 300 locations. Two-

thirds of AP's worldwide staff are newsgatherers. AP is organized as a not-for-profit, membership cooperative, and is owned by its U.S. daily newspaper members. In addition, AP supplies news services to associate members (which include many broadcast media companies) and others which are not members of AP but which subscribe to one or more of AP's services.

5. *The Center for the Rule of Law* is an educational, non-profit independent center of international scholars whose writing and teaching interests address issues relating to the rule of law, including issues in intellectual property law and rules respecting legal liability.

6. *Gannett Co., Inc.* is an international news and information company that publishes 81 daily newspapers in the United States, including USA TODAY, as well as hundreds of non-daily publications. The company also owns 23 television stations and more than 100 websites that are integrated with its publishing and broadcasting operations.

7. *ICBC Broadcast Holdings, Inc.* ("ICBC") is the second largest African American owned broadcasting company in the U.S. Primarily targeting the urban market, ICBC owns seventeen radio stations located in the top markets of New York and San Francisco, as well as smaller market stations in South Carolina and Mississippi.

8. *Institute for Policy Innovation* (“IPI”) is a non-profit, non-partisan public policy think tank founded in 1987 and based in Lewisville, Texas. IPI maintains an active interest in intellectual property law and policy. The Institute is an accredited observer NGO with the World Intellectual Property Organization (“WIPO”) in Geneva, Switzerland and participates regularly in WIPO deliberations. IPI maintains an extensive program of research and education of policy makers and the public on intellectual property issues, testifies before Congress and state legislatures on intellectual property issues, files comments with regulatory agencies, sponsors briefings in Washington, D.C. and around the world on developments in intellectual property policy, and regularly publishes scholarly papers on intellectual property policy. IPI sponsors the major World IP Day event in Washington, D.C. on each April 26th. IPI has partnered with the United States Patent and Trademark Office on a variety of projects related to intellectual property protection. IPI believes that robust intellectual property protection is the basis of markets in inventions and creative works, and believes that intellectual property protection is of compelling national interest because it is critical to the continued economic growth and innovation of the American economy.

9. *The Ladies Professional Golf Association* (“LPGA”) is an organization established to promote, develop, establish and maintain high

standards for women's professional golf activities through teaching, tournament play, and other activities that promote worldwide interest in the game of golf.

10. *The McClatchy Company* publishes 31 daily newspapers and 46 non-daily newspapers throughout the country, including the *Sacramento Bee*, the *Miami Herald*, the *Kansas City Star* and the *Charlotte Observer*. The newspapers have a combined average circulation of approximately 2,500,000 daily and 3,100,000 Sunday.

11. *The Media Institute* ("Institute") is an independent, nonprofit research organization located in Arlington, Virginia. Through conferences, publications, and filings with courts and regulatory bodies, the Institute advocates for a strong First Amendment, a competitive communications industry, and journalistic excellence.

12. *Minority Media & Telecommunications Council, Inc.* ("MMTC") is a national nonprofit organization dedicated to promoting and preserving equal opportunity and civil rights in the mass media, telecommunications and broadband industries, and closing the digital divide. MMTC is generally recognized as the nation's leading advocate for minority advancement in communications.

13. *National Association of Black Owned Broadcasters* ("NABOB") is the first and largest trade organization representing the interests of African-

American owners of radio and television stations across the country. NABOB was organized in 1976 by a small group of African-American broadcasters who desired to establish a voice and a viable presence in the industry and to address specific concerns facing African-American broadcasters. NABOB has two principal objectives: First, to increase the number of African-American owners of telecommunications facilities, and second, to improve the business climate in which they operate. In 1976, there were only 30 African-American owned broadcast facilities in the United States. Today, there are over 250. NABOB is dedicated to creating opportunities for success for African-Americans in the telecommunications industry.

14. *The National Football League* (the “NFL”) is an unincorporated association of thirty-two Member Clubs, each of which owns and operates a professional football team. NFL football is, and for many years has been, the most popular spectator sport in the United States. The NFL owns the copyright to telecasts of its sporting events and has authorized the broadcast of its telecasts to licensees for distribution on television and, in some circumstances, over the Internet. As a result of the enormous popularity of NFL football, the NFL has established a highly successful business in the commercial licensing of its copyrighted game telecasts. The unauthorized distribution of NFL copyrighted

content over the Internet impairs the NFL's ability to engage in an important segment of its business.

15. *Newspaper Association of America* ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability of the media to provide the public with news and information—online and in print—on matters of public concern.

16. *Picture Archive Council of America* ("PACA"), founded in 1951, is the trade organization in North America that represents the interests of stock archives. Through advocacy, education and communication, PACA strives to foster and protect the interests of the media archive community. Accordingly, PACA works to develop useful business standards and promote ethical business practices; actively advocates copyright protection; collects and disseminate timely information; and takes an active role in the media licensing community by building relationships with organizations from related industries.

17. *Professional Photographers of America* ("PPA"), the world's largest photographic trade association, represents photographers and photographic

artists from dozens of specialty areas including portrait, wedding, commercial, advertising, and art. The professional photographers represented by the PPA have been the primary caretakers of world events and family histories for the last 150 years, and have shared their creative works with the public secure in the knowledge that their rights in those works would be protected. PPA is joined in its support by its allied associations under the Alliance of Visual Artists umbrella; Society of Sport & Event Photographers, Commercial Photographers International, Evidence Photographers International Council, Stock Artists Alliance and Student Photographic Society.

18. *Radio Television Digital News Association* (“RTDNA”) is a professional association devoted to electronic journalism that represents local and network news executives, educators, students, and others in the radio, television and cable news business worldwide. RTDNA seeks to encourage excellence in the electronic journalism industry and to work to uphold and promote the First Amendment and other legal rights of the news media.

19. *Rosetta Stone Ltd.* develops, markets, and provides technology-based language learning solutions for use by individuals, schools, and other governmental and private institutions.

20. *The E.W. Scripps Company* is a diverse media concern with interests in newspaper publishing, broadcast television and interactive media.

Nationwide, it operates 18 daily newspapers, 10 broadcast television stations and a variety of interactive web sites.

21. *Sports Rights Owners Coalition* (“SROC”) is an informal group of international and national sports bodies with a particular focus on rights issues. SROC’s members include, among others, Fédération Internationale de Football Association (“FIFA”), Wimbledon Championships, Formula 1, and the PGA Tour.

22. *The Washington Post* is a leading newspaper and news website.

23. *Zuffa, LLC* (“Zuffa”) is a Nevada sports promotion company specializing in mixed martial arts. It is the parent company of Ultimate Fighting Championship (“UFC”), a mixed martial arts promotion company. UFC organizes and promotes popular spectator sporting events, and creates significant amounts of copyrighted entertainment content based on both live and recorded events. UFC distributes this content to its fans across multiple platforms, including pay-per-view, online and mobile media. Since 2006, UFC has been the largest pay-per-view content provider in the world, with over 22 million residential transactions during that time. It presently distributes programming content to over 400 million households in over 125 countries and territories. With the advent of online video and live streaming technology, copyrighted UFC content can be uploaded on the Internet to any number of websites, where it is downloaded or streamed to an unlimited number of unauthorized viewers. As a result of this online piracy, Zuffa

and UFC have suffered significant revenue losses, and will continue to suffer such losses in the future.

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

ss.:

**AFFIDAVIT OF
CM/ECF SERVICE**

I, Natasha S. Johnson, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

On December 10, 2010

deponent served the within: **Brief of *Amici Curiae* Advance Publications, Inc., Association of American Publishers, Association of American University Presses, The Associated Press, The Center for the Rule of Law, Gannett Co., Inc., ICBC Broadcast Holdings, Inc., Institute for Policy Innovations, The Ladies Professional Golf Association, The McClatchy Company, The Media Institute, Minority Media & Telecommunications Council, Inc., National Association of Black Owned Broadcasters, The National Football League, Newspaper Association of America, Picture Archive Council of America, Professional Photographers of America, Radio Television Digital News Association, Rosetta Stone Ltd., The E.W. Scripps Company, Sports Rights Owners Coalition, and The Washington Post and Zuffa, LLC in Support of Appellants and Reversal**

upon:

SEE ATTACHED SERVICE LIST

via the CM/ECF Case Filing System. All counsel of record in this case are registered CM/ECF users. Filing and service were performed by direction of counsel.

Sworn to before me on December 10, 2010

MARIA MAISONET
Notary Public State of New York
No. 01MA6204360
Qualified in Bronx County
Commission Expires Apr. 20, 2013

Job # 233763

SERVICE LIST:

William M. Hart
Proskauer Rose LLP
Attorneys for Plaintiff-Appellant The Football Association Premier League Limited, on behalf of themselves and all others similarly situated
1585 Broadway
New York, New York 10036
(212) 969-3095

Max W. Berger
Bernstein Litowitz Berger & Grossmann LLP
Attorneys for Plaintiff-Appellant The Football Association Premier League Limited, on behalf of themselves and all others similarly situated
1285 Avenue of the Americas
New York, New York 10019
(212) 554-1400

Louis Mark Solomon
Cadwalader, Wickersham & Taft LLP
Attorneys for Plaintiff-Appellant The Football Association Premier League Limited, on behalf of themselves and all others similarly situated
1 World Financial Center
New York, New York 10281
(212) 504-6000

Daniel C. Girard
Girard Gibbs LLP
Attorneys for Plaintiff-Appellant Cal IV Entertainment, LLC
601 California Street, Suite 1400
San Francisco, California 94108

Kevin Michael Doherty
Burr & Forman LLP
Attorneys for Plaintiff-Appellant Cal IV Entertainment, LLC
420 North 20th Street
Birmingham, AL 35203
(615) 724-3211

James Edward Hough
Morrison & Foerster LLP
Attorneys for Plaintiff-Appellant National Music Publishers' Association
1290 Avenue of the Americas
New York, New York 10104

David S. Stellings

Lieff, Cabraser, Heinmann & Bernstein, LLP
Attorneys for Plaintiff-Appellant National Music Publishers' Association
250 Hudson Street, 8th Floor
New York, New York 10013
(212) 355-9500

Christopher Lovell
Lovell Stewart Halebian LLP
Attorneys for Plaintiff-Appellant The Music Force Media Group LLC
61 Broadway, Suite 501
New York, New York 10006
(212) 608-1900

Steve D'Onofrio
Law Office of Steve D'Onofrio
Attorneys for Plaintiff-Appellant The Music Force Media Group LLC
5335 Wisconsin Avenue, NW, Suite 950
Washington, DC 20015
(202) 686-2872

Jeffrey Lowell Graubart
Law Offices of Jeffrey L. Graubart
Attorneys for Plaintiff-Appellant The Music Force Media Group LLC
350 West Colorado Boulevard, Suite 200
Pasadena, California 91106
(626) 304-2800

Andrew H. Schapiro
Mayer Brown LLP
Attorneys for Plaintiff-Appellant Youtube, Inc.
1675 Broadway
New York, New York 10019
(212) 506-2672

David H. Kramer
Wilson Sonsini Goodrich & Rosati
Attorneys for Plaintiff-Appellant Youtube, Inc.
650 Page Mill Road
Palo Alto, California 94304
(650) 493-9300

Paul M. Smith
Jenner & Block LLP
Attorneys for Plaintiff-Appellant Viacom International, Inc.
1099 New York Avenue, NW
Washington, DC 20001
(202) 639-6060