

10-3270

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

**BRIEF OF *AMICI CURIAE* MICROSOFT CORPORATION
AND ELECTRONIC ARTS INC.
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c)(1), counsel state the following:

Amicus curiae Microsoft Corporation (“Microsoft”) is a publicly-held corporation. Microsoft does not have a parent corporation and no publicly-held corporation holds 10% or more of its stock.

Amicus curiae Electronic Arts Inc. (“EA”) is a publicly-held corporation. EA has no parent corporation and no publicly-held corporation holds 10% or more of its stock.

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STATEMENT OF INTEREST¹

This appeal concerns a challenge to a district court order granting summary judgment regarding the applicability of the safe harbor provisions of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512(c), to an Internet site—YouTube—that deliberately built its audience, its monetization, and its business model on a strategy that “welcomed” “copyright-infringing material,” and that had knowledge of “pervasive,” “flagrant,” and “blatant” infringement on its site. Special Appendix (“SPA-”) 9, ECF No. 74.

Amicus curiae Microsoft Corporation (“Microsoft”) is a leading innovator in computer software and online services. Microsoft’s mission is to enable individuals and businesses throughout the world to realize their full potential by creating technology that transforms the way people work, play, and communicate. Microsoft develops, manufactures, licenses, and supports a wide range of programs and services, including Windows and Windows Live, Microsoft Office and Microsoft Office 365, Xbox and Xbox Live, and Bing. Microsoft invests enormous resources in research, development, and promotion of new technologies, products, and services, and competes vigorously in dynamic technology markets.

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

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It is therefore keenly interested in having fairness and predictability in intellectual property law, including the safe harbor provision of the DMCA at issue in this case.

Microsoft is particularly well-suited to address the broader legal, economic, technological, and societal implications of the important question presented by this case. On the one hand, Microsoft offers numerous online products and services that engage in the lawful, digital distribution of content, in reliance on the DMCA safe harbor provisions. Those provisions have been instrumental in fostering the growth of new, innovative online services. Microsoft also has first-hand experience operating user-generated content services similar to YouTube and addressing the important copyright-related issues that such services face. In 2007, for example, Microsoft joined with several of the world's leading Internet and media companies in negotiating and implementing a set of voluntary, collaborative principles governing user-generated content services that both allow for continued growth of user-generated content online and respect for the intellectual property of content owners.² The DMCA served as a backdrop to these voluntary principles, which are consistent with the spirit of that Act. Those principles—and the

² See Principles for User Generated Content Services, *available at* <http://ugcprinciples.com> (last visited Dec. 10, 2010) (reproduced in an addendum to this brief (“ADD-”)).

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safeguards they include to protect against the widespread uploading of infringing content—guided the operation of Microsoft’s own user-generated video service, Soapbox, which operated from 2006 to 2009.

On the other hand, Microsoft is the owner of highly valuable copyrighted content that is at great risk of infringement in the digital marketplace, including through the illegal conduct of online services and other intermediaries that abuse the DMCA safe harbor provisions and encourage infringement by their users. In fact, to illustrate the scope of the problem, Microsoft issues copyright-related take-down notices to online service providers for millions of infringing files every year.

Amicus curiae Electronic Arts Inc. (“EA”) is a world-leading developer and publisher of interactive entertainment software for play on the Internet, dedicated consoles, personal computers, and a variety of portable devices. EA is a copyright owner that issues take-down notices to online service providers operated by others. At the same time, EA has developed gaming products and services incorporating features that allow users to upload and share content through online services operated by EA.

Together, *amici* have a direct and profound interest in the proper interpretation of § 512(c) and in ensuring that the safe harbor strikes the balance that Congress intended between encouraging innovation online and protecting against infringement, by “preserv[ing] strong incentives for service providers and

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copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.” S. Rep. No. 105–190, at 20 (1998). *Amici* respectfully submit this brief and accompanying Motion for Leave to File in order to assist the Court in its resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1998, Congress enacted the safe harbor provisions of the DMCA to encourage innovation and expansion in the number and type of online services provided to end users, while at the same time “preserv[ing] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.” S. Rep. No. 105–190, at 1-2, 20; H.R. Rep. No. 105-551(II), at 49 (1998). Among other things, Congress established that a provider may not avail itself of the safe harbor if it “ha[s] actual knowledge that the material or an activity using the material on the system or network is infringing,” or “is ... aware of facts or circumstances from which infringing activity is apparent” and fails to “expeditiously ... remove, or disable access to, the material.” 17 U.S.C. § 512(c)(1)(A)(i)-(iii). The actual or apparent knowledge proviso is key to the safe harbor that Congress intended to confer upon online service providers.

The district court erred in concluding that the DMCA’s safe harbor provision extends to YouTube’s conduct prior to May 2008. Plaintiffs submitted evidence

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that YouTube's founders quickly discovered that YouTube was a magnet for infringing material, and that infringing content was a primary driver of user traffic on the site. YouTube implemented a business plan built on "welcom[ing]" that widespread infringement in order to achieve financial gain, and YouTube participated in that infringement. YouTube's motto ostensibly is "Broadcast Yourself." But from the time it launched in 2005 until mid-2008, the evidence shows, YouTube knew that the vast majority—some 80 percent—of the traffic to its service was driven by copyright-infringing material, such as unauthorized copies of excerpts of popular movies and television shows. Other record evidence shows that YouTube knowingly used that widespread infringement to expand its audience and thereby increase its financial value. And when Google acquired YouTube, it understood that it was buying a business known as the "video Grokster." SUF 157.³ The district court's decision holding that defendants' conduct is immunized by the DMCA dramatically upsets the balance struck by Congress in enacting the DMCA's safe harbor provision and encourages conduct that could have a devastating impact on content owners, competitors, and ultimately consumers.

³ This brief refers to the public version of Viacom's Statement of Undisputed Facts in Support of Its Motion for Partial Summary Judgment as "SUF."

The evidence in the summary judgment record in this case is extreme. It shows that YouTube's founders were fixated on increasing the number of YouTube users in short period of time in order to maximize its commercial value; that they knew YouTube had quickly become a magnet for pirated works; that they recognized the value of retaining infringing content on the site that, by YouTube's own estimates, accounted for 80% of its traffic; and that they affirmatively decided not to remove it—and even uploaded some of it themselves—in order to reach their goal of rapidly expanding YouTube's user base. The record includes smoking-gun internal communications among YouTube's own founders establishing these facts. A reasonable jury could find that YouTube became the leading Internet video-content site by deliberately exploiting the copyrighted works of others without a license—resulting in enormous wealth for its founders and venture capital investors, who sold the site to Google for \$1.65 billion little more than a year after YouTube's launch. Google itself referred to YouTube as a “‘rogue enabler’ of content theft” and recognized that YouTube's business model was “‘completely sustained by pirated content.’” SUF 157.

The district court reviewed the summary judgment record and acknowledged that a reasonable jury could conclude that “defendants not only were generally aware of, but *welcomed*, copyright-infringing material being placed on their website,” because “[s]uch material was attractive to users, whose increased usage

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enhanced defendants' income from advertisements." SPA-9 (emphasis added). The district court nevertheless concluded that defendants were entitled to the DMCA's safe harbor as a matter of law, even on the extreme facts presented here. The defendants' "awareness of pervasive copyright-infringing, however flagrant and blatant," the district court ruled, "is not enough" (SPA-20, 18) to create a triable issue as to whether defendants were "aware of facts or circumstances from which infringing activity is apparent." 17 U.S.C. § 512(c)(1)(A)(ii).

The district court's award of summary judgment to defendants on this record requires reversal. It is based on both an untenable construction of the relevant statutory provisions and a flawed assessment of the record. In enacting the DMCA and its safe harbor provisions, Congress sought to encourage the proliferation of Internet-based services by giving providers of those services more predictability with respect to their exposure for copyright infringement that they may unwittingly make possible through their service. To be sure, the statutory safe harbor is a critical safeguard—but it is not absolute. It does not protect entities that knowingly facilitate blatant and widespread infringement on their service with the intent to exploit that infringing activity in order to increase their bottom line. The district court erred in concluding that the record fails to create a genuine dispute of fact as to defendants' wrongful intent to encourage, facilitate, and profit from its users' infringement.

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If, as the district court held, the evidence adduced by plaintiffs on summary judgment does not raise a triable issue as to whether defendants had “aware[ness] of facts or circumstances from which infringing activity [wa]s apparent,” it is difficult to imagine what sort of record would suffice. On this record, a reasonable jury could find that YouTube knew of, encouraged, participated in, and intended to profit from “pervasive,” “blatant,” and “flagrant” copyright infringement on its service. The district court’s holding reads the apparent knowledge provision (17 U.S.C. § 512(c)(1)(A)(ii)) out of the statute, broadly immunizes conduct that Congress never intended to shield when it enacted the DMCA, and destroys “incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.” S. Rep. No. 105–190, at 20.

By incorrectly construing Section 512 and preventing a jury from hearing the evidence of YouTube’s cavalier conduct regarding blatant copyright infringement, the district court exacerbates ongoing competitive harm in the online content marketplace. During the time at issue, no other mainstream online video service, including defendant Google’s own Google Video, employed YouTube’s aggressive business model predicated on “welcom[ing]” infringing material (SPA-9), in part because those competing services were trying to stay within the legitimate confines of the DMCA’s safe harbor. While YouTube proceeded to

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build its audience by exploiting others' copyrighted content, its online video competitors adhered to the proper limits of copyright law but, inevitably, fell far behind YouTube in user popularity. Apparently recognizing the futility of trying to compete with YouTube's aggressive approach, Google itself switched course—acquiring YouTube and changing its corporate policies in order to capitalize on the audience that YouTube built. Congress could not have intended to create these perverse market incentives when it enacted the DMCA. The judgment of the district court should be reversed.

ARGUMENT

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO YOUTUBE ON THE AVAILABILITY OF THE DMCA'S SAFE HARBOR PROVISION IN THESE EXTREME CIRCUMSTANCES

A. The Summary Judgment Record Includes Ample Evidence Showing That YouTube Intentionally Built Its Business On, And Participated In, Rampant Infringement Of Copyrighted Works

Critical to the disposition of this case are the extraordinary facts that plaintiffs compiled documenting YouTube's intentional efforts to build—and expand—its business based on a model that invited users to upload copyright-infringing content to its site. There is undisputed evidence in the record that YouTube's founders sought to quickly make YouTube the web's most popular video site—through any means necessary—and then cash in. SUF 30, 36, 49-50 (“our dirty little secret ... is that we actually just want to sell out quickly”). As

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one of its founders candidly remarked, YouTube’s goal was to “build[] up [its audience] as aggressively” as possible over a short period, “through whatever tactics, however evil.” SUF 85. Once it achieved a critical mass of users, the founders hoped to sell YouTube “for somewhere between \$250m[illion] - \$500m[illion],” and believed that there was “potential to get to \$1 b[illion].” *Id.* The plan worked better than anticipated: they ultimately sold YouTube to Google for \$1.65 billion. SUF 16.

The evidence establishes that YouTube understood that one sure-fire tactic for attracting and retaining users was to make YouTube a haven for unauthorized copyrighted content, which is why it aspired to be the next “napster,” “kazaa,” or “bittorrent.” SUF 29.⁴ As early as June 2005—just weeks after YouTube’s beta launch—the company received a complaint from its service provider that YouTube was in violation of a user agreement. SUF 33. Founder Steve Chen told his partners that he believed the complaint was a result of YouTube “hosting copyrighted content.” *Id.* But YouTube, Chen went on to admonish, was “not about to take down content because our ISP is giving us sh[*]t.” *Id.* (alteration

⁴ These are references to well-known “peer-to-peer” sharing sites that “allow[] users to download infringing copies of popular movies, television shows, sound recordings, software programs, video games, and other copyrighted content free of charge.” *Columbia Pictures Indus., Inc. v. Fung*, No. CV-06-5578, 2009 WL 6355911, at *2 (C.D. Cal. Dec. 21, 2009).

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added). And before too long, according to YouTube's own estimates, as much as 80% of user traffic was driven by pirated videos. *See, e.g.*, SUF 104 (March 1, 2006 instant message conversation between YouTube production manager Maryrose Dunton and YouTube systems administrator Bradley Heilbrun: "the truth of the matter is, probably 75-80% of our views come from copyrighted material."); SUF 95 (February 28, 2006 instant message conversation between Dunton and YouTube co-founder Steve Chen: "over 70%" of the "most viewed/most discussed/top favorites/top rated" videos on YouTube "is or has copyrighted material.").

Plaintiffs submitted evidence that YouTube's business model and aggressive monetization goals depended on facilitating and, indeed, cultivating such widespread copyright infringement. YouTube itself estimated that if it removed infringing material, "site traffic and virality [would] drop to maybe 20% of what it is," stunting YouTube's growth. SUF 55; *see also* SUF 37-39, 57. So YouTube chose to keep blatantly infringing "sports, commercials, news, etc.," in order to "improve video uploads, videos viewed, and user registrations" until the founders could cash out. SUF 58. Moreover, the evidence adduced by plaintiffs shows that YouTube had much more than a mere "generalized" awareness that there was massive infringing activity on YouTube; it knew of numerous *specific* instances of what it regarded as infringing content and yet chose to do nothing about it during

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the period at issue. It is undisputed, for example, that in March 2006, one of YouTube's founders informed the board of directors that there was "blatantly illegal" content on the site, including "episodes and clips of ... Family Guy, South Park, MTV Cribs, Daily Show, Reno 911, [and the] Dave Chapelle [Show]." SUF 109-11.

Indeed, YouTube did much more than intentionally retain obviously infringing content uploaded by others; plaintiffs adduced evidence that YouTube actively participated in infringing activity by knowingly uploading copyrighted content to its site in an effort to increase traffic. *See, e.g.*, SUF 40 (July 19, 2005 email from Steve Chen to YouTube co-founders Chad Hurley and Jawed Karim: "We're going to have a tough time [arguing] that we're not liable for the copyrighted material on the site ... when one of the co-founders is blatantly stealing content from other sites and trying to get everyone to see it."); SUF 93 (instant message from Maryrose Dunton to Bradley Heilbrun stating that she had "started like 5 groups based on copyrighted material").

Fueled by infringing videos, YouTube achieved its objective of quickly becoming the web's most popular video site and attracted the attention of Google, which saw YouTube as a way of expanding its own reach. Plaintiffs adduced evidence demonstrating that Google understood that YouTube's business model facilitated copyright infringement. Indeed, the presence of infringing content on

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YouTube was a chief reason why YouTube was crushing its competitors, including Google Video, in the race to be the first to attract a critical mass of users. Google itself referred to YouTube as a “‘rogue enabler’ of content theft.” SUF 157; *see also* SUF 145 (email from Google executive Peter Chane to the Video Team forwarding a statement by Peter Chernin, then CEO of Fox Entertainment, about YouTube: “We did a survey and more than 80 percent of video on this site is copyrighted content”); SUF 150 (Google Video document indicating YouTube’s “[t]raffic is high but content is mostly illegal”); SUF 230 (draft 2007 strategy document from Google’s company-wide monetization team, noting that “copyright infringed content” was “among the primary drivers of YouTube traffic” and that “[b]y developing and [sic] audience following the users first, YouTube has created advertiser and monetization value”) (alterations in original).

B. The DMCA’s Safe Harbor Does Not Shield Service Providers That “Welcome” Pervasive Infringement And Intend To Profit From It

1. Congress did not intend to extend the DMCA’s safe harbor to businesses intentionally modeled on such widespread and blatant copyright infringement. In enacting Title II of the DMCA, Congress sought to encourage innovation and expansion in the number and type of online services provided to end users, while “preserv[ing] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the

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digital networked environment.” S. Rep. No. 105–190, at 1-2, 20; H.R. Rep. 105-551(II), at 49. It struck that balance by crafting statutory “safe harbors” intended to provide “greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities,” given the evolving state of the law concerning service providers’ liability for copyright infringement. S. Rep. No. 105-109, at 19-20. Relevant here, Congress created a statutory safe harbor for service providers who store material “at the direction of a user,” for copyright infringements that occur “by reason of” such storage. 17 U.S.C. § 512(c)(1). But the safe harbor does not confer absolute immunity on such service providers. It is subject to three important express limitations, as relevant to the infringing conduct at issue here.

First, a provider may not avail itself of the DMCA’s safe harbor provision if it “ha[s] actual knowledge that the material or an activity using the material on the system or network is infringing,” or “is ... aware of facts or circumstances from which infringing activity is apparent” and fails to “expeditiously ... remove, or disable access to, the material.” *Id.* § 512(c)(1)(A)(i)-(iii). *Second*, even if a service provider has no actual or “apparent” knowledge of infringement, it will be excluded from the safe harbor if it “receive[s] a financial benefit directly attributable to the infringing activity” and has “the right and ability to control such activity.” *Id.* § 512(c)(1)(B). *Third*, a provider cannot qualify for the safe harbor

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unless, “upon notification of claimed infringement . . . , [it] responds expeditiously to remove, or disable access to, the material that is claimed to be infringing.” *Id.* § 512(c)(1)(C). This last requirement is known as the “notice-and-take-down” provision.

2. Having reviewed the overwhelming record evidence of defendants’ knowledge of and participation in infringing activity, the district court itself acknowledged, with some understatement, that a reasonable jury could find that “defendants not only were generally aware of, but *welcomed*, copyright-infringing material being placed on their website,” because “[s]uch material was attractive to users, whose increased usage enhanced defendants’ income from advertisements displayed on certain pages of the website.” SPA-9 (emphasis added). The district court nevertheless concluded that defendants were entitled to the DMCA’s safe harbor as a matter of law. The district court further held that defendants’ “awareness of pervasive copyright-infringing, however flagrant and blatant” is not enough to create a triable issue as to whether they are entitled to the statutory safe harbor. SPA-20, 18.

Relying on what it perceived to be the “tenor” of various excerpts of the legislative history, the district court held that disqualifying “aware[ness] of facts or circumstances from which infringing activity is apparent” can be obtained only through “knowledge of specific and identifiable infringements of particular

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individual items.” SPA-18. Similarly, the district court held that defendants could not have the “right and ability to control” its users’ infringing activities for purposes of § 512(c)(1)(B), because they purportedly did not have sufficient “item-specific” knowledge of the infringing activity from which they indisputably reaped a lucrative financial benefit. SPA-28.

3. *Amici* here focus on the district court’s conclusion that, as a matter of law, defendants were not “aware of facts or circumstances from which infringing activity [wa]s apparent” under § 512(c)(1)(A)(ii). On this record, that conclusion is plainly wrong. And that error in itself requires reversal.

Congress excluded from the safe harbor not just those who have (i) “actual knowledge” of infringing activity, but also those who, (ii) “*in the absence of actual knowledge*, [are] aware of facts or circumstances from which infringing activity is apparent.” 17 U.S.C. § 512(c)(1)(A)(i)-(ii) (emphasis added). By its terms, the statute defines “awareness of facts and circumstances” as something short of “actual knowledge” of infringing activity. Under the district court’s test, which would require plaintiffs to demonstrate that the defendants had “knowledge of specific and identifiable infringements of particular individual items” (SPA-18), the apparent knowledge prong (17 U.S.C. § 512(c)(1)(A)(ii)) is superfluous; apparent knowledge will never be enough unless the defendants also have *actual* knowledge of specific infringing activity under § 512(c)(1)(A)(i). It is a

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fundamental rule of statutory interpretation, however, that a statute should be construed, if possible, in a manner that gives effect to all of its parts. *See Jacobs v. New York Foundling Hosp.*, 577 F.3d 93, 99 (2d Cir. 2009) (“It is ‘a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)); *Connecticut ex rel. Blumenthal v. United States Dep’t of the Interior*, 228 F.3d 82, 88 (2d Cir. 2000) (“[W]e are required to ‘disfavor interpretations of statutes that render language superfluous.’”) (quoting *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992)).

Indeed, the district court’s construction arguably renders the entire knowledge exception to the safe harbor a nullity, because—as a practical matter—defendants are entitled to benefit from the safe harbor, even though they *intended to facilitate infringement*, so long as they have satisfied the entirely independent statutory requirement to promptly remove infringing material upon receipt of a take-down notice. *See SPA-26* (“[I]t is uncontroverted that when YouTube was given the notices, it removed the material. It is thus protected”). The district court seemed to suggest that that would be a fine result, remarking that “the present case shows that the DMCA notification regime works efficiently.” *SPA-19* (referring to Viacom’s February 2007 take-down notice). Congress, however, did

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not share the district court's belief that the notice-and-take-down regime alone would be sufficient to protect against the risk of massive piracy in the digital age.

The structure of the statute is clear: service providers who want to avail themselves of the statutory safe harbor must comply with take-down notices, but they also must take action to remove infringing material when they obtain disqualifying "aware[ness]" of infringing activity through some other means. *See* 17 U.S.C. § 512(c)(1)(A). Congress's use of "and" at the end of § 512(c)(1)(B) makes clear that the safe harbor is not available unless a service provider can show that it satisfies *all* of the requirements in § 512(c)(1). And although the text of the statute alone establishes the district court's error, the legislative history confirms that the statute's apparent-knowledge trigger operates independently of § 512's separate notice-and-takedown requirement. *See, e.g.,* S. Rep. No. 105-190, at 45 ("Section 512 does not require use of the notice and take-down procedure. A service provider wishing to benefit from the [safe harbor] must 'take down' or disable access to infringing material ... 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.").

Indeed, though the district court's opinion consists largely of lengthy block quotations from the legislative history, on closer examination the legislative history tends to undercut, rather than support, the district court's strained reading. The

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Senate Judiciary Committee Report refers to subsection (c)(1)(A)(ii) as a “‘red flag’ test.” *Id.* at 44. The House Committee Reports also use the “red flag” shorthand, in describing identical language in the safe harbor provisions contained in § 512(a) and (d). H.R. Rep. No. 105-551(I), at 25 (1998); H.R. Rep. No. 105-551(II), at 57. Describing the “red flag” test in the context of § 512(d)’s safe harbor for directory providers (which contains language identical to that in §512(c)(ii)), the House and Senate Reports explain that a service provider “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; H.R. Rep. No. 105-551(II), at 57.

In the context of § 512(c), the safe harbor provision at issue here, the Senate Judiciary Committee further elaborated on the so-called “red flag” test:

The “red flag” test has both a subjective and an objective element. In determining whether the service provider was aware of a “red flag,” *the subjective awareness of the service provider of the facts or circumstances in question must be determined.* However, in deciding whether those facts or circumstances constitute a “red flag”—in other words, whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances—an objective standard should be used.

S. Rep. No. 105-190, at 44 (emphasis added). In other words, “subjective awareness” of wrongdoing was meant to be the touchstone of the “red flag” test.

Yet the district court’s test, with its almost myopic focus on the specificity of the information obtained by YouTube, considers neither the subjective wrongful

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intent of YouTube nor whether “infringing activity” would have been “apparent” to a reasonable entity operating in similar circumstances. The result is that the district court’s decision extends the DMCA’s safe harbor to the extreme situation that Congress clearly intended to bar: conduct that includes implementation of a business plan intentionally built on welcoming, facilitating, and even participating in widespread infringement of copyrighted works.

In her recent article, Professor Jane C. Ginsburg specifically questioned the district court’s interpretation of the DMCA’s safe harbor provision in this case, which, as she states, extends statutory immunity to insulate online entrepreneurs “who effectively *solicit* infringers” for profit. Jane C. Ginsburg, *User-Generated Content Sites and Section 512 of the US Copyright Act, in Copyright Enforcement and the Internet* 183, 185 (Irina A. Stamatoudi ed., 2010) (emphasis added) (hereinafter “Ginsburg”). That interpretation of the safe harbor’s “apparent knowledge” proviso is flawed. As Professor Ginsburg has explained:

The statute articulates two circumstances that hoist the red flag: ‘actual knowledge’ of infringement and ‘facts and circumstances from which infringing activity is apparent’. [The district court’s decision in] *Viacom* and some of its predecessors appear to conflate the two.

Id. at 193.

4. The district court’s decision in this case also effectively interprets the DMCA’s safe harbor provision to immunize conduct that the Supreme Court held

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would subject a third party to contributory liability for copyright infringement in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). Here, as in *Grokster*, there is “evidence of infringement on a gigantic scale”; evidence that defendants built their business model based on “aiming to satisfy a known source of demand for copyright infringement”; evidence that defendants had actual or apparent knowledge of the massive infringement on the site; and evidence that defendants actively sought to profit from that infringement. *See id.* at 922-27, 937-41. Indeed, Google understood that YouTube was known as the “video Grokster.” SUF 157.

Like *Grokster*, this is not a case in which subjective awareness must be merely “imputed” from “red flags” that would indicate, objectively, that infringing activity is happening. The record is replete with evidence of the defendants’ state of mind, all pointing to the conclusion that they *intended* to multiply traffic on their website—and thereby increase the financial value of their business—by facilitating “copyright-infringing material being placed on their website.” SPA-9. There is no reason to conclude that Congress intended to immunize a *Grokster*-like business model—incentivizing entrepreneurs actively to facilitate infringement with a “patently illegal objective.” *Grokster*, 545 U.S. at 941.

5. Given the overwhelming evidence plaintiffs have compiled on YouTube’s subjective awareness of, and intentional efforts to profit from,

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infringement, there is plainly a genuine issue of fact precluding summary judgment for the defendants on a proper interpretation of the DMCA's safe harbor provision. *See id.* at 941; *see also id.* at 942 ("There is here at least a 'genuine issue as to a material fact'" precluding summary judgment; discussing factual record) (Ginsburg, J., joined by Rehnquist, C.J., and Kennedy, J., concurring) (alterations in original) (citation omitted). That alone requires reversal.

C. Extending Blanket Immunity To The Conduct And Business Model At Issue In This Case Would Frustrate Congress's Objectives, Penalize Responsible Service Providers, And Reward Illegitimate Conduct That Harmed Legitimate Competitors, Content Owners, And The Public

The district court's decision in this case not only extends the DMCA's safe harbor to online businesses intentionally created and managed to profit from copyright infringement, it creates a perverse *disincentive* for responsible service providers to cooperate with content owners and to seek mutually beneficial solutions to piracy problems. Indeed, in stark juxtaposition with YouTube's market bonanza, many competitors who worked cooperatively with content owners to address unquestionable infringements were harmed by YouTube's business model and found themselves unable to compete.

In 2007, a broad cross-industry group of online video services and content owners (including *amicus* Microsoft) came together to develop an approach for dealing with the infringement problem. The members of the group recognized that

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“[t]he ease of uploading video content on the Internet has led to the creation of millions of original works by new creators—works that range from scripted programs, to virtuoso musical performances and to humorous skits and social parody. It also has resulted in the proliferation of uploaded content that infringes copyrighted works.”⁵ In order to address the challenge of developing new modes of distribution while protecting intellectual property interests, these prominent members of the digital media and Internet industries developed a set of “best practices” for user generated video services, referred to as the Principles for User Generated Content Services (“UGC Principles”).⁶

Among other things, the UGC Principles encourage:

- the use of commercially reasonable filtering technologies with the goal of eliminating infringing content on UGC services;
- cooperation to ensure technology is implemented in a manner that respects fair use;
- cooperation in developing procedures for promptly addressing claims that content was blocked in error.

⁵ Press Release, CBS Corp. et al., Internet and Media Leaders Unveil Principles to Foster Online Innovation While Protecting Copyrights (Oct. 18, 2007), *available at* http://ugcprinciples.com/press_release.html (Oct. 18, 2007).

⁶ *See* ADD-1-4. Signatories to the UGC Principles include both online services—MySpace, dailymotion, Crackle, sevenload, Veoh, and Microsoft—and content owners—CBS Corporation, Disney, Fox Entertainment Group, NBC Universal, Sony Pictures, and Viacom. YouTube declined to participate.

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The district court’s test creates a powerful *disincentive* for cooperative efforts such as the UGC Principles. It thus frustrates Congress’s sensible objective in the face of profound and breakneck technological changes to “preserve[] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.” S. Rep. No. 105–190, at 20.

The suggestion that courts should err on the side of conferring absolute immunity even in circumstances as extreme as those presented by the facts in the record below is seriously misguided. If the goal is to create a premier online experience for the consumer, creativity must be fostered on the content side as well as the technology side. As Congress recognized when it enacted the DMCA, “[d]ue 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.” *Id.* at 8. The district court’s test would stifle both technological innovation and artistic creation in ways that will hurt the digital ecosystem—and thus the consumer.

Finally, the district court’s construction of § 512(c)’s safe harbor to prevent a jury from hearing evidence of YouTube’s extreme conduct in this case exacerbates and perpetuates a particular competitive harm. YouTube won the race

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to be “the” online source to search for and view video content on the web, but only by unleashing an aggressive business model that sought to (and did) expand its audience by “welcom[ing]” and facilitating infringing material. SPA-9. While YouTube built its business by exploiting copyrighted content in order to capture its critical audience, many of its competitors in online video worked with content owners to address concerns and remain within the copyright law.

Amicus Microsoft, as just one example, launched its own user-generated content site, called Soapbox, in 2006. Like YouTube, Microsoft saw that infringing videos were uploaded to the site and heard strong concerns from content owners. But unlike YouTube, Microsoft was determined to act responsibly and address those concerns. In March 2007, shortly after Soapbox debuted, Microsoft temporarily closed the site to new users so that it could implement better safeguards against infringing content.⁷

YouTube’s competition—including Google’s in-house offering, Google Video—was unable to compete with YouTube given the incredible momentum created by its illicit business strategy. Google recognized the competitive

⁷ See Greg Sandoval, *Microsoft temporarily closes video site*, CNET News (Mar. 22, 2007), http://news.cnet.com/Microsoft-temporarily-closes-video-site/2100-1025_3-6169851.html?tag=mncol;txt; James Delahunty, *MSN’s Soapbox re-opens with filtering technology*, AfterDawn (June 4, 2007), http://www.afterdawn.com/news/article.cfm/2007/06/04/msn_s_soapbox_reopens_with_filtering_technology.

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advantage of YouTube's audience and concluded that the only way it could attain a dominant position in online entertainment was to acquire YouTube.

YouTube's pursuit of growth at any cost came at the expense not only of content owners like Viacom but also of YouTube's competitors and, ultimately, consumers of online entertainment. There is no reason to interpret the DMCA's safe harbor, as the district court did below, to invite such competitive harms.

CONCLUSION

The judgment of the district court should be reversed, and this Court should hold that defendants were not entitled, on this extraordinary record, to summary judgment on the availability of the DMCA's safe harbor.

December 10, 2010

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) and (C), the foregoing brief contains 5,831 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), according to the Word Count feature of Microsoft Word. This brief has been prepared in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of December, 2010, a true and correct copy of the foregoing **Brief of Amici Curiae Microsoft Corporation and Electronic Arts Inc. in Support of Plaintiffs-Appellants** was served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h)(1)& (2):

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**ADDENDUM TO BRIEF OF *AMICI CURIAE* MICROSOFT
CORPORATION AND ELECTRONIC ARTS INC. IN SUPPORT OF
PLAINTIFFS-APPELLANTS**

| Document Description | Page |
|--|-------------|
| Principles for User Generated Content Services, <i>available at</i> http://ugcprinciples.com | ADD-1 |

Principles for User Generated Content Services

Foster Innovation. Encourage Creativity. Thwart Infringement.

Related Releases

- sevenload Protects Professional Content Partners and User Generated Video
- Sony Pictures Entertainment and Crackle Join Pioneering User-Generated Content Coalition
- Internet and Media Industry Leaders Unveil Principles to Foster Online Innovation While Protecting Copyrights

The following companies support these principles:



CRACKLE

Dailymotion



Microsoft



sevenload



SONY PICTURES

veoh

viacom

Leading commercial copyright owners ("Copyright Owners") and services providing user-uploaded and user-generated audio and video content ("UGC Services") have collaborated to establish these Principles to foster an online environment that promotes the promises and benefits of UGC Services and protects the rights of Copyright Owners. In this context, UGC Services are services such as Soapbox on MSN Video, MySpace, Dailymotion and Veoh.com, and not other technologies such as browsers, applets, email, or search services. While we may differ in our interpretation of relevant laws, we do not mean to resolve those differences in these Principles, which are not intended to be and should not be construed as a concession or waiver with respect to any legal or policy position or as creating any legally binding rights or obligations. We recognize that no system for deterring infringement is or will be perfect. But, given the development of new content identification and filtering technologies, we are united in the belief that the Principles set out below, taken as a whole, strike a balance that, on a going-forward basis, will result in a more robust, content-rich online experience for all.

In coming together around these Principles, Copyright Owners and UGC Services recognize that they share several important objectives: (1) the elimination of infringing content on UGC Services, (2) the encouragement of uploads of wholly original and authorized user-generated audio and video content, (3) the accommodation of fair use of copyrighted content on UGC Services, and (4) the protection of legitimate interests of user privacy. We believe that adhering to these Principles will help UGC Services and Copyright Owners achieve those objectives.

1. UGC Services should include in relevant and conspicuous places on their services information that promotes respect for intellectual property rights and discourages users from uploading infringing content.
2. During the upload process, UGC Services should prominently inform users that they may not upload infringing content and that, by uploading content, they affirm that such uploading complies with the UGC Service's terms of use. The terms of use for UGC Services should prohibit infringing uploads.
3. UGC Services should use effective content identification technology ("Identification Technology") with the goal of eliminating from their services all infringing user-uploaded audio and video content for which Copyright Owners have provided Reference Material (as described below). To that end and to the extent they have not already done so, by the end of 2007, UGC Services should fully implement commercially reasonable Identification Technology that is highly effective, in relation to other technologies commercially available at the time of implementation, in achieving the goal of eliminating infringing content. UGC Services should enhance or update the Identification Technology as commercially reasonable technology that makes a meaningful difference in achieving the goal becomes available.
 - a. If a Copyright Owner has provided: (1) the reference data for content required to establish a match with user-uploaded content, (2) instructions regarding how matches should be treated, and (3) representations made in good faith that it possesses the appropriate rights regarding the content (collectively, "Reference Material"), then the UGC Service should apply the Identification Technology to that content to implement the Filtering Process described below. UGC Services should ensure that reasonable specifications, as well as any tools and/or technical support, for the delivery of Reference Material are made available to Copyright Owners. If a Copyright Owner does not include in the Reference Material instructions regarding how matches should be treated, the UGC Service should block content that matches the reference data.

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- b. The Identification Technology should use Reference Material to identify user-uploaded audio and video content that matches the reference data and should permit Copyright Owners to indicate how matches should be treated.
- c. If the Copyright Owner indicates in the applicable Reference Material that it wishes to block user-uploaded content that matches the reference data, the UGC Service should use the Identification Technology to block such matching content before that content would otherwise be made available on its service ("Filtering Process"). The Copyright Owner may indicate in the applicable Reference Material that it wishes to exercise an alternative to blocking (such as allowing the content to be uploaded, licensing use of the content or other options), in which case, the UGC Service may follow those instructions or block the content, in its discretion.
- d. Copyright Owners and UGC Services should cooperate to ensure that the Identification Technology is implemented in a manner that effectively balances legitimate interests in (1) blocking infringing user-uploaded content, (2) allowing wholly original and authorized uploads, and (3) accommodating fair use.
- e. UGC Services should use the Identification Technology to block user-uploaded content that matches Reference Material regardless of whether the UGC Service has any licensing or other business relationship with the Copyright Owners who have provided such Reference Material (except that UGC Services may require that Copyright Owners enter into agreements with respect to the specifications for delivery of Reference Material that are commercially reasonable and that facilitate the provision of Reference Material by Copyright Owners and promote the goal of the elimination of infringing content). If a Copyright Owner authorizes specific users to upload content that would otherwise match Reference Material submitted by the Copyright Owner, the Copyright Owner should provide to the UGC Service a list of such users (a so-called white list).
- f. UGC Services may, at their option, utilize manual (human) review of all user-uploaded audio and video content in lieu of, or in addition to, use of Identification Technology, if feasible and if such review is as effective as Identification Technology in achieving the goal of eliminating infringing content. If a UGC Service utilizes such manual review, it should do so without regard to whether it has any licensing or other business relationship with the Copyright Owners. Copyright Owners and UGC Services should cooperate to ensure that such manual review is implemented in a manner that effectively balances legitimate interests in (1) blocking infringing user-uploaded content, (2) allowing wholly original and authorized uploads, and (3) accommodating fair use.
- g. Copyright Owners should provide Reference Material only with respect to content for which they believe in good faith that they have the appropriate rights to do so, and should update rights information as reasonable to keep it accurate. The inclusion of reference data for content by, or at the direction of, a Copyright Owner shall be deemed to be an implicit representation made in good faith that such Copyright Owner has the appropriate rights regarding such content. Copyright Owners should reasonably cooperate with UGC Services to avoid unduly stressing the Services' Identification Technology during limited periods when Copyright Owners, collectively, may be providing an overwhelmingly high volume of Reference Material. UGC Services should reasonably cooperate with Copyright Owners to ensure that such Reference Material is utilized by the Identification Technology as soon as possible during such overload periods.
- h. Promptly after implementation of Identification Technology, and at intervals that are reasonably timed throughout each year to achieve the goal of eliminating infringing content, UGC Services should use Identification Technology throughout their services to remove infringing content that was uploaded before Reference Material pertaining to such content was provided.
- i. Copyright Owners and UGC Services should cooperate in developing reasonable procedures for promptly addressing conflicting claims

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with respect to Reference Material and user claims that content that was blocked by the Filtering Process was not infringing or was blocked in error.

4. UGC Services and Copyright Owners should work together to identify sites that are clearly dedicated to, and predominantly used for, the dissemination of infringing content or the facilitation of such dissemination. Upon determination by a UGC Service that a site is so dedicated and used, the UGC Service should remove or block the links to such sites. If the UGC Service is able to identify specific links that solely direct users to particular non-infringing content on such sites, the UGC Service may allow those links while blocking all other links.
5. UGC Services should provide commercially reasonable enhanced searching and identification means to Copyright Owners registered with a service in order: (a) to facilitate the ability of such Copyright Owners to locate infringing content in all areas of the UGC Service where user-uploaded audio or video content is accessible, except those areas where content is made accessible to only a small number of users (not relative to the total number of users of the UGC Service), and (b) to send notices of infringement regarding such content.
6. When sending notices and making claims of infringement, Copyright Owners should accommodate fair use.
7. Copyright Owners should provide to UGC Services URLs identifying online locations where content that is the subject of notices of infringement is found – but only to the extent the UGC Service exposes such URLs.
8. When UGC Services remove content pursuant to a notice of infringement, the UGC Service should (a) do so expeditiously, (b) take reasonable steps to notify the person who uploaded the content, and (c) promptly after receipt of an effective counter-notification provide a copy of the counter-notification to the person who provided the original notice, and, at its option, replace the content if authorized by applicable law or agreement with the Copyright Owner.
9. When infringing content is removed by UGC Services in response to a notice from a Copyright Owner, the UGC Service should use reasonable efforts to notify the Copyright Owner of the removal, and should permit the Copyright Owner to provide, or request the UGC Service to provide on its behalf, reference data for such content to be used by the Identification Technology.
10. Consistent with applicable laws, including those directed to user privacy, UGC Services should retain for at least 60 days: (a) information related to user uploads of audio and video content to their services, including Internet Protocol addresses and time and date information for uploaded content; and (b) user-uploaded content that has been on their services but has been subsequently removed following a notice of infringement. UGC Services should provide that information and content to Copyright Owners as required by any valid process and consistent with applicable law.
11. UGC Services should use reasonable efforts to track infringing uploads of copyrighted content by the same user and should use such information in the reasonable implementation of a repeat infringer termination policy. UGC Services should use reasonable efforts to prevent a terminated user from uploading audio and/or video content following termination, such as blocking re-use of verified email addresses.
12. In engaging in the activities set forth in these Principles outside the United States, UGC Services and Copyright Owners should follow these Principles to the extent that doing so would not contravene the law of the applicable foreign jurisdiction.
13. Copyright Owners should not assert that adherence to these Principles, including efforts by UGC Services to locate or remove infringing content as provided by these Principles, or to replace content following receipt of an effective counter notification as provided in the Copyright Act, support

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disqualification from any limitation on direct or indirect liability relating to material online under the Copyright Act or substantively similar statutes of any applicable jurisdiction outside the United States.

14. If a UGC Service adheres to all of these Principles in good faith, the Copyright Owner should not assert a claim of copyright infringement against such UGC Service with respect to infringing user-uploaded content that might remain on the UGC Service despite such adherence to these Principles.
15. Copyright Owners and UGC Services should continue to cooperate with each other's reasonable efforts to create content-rich, infringement-free services. To that end, Copyright Owners and UGC Services should cooperate in the testing of new content identification technologies and should update these Principles as commercially reasonable, informed by advances in technology, the incorporation of new features, variations in patterns of infringing conduct, changes in users' online activities and other appropriate circumstances.

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