

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

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

Defendants.

CASE NO. 1:07-CV-02103-LLS
(Related case No. 1:07-CV-03582-LLS)

ECF CASE

**BRIEF OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION
IN SUPPORT OF PLAINTIFFS**

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit, public interest law and policy center with supporters in all fifty states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. In particular, WLF has regularly appeared as an *amicus curiae* before this and numerous other federal and state courts in favor of protecting the rights of property owners, including owners of intellectual property. *See, e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *Author's Guild v. Google, Inc.*, No. 05 Civ. 8136 (DC), 2009 U.S. Dist. LEXIS 116175 (S.D.N.Y. Dec. 1, 2009).

In addition, WLF's Legal Studies Division routinely publishes articles and sponsors briefings on a variety of legal issues, including those that are implicated in this case. *See, e.g., Sony v. Tenenbaum: There Are Limits To Fair Use Defense In Copyright Infringement Cases* (WLF Legal Opinion Letter), Oct. 9, 2009; *Liberty And Property: Human Rights And The Protection Of Intellectual Property* (WLF Working Paper), Jan. 2009; *Copyrights in Cyberspace: Are Intellectual Property Rights Obsolete in the Digital Economy?* (WLF Media Briefing), March 28, 2001; *Congress Modifies Copyright Protections for the Digital Age* (WLF Legal Backgrounder), Feb. 19, 1999.

I. INTRODUCTION

WLF submits this brief to support plaintiffs' position regarding the important copyright and public policy issues raised by this case and to provide the Court with a fuller context on which to anchor its decision on the pending motions. While the parties and other *amici* have fully briefed the *specific* issues, WLF submits this brief to emphasize that Congress's intent and purpose in enacting the Digital Millennium Copyright Act ("DMCA") is a crucial consideration in this case. As explained in greater detail below, the DMCA establishes a regime of shared responsibility on the part of both copyright owners and Internet service providers to police and enforce intellectual property rights. This is especially important in this case, where the unique business model utilized by YouTube — deriving advertising revenue from user-generated content — was not in existence, or even contemplated, when the DMCA was crafted. Precisely because YouTube's operations are, at a minimum, very different from the kinds of passive, innocent service provider conduct that was before Congress when it enacted the DMCA, the Court should carefully examine the intent and purpose of Congress.¹ *See Costar Group, Inc. v. LoopNet, Inc.*, 164 F. Supp. 2d 688, 693-94 (D. Md. 2001), *aff'd* 373 F.3d 544 (4th Cir. 2004) ("The world wide web has progressed far faster than the law and, as a result, courts are struggling to catch up. Legislatures and courts endeavor in this growing area to maintain the free flow of information over the internet while still protecting intellectual property rights. The DMCA is one attempt by Congress to strike the proper balance. Understanding the interplay

¹ In enacting the DMCA, Congress made no mention of so-called "user-generated content" sites similar to YouTube because such sites did not yet exist. Rather, Congress merely noted that "[e]xamples of such storage [under § 512(c)] include providing server space for user's web site, for a chatroom, or other forum in which material may be posted at the direction of users." *See* S. REP. No. 105-190, 105th Cong. 2d Sess., at 43 (1998).

between basic copyright jurisprudence and the DMCA presents an additional challenge for the courts.”).

II. IF YOUTUBE IS PROVIDED SAFE HARBOR, THE BALANCE AND PROTECTIONS CONGRESS INTENDED IN THE DMCA WILL BE ELIMINATED.

Although Congress could not anticipate the technological changes that would later confront the courts, the legislative history of the Online Copyright Infringement Liability Limitation Act, Title II of the DMCA (17 U.S.C. § 512), demonstrates that Congress was well aware of the dangers posed by large-scale infringement of copyrighted works over the Internet. *See* Brief of Amicus Curiae in Support of Plaintiffs at 8. This concern was evident from the earliest days of modern computer technology when Congress was considering revising the Copyright Act. *See, e.g.*, H.R. REP. No. 2237, 89th Cong. 2d Sess., at 57 (1966) (“In addition to the direct showings of a copy of a work, ‘display’ would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube or *similar viewing apparatus connected with any sort of information and storage and retrieval system.*”) (emphasis added). The DMCA was crafted to accommodate the concerns of copyright holders as well as the interests of Internet service providers. Specifically, Congress sought both to protect the intellectual property rights of copyright owners and to limit the liability of *innocent* service providers. As the DMCA makes clear, Congress believed these twin goals could best be accomplished by encouraging cooperation. *See* H.R. REP. 105-551(II), 105th Cong. 2d Sess., at 49 (1998) (recognizing that the purpose of section 512 was 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 network environment.”). This intention to provide for mutual rights and obligations has been reiterated and reinforced by the courts. *See, e.g., Rossi v. Motion Picture Ass’n of Am., Inc.*, 391 F.3d 1000, 1003 (9th Cir. 2004) (“Title II of the DMCA contains a number of measures designed to enlist the cooperation of Internet and other online service providers to combat ongoing copyright infringement.”); *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (“OCILLA endeavors to facilitate cooperation among Internet service providers and copyright owners....”).

The DMCA did not eliminate the liability of service providers. *See, e.g., Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1174 (C.D. Cal. 2002) (clarifying that safe harbors “do not affect the question of ultimate liability under the various doctrines of direct, vicarious, and contributory liability.”) (*citing* H.R. REP. No. 105-551(II), at 50). Although Congress intended to protect service providers when they engaged in certain core conduct that Congress viewed as crucial to the functioning of the Internet, but that could give rise to unpredictable liability, the DMCA was neither adopted nor intended to encourage service providers to exploit the existence of the safe harbors by designing businesses based on an ability to avoid liability. *See, e.g., ALS Scan, Inc. v. RemarQ Cmty., Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) (“This immunity, however, is not presumptive, but granted only to ‘innocent’ service providers who can prove they do not have actual or constructive knowledge of the infringement.”); *Columbia Pictures Indus., Inc. v. Fung*, No. CV 06-5578 SVW(JCx), 2009 WL 6355911, at *18 (C.D. Cal. Dec. 21, 2009) (“[T]he statutory safe harbors are based on passive good faith conduct aimed at operating a legitimate internet business.”); H.R. REP. No. 105-

551(I), 105th Cong. 2d Sess., at 11 (1998) (explaining that under the DMCA “liability is ruled out for *passive, automatic* acts engaged in through a technological process initiated by another”) (emphasis added); *Cf. Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 n.3 (11th Cir. 2006).

The structure of the DMCA also reveals that the law was designed to implement the shared burdens Congress intended. “Section 512 creates four safe harbors, each of which immunizes ISPs from liability for copyright infringement under certain *highly specified conditions*.” *Recording Indus. Ass’n. of Am., Inc. v. Verizon Internet Serv., Inc.*, 351 F.3d 1229, 1234 (D.C. Cir. 2003) (emphasis added). Thus, the DMCA is not merely a notice and takedown statute. As a threshold matter, Section 512(c) – the safe harbor at issue in this case – applies only to claims of infringement against a service provider that arise “by reason of the storage at the direction of a user of material that resides” on the provider’s system or network. Even with respect to those claims, a qualifying service provider must comply with several disjunctive requirements.² Under 17 U.S.C. § 512(c)(1), a provider is disqualified from safe harbor if it:³ (A) fails to expeditiously remove or disable access to infringing material or activity when it (1) knows of infringement *or* (2) is aware of facts or circumstances from which infringing activity is apparent *or* (3) has received DMCA-compliant notice *or* (B) receives a direct financial benefit from infringement and possesses the ability to control infringement. *See Capitol Records, Inc. v. MP3Tunes, LLC*, No. 07 Civ. 9931 (WHP), 2009 U.S. Dist. LEXIS 96521, *8-9 (S.D.N.Y. Oct.

² The party claiming any safe harbor must satisfy the definition of “service provider” in section 512(k)(1), and it must adopt and implement a policy for termination of the accounts of repeat infringers. 17 U.S.C. 512(i).

³ Qualification for a safe harbor is an affirmative defense with the burden on the party asserting it. *Hendrickson v. Amazon.com, Inc.*, 298 F. Supp. 2d 914, 915 (C.D. Cal. 2003) (“[B]ecause Amazon is asserting an affirmative defense ... it must establish all elements of the safe harbor rule under the DMCA.”).

16, 2009); *see also, e.g., Tur v. YouTube, Inc.*, No. CV 06-4436 FMC (AJWx), 2007 U.S. Dist. LEXIS 50254, *6 (C.D. Cal. June 20, 2007) (confirming that safe harbor is available only “upon a showing that all of the statutory prerequisites ... are met.”).

Moreover, Congress never intended that a service provider performing certain functions that qualified for safe harbor would have absolute immunity for all of its functions. Rather, in order to further delineate between service provider functions entitled to protection and those that are unprotected, Congress directed that each separate function of a service provider must independently qualify and be considered for safe harbor. *See* 17 U.S.C. § 512(n); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1117 (9th Cir. 2007) (“Even if CCBill’s provision of a hyperlink is immune under § 512(n), CCBill does not receive blanket immunity for its other services.”); S. REP. No. 105-190, at 55 (“Section 512’s limitations on liability are based on functions, and each limitation is intended to describe a separate and distinct function.”). This important section of the DMCA already has been applied to YouTube. *See Tur*, 2007 U.S. Dist. LEXIS 50254 at *10 (holding that the fact that users *initially* upload content at YouTube’s invitation does not immunize YouTube from conduct “undertaken from the time a user submits a video clip to the point of display on the YouTube website”); *see also Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 149 (S.D.N.Y. 2009) (stating that defendants’ actions have “transform[ed] Defendants from passive providers of a space in which infringing activities happened to occur to active participants in the process of copyright infringement”) (*quoting Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 513 (N.D. Ohio 1997)). A service provider’s safe harbor protections extend only so far as they apply to claims arising from its engagement in activities defined by a safe harbor, and no further.

Relying on highly fact-specific decisions, YouTube and its *amici* seek to place essentially the entire burden on the copyright holder. This approach cannot be reconciled with Congress's clearly stated intent to "preserve strong incentives for ... cooperat[ion]," (H.R. REP. 105-551(II), at 49) nor with the structure of the statute Congress enacted. In essence, YouTube asks this court to convert a calibrated series of shared obligations into a single "takedown" notice requirement placed solely on copyright owners.⁴ Not only is such a limiting interpretation belied by the DMCA, it is undermined by the fact (as illustrated here) that a takedown notice often provides little or no protection to copyright owners.

All too often, service providers merely choose to disable access to the single URL specified in the notice, not to other URLs embodying essentially the same copyrighted work. This is the very approach previously adopted by YouTube. Moreover, service providers contend they need do nothing to prevent essentially the same work from reappearing immediately, despite the users' ability to do so. The copyright owner thus continuously is forced to search the offending website in an attempt to locate infringement and then must begin the takedown process anew, while the service provider, far from "cooperating," chooses to remain willfully ignorant of infringement on its own service. By the time, if ever, those infringements are located by copyright owners, the infringing works have been released permanently on the Internet to be viewed, distributed, and copied by anonymous users (*i.e.*, anyone with access to the Internet).

⁴ Although Plaintiffs provided thousands of takedown notices, it is clear that whether or not copyright proprietors avail themselves of the notice and takedown provisions, service providers must nevertheless meet *all* DMCA requirements in order to limit their exposure to infringement liability. 3 M. Nimmer & D. Nimmer, *Nimmer On Copyright* § 12B.04 (2010 ed.) ("[C]opyright owners are not obligated to give notification of claimed infringement in order to enforce their rights.") (internal citations omitted).

See Twentieth Century Fox Film Corp. v. Streeter, 438 F. Supp. 2d 1065, 1073 n.2 (D. Ariz. 2006) (“When digital works are distributed via the internet ... every downloader who receives one of the copyrighted works from Defendant is in turn capable of transmitting perfect copies of the works ... threatening virtually unstoppable infringement....”).

Under its interpretation of the DMCA, YouTube would be free to set up a business that knowingly infringes (and encourages and induces infringement of) copyrighted works on a massive scale by copying, publicly performing, displaying, and disseminating those works. Under the construction of the DMCA it urges on this Court, YouTube could actively encourage massive infringement and still claim DMCA protection simply by after-the-fact (limited) response to takedown notices. Simply put, Congress never intended such a patently unjust and one-sided result. *Hendrickson*, 298 F. Supp. 2d at 917 (“[I]t is ... against the spirit of the DMCA if the entire responsibility lies with the copyright owner to forever police websites in search of possible infringers.”). It is neither good law nor good policy (and was not the intent of Congress) to reward a service provider with safe harbor for “[w]illful blindness” to acts of infringement, *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003), and for failure to take reasonable measures to at least limit infringement. *Id.* at 655 (“The common element of [the DMCA’s] safe harbors is that the service provider must do what it can reasonably be asked to do to prevent the use of its service by ‘repeat infringers.’”).

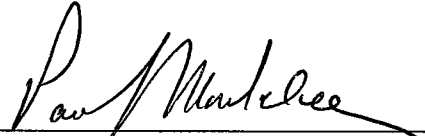
III. CONCLUSION

As the Second Circuit reiterated only last week, even in the face of a First Amendment challenge, “[t]he fundamental copyright principles are clear. The owner of a copyright has the

exclusive right to – or to license others to – reproduce, perform publicly, display publicly, prepare derivative works of, and distribute copies of, his copyrighted works.” *Arista Records LLC v. Doe 3*, No. 09-0905 at *13 (2d Cir. April 29, 2010) (affirming denial of motion to quash subpoena). *Amicus* WLF respectfully submits that in ruling on the pending motions, this Court should consider these fundamental copyright principles in the context of the intent and purpose of Congress in adopting the DMCA.

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