
No. 09-56777

In The United States Court of Appeals for the Ninth Circuit

UMG RECORDINGS, INC.; UNIVERSAL MUSIC CORP.; SONGS
OF UNIVERSAL, INC.; UNIVERSAL-POLYGRAM
INTERNATIONAL PUBLISHING, INC.; RONDOR MUSIC
INTERNATIONAL, INC.; UNIVERSAL MUSIC--MGB NA LLC;
UNIVERSAL MUSIC--Z TUNES LLC; UNIVERSAL MUSIC--MBG
MUSIC PUBLISHING LTD.,

Plaintiffs-Appellants,

v.

VEOH NETWORKS, INC.,

Defendant-Appellee.

*On Appeal from The United States District Court
for the Central District of California, Western Division -- Los Angeles
Honorable A. Howard Matz, District Judge*

**BRIEF OF *AMICI CURIAE* THE RECORDING INDUSTRY
ASSOCIATION OF AMERICA, THE NATIONAL MUSIC
PUBLISHERS' ASSOCIATION, NBC UNIVERSAL INC., AND
THE AMERICAN FEDERATION OF MUSICIANS IN
SUPPORT OF PLAINTIFFS-APPELLANTS' APPEAL
SEEKING REVERSAL OF THE DISTRICT COURT'S
ORDERS**

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae the Recording Industry Association of America states that it has no ultimate parent company. *Amicus curiae* the National Music Publishers' Association states that it has no ultimate parent company. *Amicus curiae* NBC Universal Inc. is indirectly wholly owned by the General Electric Company, a publicly traded U. S. company, and Vivendi S.A., a publicly traded French company. *Amicus curiae* the American Federation of Musicians states that it has no ultimate parent company.

STATEMENT OF INTERESTS

Amici curiae, the Recording Industry Association of America (“RIAA”), the National Music Publishers’ Association (“NMPA”), and the American Federation of Musicians (“AFM”) represent thousands of members whose livelihoods or businesses depend upon effective copyright protection. NBC Universal Inc. (“NBC Universal”) is a leading media and entertainment company that similarly depends on effective copyright protection. RIAA, NMPA, AFM, and NBC Universal (“*Amici*”) are all involved in creating and making available to the American public a wide variety of copyrighted works -- musical performances and sound recordings, motion pictures, television programming, sports programming, and literary works. Defendant-Appellee Veoh’s website streams and distributes copyrighted works of the type belonging to each *amicus curiae*. *Amici* are harmed by Internet piracy similar to that which plagues the music industry Plaintiffs-Appellants and that the District Court, in its decision below, effectively permits to continue unabated on infringing User Generated Content and other file sharing websites like Veoh.

The decision below presents questions of first impression regarding the interpretation of the safe harbor provisions of the DMCA. *Amici* are concerned that the District Court’s novel and incorrect views of the Digital Millennium

Copyright Act (“DMCA”) will adversely affect their ability to protect copyrighted works in a digital environment.

The RIAA is the trade group representing the American recording industry. The RIAA’s record company members create, manufacture, and/or distribute the vast majority of all legitimate sound recordings produced and sold in the United States. The RIAA protects the intellectual property and First Amendment rights of artists and music labels and monitors and reviews state and federal laws, regulations and policies.

The NMPA is the principal trade association of music publishers in the United States and has over 2,500 members, which own or control the majority of musical compositions available for licensing in the United States. Its mission is to protect, promote, and advance the interests of music’s creators. The goal of the NMPA is to protect its members’ property rights on the legislative, litigation, and regulatory fronts.

NBC Universal is a leading media and entertainment company in the development, production, and marketing of entertainment, news, and information to a global audience. NBC Universal owns and operates news and entertainment networks, a motion picture company, television production operations and a television stations group.

The AFM is an international labor organization representing over 90,000 professional musicians in the United States and Canada. Musicians represented by the AFM record albums, movie sound tracks, television and radio programming, and commercials under industry-wide collective bargaining agreements negotiated by the AFM. The AFM works to ensure that musicians are adequately compensated for the sale or other exploitation of their recorded performances, and all phonograph and motion picture recording musicians receive some compensation tied to the sales of product recorded under AFM industry wide collective bargaining agreements. Because piracy of copyrighted works reduces sales and therefore reduces income for recording musicians, the AFM has a strong interest in the prevention of illegal copying and distribution of sound recordings.

SUMMARY OF ARGUMENT

The decision of the district court below fundamentally misinterprets the safe harbor provisions of Title II of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512. If upheld, the decision would effectively immunize broad categories of infringing conduct on so-called “user generated content” (“UGC”) sites and other file-sharing website businesses like that operated by defendant Veoh Networks, Inc. (“Veoh”), simply because they also happen to perform some storage functions. The amount of copyright infringement on website businesses like Veoh’s is staggering, and in the aggregate poses a major threat to legitimate interests of copyright holders. Congress intended to prevent precisely such harm to copyright holders when it enacted the DMCA.

By extending the safe harbors to infringing website businesses, the district court’s decision eliminates the DMCA’s careful balance between the protection of specified core Internet activities critical to the proper functioning of the Internet and the protection of copyright owners against the virtually unlimited infringement of their rights that the Internet uniquely makes possible. The decision of the court below would permit conduct on the Internet that would never be lawful in the non-Internet world, including conduct inimical to copyright owners’ basic rights, which Congress intended to protect.

This appeal raises issues of first impression at the appellate level regarding the scope of the safe harbor for “storage at the direction of a user,” Section 512(c). The district court’s decision threatens everyone lawfully involved in the creation or distribution of copyright-protected works such as music, film, sports broadcasts, television programming, magazines and books. The decision also threatens the development of the Internet itself as a vehicle to distribute lawful content to users worldwide.

The district court made two fundamental errors in interpreting the DMCA that will be addressed by *Amici*.¹ First, the district court incorrectly held that the safe harbor provisions protect operators of UGC and similar websites for activities that have been determined by other courts to constitute copyright infringement. Specifically, *Napster*, *Grokster* and their progeny held acts such as unauthorized file sharing and distribution of copyrighted works illegal. Nonetheless, the court below held that the DMCA safe harbors protect just such conduct by website operators who control and direct the performance and distribution of infringing works to content consumers. The safe harbors were never intended to protect such activities.

¹ The court below made multiple errors, but this brief will address only two of them.

Websites like Veoh act much as traditional broadcasting companies. Indeed, Veoh describes its business as “Internet Television Broadcasting” -- not storage. Content consumers indisputably comprise the audiences of such websites. The district court held that the safe harbor in Section 512(c) of the DMCA protects the operators of such website broadcasting businesses, even though that section applies only to claims of infringement “by reason of storage at the direction of a user.” The district court incorrectly applied this safe harbor to all of the infringing activities on these websites, solely because some of the activities include the storage of videos in a process ancillary to their primary business of streaming and distributing videos to consumers of content.

The district court’s application of the safe harbor to copying, streaming and distributing videos by website operators flies in the face of the plain meaning of the safe harbor provision and the earlier decision of this Court in *Perfect 10, Inc. v. CCBill LLC, et al.*, 488 F.3d 1102 (9th Cir. 2007). The safe harbor provisions protect only specified functions and not online activities generally. Section 512(n) of the DMCA explicitly provides that each activity of a service provider must be separately evaluated for protection under a safe harbor. As this Court held in *CCBill*, even if the safe harbor provisions protect some functions of a service provider, they do not protect the “performance of other business services.” 488 F.3d at 1117. In *CCBill*, where certain functions performed by the defendant

arguably came within a safe harbor, this Court nevertheless denied application of the safe harbor provisions because “the majority of CCBill’s functions would remain outside of the safe harbor. . . .” *Id.*

As in *CCBill*, a website operator’s inclusion of a storage function does not immunize infringement by reason of other activities on the website. Safe harbors for service providers accommodating the unique technical attributes of the Internet are necessary only when copying is required in the operation of specified core Internet functions. And only then do the safe harbors not expose copyright owners to the same risks of infringing activities faced in the offline world.

By contrast, where the alleged infringement arises by reason of activities by a service provider other than the specified core functions -- such as streaming or distributing a copyrighted work to an audience of content consumers -- application of the safe harbor disregards the plain meaning of the statute and also turns the legislative balance on its head. Providing a safe harbor for such activity is unnecessary to the functioning of the Internet infrastructure and would be antithetical to the most fundamental rights of copyright owners under the Copyright Act.

Second, the court below erred by critically misconstruing the important exception to the safe harbor where a service provider 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). Contradicting 50 years of judicial interpretation of that same language in the context of the vicarious liability doctrine under copyright law, the lower court held that a service provider that receives a direct financial benefit from infringing activity does not need to take reasonable steps within its control to limit the infringing activity. The court based this ruling in part on a never before interpreted provision of the DMCA, entitled “Protection of privacy” (17 U.S.C. § 512(m)). This provision was not intended to apply to website operators or others in the position to control and benefit directly from infringing activity. Specifically, the district court incorrectly held that Section 512(m) means that a service provider has no obligation to investigate facts or monitor its website, even where it directly profits from infringing activity and reasonable efforts by it could prevent infringement.

The lower court’s decision nullifies Section 512(c)(1)(B) and brings into the safe harbor service providers who can control infringing activity from which they directly benefit. By removing this exception, the district court fundamentally upset the balance of responsibility that Congress adopted for controlling infringing conduct on such websites. The lower court’s decision effectively requires actual or constructive knowledge of specific infringements before protection under the safe harbor is lost, circumstances already addressed in a separate exception to the safe

harbor. This decision would encourage service providers not to take reasonably available steps within their control to uncover or limit infringing activity because knowledge gained through such steps might subject them to a risk of liability. Equally fundamental, this shifting to content owners of responsibility for controlling infringing activity on websites would adversely affect the economics and effectiveness of efforts to reduce infringing activity on the Internet.

Under the DMCA, correctly interpreted, a service provider with the right and ability to control infringing activity, and that directly profits from that activity, must at a minimum take reasonable precautions available to it to limit infringing activity to avoid liability. Removing that responsibility for controlling infringement makes no sense. A website operator who reaps financial benefits from infringing activity and who has the ability to control it is plainly the party in the best position -- and in many cases the only party in a position -- to know the sources of infringement on its website, to understand its technology and how that technology might be used to support or prevent infringing activity, and to adopt reasonably available technologies or other approaches to limit infringement on its website. Copyright owners are not in the same position to control infringement.

The district court improperly attempted to fit the activities of Veoh and similar websites into a DMCA safe harbor shoe that does not fit. Only by straining and twisting the actual words of the statute, the meaning behind those words as

expressed by Congress, and the prior holdings of this Court could the court confer immunity on websites like Veoh. If this interpretation were to stand, it would severely harm content owners everywhere and thereby seriously impede the growth of the Internet as a way for consumers legitimately to obtain content they seek.

ARGUMENT

I. CONGRESS INTENDED THE SAFE HARBOR PROVISIONS TO STRIKE AN APPROPRIATE BALANCE BY PROTECTING BOTH CORE ACTIVITIES UNIQUE TO INTERNET OPERATIONS AND COPYRIGHT OWNERS FACING UNPRECEDENTED PIRACY ON THE INTERNET

The DMCA safe harbors (17 U.S.C. § 512(a)-(d)) and legislative history balance the support of infrastructure activities necessary to the Internet and the protection of the interests of copyright owners. The court below cited to the legislative history of the DMCA, but misapplied that legislative history in interpreting the scope of the safe harbor provisions. The district court acknowledged that the safe harbors are based on a balance between the needs of technology providers and copyright holders. The district court misunderstood, however, the balance adopted by Congress and the important distinction upon which that balance rests. Specifically, the safe harbor provisions distinguish between certain core technologies critical to the functioning of the Internet and all other activities on the Internet. By misunderstanding this fundamental distinction and the resulting legislative balance, the district court immunized infringing activities consistently held to violate fundamental rights of copyright holders both online and offline.

In enacting the DMCA, Congress recognized that, unlike the offline world of “brick and mortar” businesses, unique attributes of core Internet technologies require the creation of copies of data in the course of enabling routine operations.

In the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability. For example, service providers must make innumerable electronic copies by simply transmitting information over the Internet. Certain electronic copies are made to speed up the delivery of information to users. Other electronic copies are made in order to host World Wide Web sites.

S. Rep. No. 105-190, at 8 (1998) (emphasis added).

Congress further recognized that the Internet poses unprecedented risks to copyright owners -- copying and distribution on the Internet is virtually cost free, immediate and unlimited in scope. An Internet without adequate copyright protections could destroy, almost immediately, the value of copyrighted works and, indeed, could eliminate entire industries that depend on copyright protection. *Id.* (“digital works can be copied and distributed worldwide virtually instantaneously”).

In balancing these interests, Congress created the “safe harbors” for service providers, but only for specified unique Internet technologies or activities and even then only if other conditions are met. Protection for service providers was thus limited to claims of copyright infringement “by reason of” the performance of particular core functions -- specifically, those that are critical to the operation of

the Internet, including transmission, routing, caching or storage of data at the direction of another. These infrastructure activities represent what the legislative history variously refers to as the “passive, automatic acts engaged in through a technological process initiated by another,” “stor[age] through an automatic technical process,” and “providing server space for a user’s web site” operated by another. *See* H.R. Rep. No. 105-551, pt.1, at 11 (1998) (emphasis added); H.R. Rep. No. 105-551, pt. 2, at 52 (1998) (emphasis added); S. Rep. No. 105-190 (1998), at 43 (emphasis added), respectively. As stated in *Columbia Pictures Indus., Inc. v. Fung, et al.*, CV 06-5578 SVW(JCx), 2009 U.S. Dist. LEXIS 122661 at *61 n.26, (C.D. Cal. December 21, 2009), the DMCA safe harbors apply to “passive transmission or storage of infringing materials.”

Under this balancing approach, the DMCA safe harbors do not immunize entities simply because they meet the definition of a service provider. Congress did not intend the DMCA to be some sort of “protection at all costs” or blanket immunity for service providers. The safe harbors instead apply only “for certain common activities of service providers. A service provider which qualifies for a safe harbor, receives the benefit of limited liability.” S. Rep. No. 105-190, at 19 (1998) (emphasis added).

By defining safe harbors for specified activities under particular conditions, Congress gave service providers “clarification of their liability” so that they would

be better informed about what functions were protected, and, by exclusion, which activities could subject them to liability. *See* S. Rep. No. 105-190, at 8 (1998). Indeed, Congress considered the very act of clarifying the boundaries of safe harbor protections, even though limited, as conferring an important benefit, since without such clarification, “service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet.” *Id.* As one of the drafters of the legislation summarized the balance and clarification of rights reflected in the DMCA:

These provisions set forth “safe harbors” from liability for ISP’s and OSP’s under clearly defined circumstances, which both encourage responsible behavior and protect important intellectual property rights.

See S. Rep. No. 105-190, at 67 (1998) (“Additional Views of Mr. Leahy”) (emphasis added).

This legislative history demonstrates that the safe harbor provisions do not protect operators of websites who control the copying and distribution of materials on their websites for their own benefit, in contrast to providers of unique infrastructure technologies necessary to the functioning of the Internet. This distinction is compelling. The Internet functions specified in the safe harbor provisions generally are performed by passive technologies that are content neutral and lack recognition of or control over the content transmitted through the use of the technologies. The business conducted by most website operators, by contrast,

does not provide core technology for the functioning of the Internet and is not unique at all to the Internet. Instead, the conduct of these website businesses is very much like the conduct of offline businesses. Such website operators design and operate services according to their particular business model, exercise control over the activities on those services, and directly profit from those activities.² Importantly, such website operators are the best and fairest cost avoiders for their infringing activities.

The fundamental distinction between “background” technology functions specified in the safe harbors, and “foreground” businesses using such core technologies, like many UGC websites, is central to a proper interpretation of the DMCA. As explained below, the district court failed to make this distinction and, as a result, misapplied the safe harbor for storage at the direction of a user, applying it to common website activities that copied, performed and distributed infringing content.

² For example, when discussing what notice of infringement to service providers may be required under the DMCA’s safe harbor provisions, the legislative record describes a hypothetical involving “an unauthorized Internet jukebox from a particular site.” S. Rep. No. 105-190, at 46 (1998). The hypothetical discusses the level of notice that the service provider host of the jukebox site might be entitled to receive, but does not discuss or contemplate the operator of the “unauthorized Internet jukebox” website as being entitled to any notice under, or protection by, the DMCA.

II. LIKE OTHER USER GENERATED CONTENT WEBSITES, THE PRIMARY ACTIVITY ON VEOH'S WEBSITE IS VIEWING AND DOWNLOADING CONTENT; STORAGE IS MERELY ANCILLARY TO THIS PRIMARY BUSINESS

Veoh's business is the same as that conducted on many UGC and other file sharing websites on the Internet. The primary activity on these sites is streaming and distributing content. Neither the district court opinion nor Veoh's website ever describes Veoh's business as "storage." On Veoh's "Internet Television," storage is merely an ancillary activity to support the performance and distribution of copyrighted works. [RE 2055.]

As the court below explained: "Veoh's services allow users to view and share videos with anyone who has an internet connection." *UMG Recordings, Inc., et al. v. Veoh Networks, Inc., et al.*, 665 F. Supp. 2d 1099, 1101 (C.D. Cal. 2009) (emphasis added). "If a user wishes to share a video, he can transfer it to Veoh's system. When a different user learns that the uploaded video is accessible -- perhaps by searching for key terms in the video's description, or following a hyperlink -- he can view it on his own computer." *UMG Recordings, Inc., et al. v. Veoh Networks, Inc., et al.*, 620 F. Supp. 1081, 1083 (C.D. Cal. 2008) (citations omitted) (emphasis added).

Veoh fully participates in this copying by designing and operating a website upon which Veoh makes copies of the content in special formats to stream and download. Veoh promotes, categorizes and indexes the content. And Veoh

encourages and assists users to view and download content through the simple click of an icon. Like many other UGC websites, Veoh is neither a passive or content-neutral provider of core infrastructure technology, nor is storage its primary business or ‘majority of functions.’ *CCBill*, 488 F.3d at 1117.

Unlike the technologies Congress had in mind in enacting the DMCA, the business of Veoh and similar websites is in substantial respects like any offline media business. Their users are consumers of content and the business of these websites depends on promoting content to those consumers. According to the court below, “[l]ike many internet businesses, Veoh’s plan has been to ‘build or create an audience’ and then ‘subsequently . . . turn that into a revenue stream’ through advertising Consequently, Veoh’s executives concluded that having a wide range of content on its system would be important to its success.” *Veoh*, 665 F. Supp. 2d at 1102 (citations omitted) (emphasis added).

The content on Veoh’s website includes television programs, movies, sports telecasts, and music videos, either available for streaming in their full lengths or highlights, depending on the actions of the uploaders. The court below observed that UGC websites like Veoh commonly include pirated content. *Veoh*, 665 F. Supp. 2d at 1111. The major difference between Veoh and other media companies is simply that Veoh broadcasts from a website rather than through other technology

platforms. In addition, Veoh does not pay for its content, unlike other media companies that are forced to compete against Veoh.

III. DMCA SAFE HARBOR PROTECTION UNDER SECTION 512(c) IS NOT TRIGGERED WHERE THE INFRINGING ACTIVITY IS NOT “BY REASON OF STORAGE AT THE DIRECTION OF A USER”

The DMCA safe harbors do not protect copyright infringement by websites whose business is file sharing, streaming, and distributing copyrighted content. Courts have consistently held such activities represent garden variety copyright infringement, including in *Napster*, *Grokster* and their progeny. While alternative tests reasonably might be applied to determine when activities go beyond the safe harbors, unauthorized file sharing and streaming websites like Veoh’s plainly go far beyond safe harbor protection under any test. Infringement on such sites is by reason of non-storage activities. The “predominant” and “primary” services on such sites are streaming and downloading, not storage. And the ‘majority of functions’ performed on such sites have nothing to do with the core technologies specified in the DMCA’s safe harbor provisions. *See CCBill*, 488 F.3d at 1116-17 (denying safe harbor treatment where the “majority of CCBill’s functions would remain outside of the safe harbor”). Such website businesses are not shielded from liability under the DMCA.

A. The DMCA “Safe Harbors” Apply Only Where Liability Is Based Upon The Performance of Specified Core Functions By Service Providers

A service provider may claim safe harbor protection under the DMCA for four and only four functions (and assuming it meets other conditions). For each of these activities, the structure of the safe harbor provision is the same.

Each “safe harbor” begins: “A service provider shall not be liable . . . for infringement of copyright by reason of . . .”.³ Each “safe harbor” then continues with a description of the specific activity potentially protected:

Section 512(a): “the provider’s transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections”;

Section 512(b)(1): “the intermediate and temporary storage” by or for the service provider under certain circumstances;

Section 512(c)(1): “the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider”; and

Section 512(d): “the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link”

³ 17 U.S.C. § 512(a), (b)(1), (c)(1), and (d) (emphasis added).

If a plaintiff seeks to hold a service provider liable “by reason of” one of these four core Internet functions, then, and only then, might the DMCA safe harbors apply. However, if a copyright claim arises “by reason of” some other function, the DMCA does not apply at all -- even if the defendant satisfies the definition of a “service provider” and performs one or more safe harbor functions.

Under that circumstance, whether or not a defendant is liable for infringement, the DMCA does not play a role in the analysis. Rather, traditional copyright principles apply. *See* 17 U.S.C. § 512(l). As Congress put it:

Even if a service provider’s activities fall outside the limitations on liability specified in the bill, the service provider is not necessarily an infringer; liability in these circumstances would be adjudicated based on the doctrines of direct, vicarious or contributory liability for infringement as they are articulated in the Copyright Act and in the court decisions interpreting and applying that statute, which are unchanged by section 512. In the event that a service provider does not qualify for the limitation on liability, it still may claim all of the defenses available to it under current law. New section 512 simply defines the circumstances under which a service provider, as defined in this Section, may enjoy a limitation on liability for copyright infringement.

S. Rep. No. 105-190, at 55 (1998).

The application of the safe harbor provisions, including in the specific context where a service provider performs multiple functions, is not new to this Court. In *CCBill*, the defendant service provider operated a linking and payment service in which consumers could use *CCBill* as a portal to access many other

websites that displayed infringing material. As this Court noted, the initial question posed by the DMCA was whether the basis for liability alleged against *CCBill* was “by reason of” one of the four core activities. *CCBill*, 488 F.3d at 1116.

The Court concluded that the plaintiff’s claim was not for infringement “by reason of” any hyperlink. Instead, the action was predicated on “infringement through *CCBill*’s performance of other business services for the[] websites.” *Id.* at 1117 (emphasis added). “Even if the hyperlink provided by *CCBill* could be viewed as an ‘information location tool,’ the majority of *CCBill*’s functions would remain outside of the safe harbor. . . .” *Id.* at 1116-17 (emphasis added).

Because the basis for the alleged infringement was not “by reason of” *CCBill*’s performing the function specified in the safe harbor (*i.e.*, “referring or linking users to an online location”), the safe harbor provision did not apply at all. This Court summed up the conclusion succinctly: “Even if *CCBill*’s provision of a hyperlink is immune under § 512(n), *CCBill* does not receive blanket immunity for its other services.” *Id.* (emphasis added).

B. Liability For Websites Like Veoh Arise From Activities Other Than Storage of Infringing Material At the Direction of A User

The safe harbors do not apply when the alleged liability arises by reason of a function that is not one of the four safe harbor functions. Under such circumstances, the infringing activity injures a copyright holder in the same

manner as when content is pirated in non-Internet contexts, and such activity is unnecessary to the functioning of the Internet. For websites such as Veoh, which stream and download content for free to anyone who wants it, the infringing activity serves purposes far beyond the safe harbor functions. The business model and activities of such websites are based on the performance and distribution of works of authorship -- not storage. These are impermissible under the copyright law, and it would turn copyright law upside down to allow infringement for such purposes to immunize website operations, as the district court here held.

Like other UGC websites, Veoh -- acting as a website operator -- accepts content provided to it by third parties. It is the website operator that then copies the videos to facilitate streaming and downloading (*e.g.*, like Veoh's creating "Flash" and "chunk" copies), implicating the exclusive right of reproduction of a copyrighted work (Section 106(1)), and makes those copies available to the public at large to view, implicating the exclusive rights of distribution, public performance and display of a copyrighted work (Sections 106(3)-(5)), at any time from their own computers.

The website operator designs the system and specific program functions and operates the website to serve its business model. The website operator also writes the specific computer program code for these activities, including the code that

permits the public at large to view from their own computers the videos or to download entire copies of the videos to any computer at the click of a button.

The website operator further establishes the terms and conditions for use of its website, and those terms and conditions govern both those who provide the videos for display and copying and those who visit the site to watch and download the videos. It is likewise the website operator that advertises its site as a place for the public to come to stream and download videos, and the website operator that typically sells (and profits from) advertising space on the same pages from which the videos are streamed and copied.

The alleged infringement in this case is not “by reason of” Veoh’s acts relating to the provision of server storage space for users. Rather, the claim for infringement here is “by reason of” Veoh’s broadcasting activities -- the streaming and distribution of content for free to content consumers.

Perhaps the clearest way to illustrate that the basis for Veoh’s liability does not arise “by reason of the storage” is to consider whether the basis for liability would have been any different if the infringing material had not been stored by Veoh at all. Assume that, rather than Veoh owning servers to which users would upload videos, the users never uploaded material at all. Instead, assume that users offered videos for use on the Veoh website, keeping the files on their own hard-drives, but permitting Veoh to access those hard-drives remotely to obtain the

video files. Veoh could then access those videos, make the necessary “Flash” and “chunk” file copies it uses to stream and provide for download on Veoh.com, but Veoh would not be “storing” files for anyone.

Under this scenario, the theory of liability would effectively be the same. Veoh would be liable for copyright infringement resulting from its making the Flash and chunk copies, streaming the videos on the website (implicating the distribution, public performance and display rights), and providing a download button for users (implicating distribution rights). None of these activities could be “by reason of storage” in the hypothetical, since no “storage” occurred. Similarly, the activities are not “by reason of storage” under the actual facts of cases like this one, because they are activities in addition to and distinct from any “storage” that Veoh provided.⁴

The claims of infringement in this case are based on infringing activities by reason of a website operator’s broadcasting business -- which provides free streaming and free downloads to anyone in the world who wants them -- and not

⁴ Congress explained that, when Section 512(c)(1) refers to “by reason of the storage” of material, “[e]xamples of such storage include providing server space for a user’s web site, for a chatroom, or other forum in which material may be posted at the direction of users.” S. Rep. No. 105-190, at 43 (1998). The statute was not intended to protect the third parties who operate an infringing website using those servers, nor does it protect a webhosting company if it is the one that also operates an infringing website. *Cf. CCBill*, 488 F.3d at 1116-17; *see also* n.2, *supra*.

by reason of any ancillary storage activities on Veoh's site. As a result, there is no basis for application of the DMCA safe harbors.

IV. THE DISTRICT COURT MISINTERPRETED THE “RIGHT AND ABILITY TO CONTROL” PROVISIONS OF THE DMCA

Section 512(c)(1)(B) provides that a service provider can only secure the benefit of the safe harbor if it “does not receive 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.” The language of this exception to the safe harbor mirrors the language of the common law doctrine of vicarious liability under copyright law. In holding that the same language has the same meaning in both contexts, this Court reasoned in *CCBill* that it is a “well-established rule of construction that where 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 these terms.” *CCBill*, 488 F.3d at 1117 (quoting earlier Supreme Court authority).⁵

Despite this Court's holding in *CCBill*, the district court rejected this construction of the safe harbor exception and concluded that the exception in fact means the opposite of what the same language means under the common law

⁵ *CCBill* specifically addressed the language in the first part of the clause, “does not receive a financial benefit directly attributable to the infringing activity.” *Id.* at 1118.

doctrine. According to the court below, a service provider can have no duty to take reasonable steps available to it to prevent infringing activity -- even where it has the right and actual ability to control the infringing activity and secures a direct financial benefit from it (unless the requirements of the separate safe harbor exception found in Section 512(c)(1)(A) are met). The court below effectively nullifies this important exception to the safe harbor.

The district court decision is wrong and represents dangerous precedent, potentially creating immunity for those who reasonably could prevent infringing activity more fairly, effectively and at a far lesser cost than copyright holders. The decision below thus eliminates the balance of interests between technology and content companies underlying the safe harbor provisions of the DMCA.

Until the decision below, during over five decades of copyright law, the language “right and ability to control” meant that a party with the right to control activity must take steps reasonably necessary and available to it to avoid copyright infringement. *See Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307-08 (2d Cir. 1963) (department store concessionaires); *Polygram Int’l Publ’g, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1328-1330 (D. Mass 1994) (COMDEX trade show). In the leading decision in this Circuit, *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996), the Court found sufficient to support a claim of vicarious liability allegations that swap meet operators “had the

right to terminate vendors for any reason whatsoever and through that right had the ability to control the activities of vendors on the premises.”

The same principles are applied in an online context. In *Napster*, this Court found a right and ability to control where a file sharing service reserved the right to refuse or terminate service. The Court held that “the reserved right to police must be exercised to the fullest extent,” including the use of reasonably available search functionality. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023-24 (9th Cir. 2001) (emphasis added).

Similarly, in *Perfect 10 v. Cybernet*, the court ruled that a portal website had the ability to control third party websites, explaining:

Cybernet, like the swap meet in *Fonovisa*, not only has the right to terminate webmasters at will, it controls consumer access, and promotes its services. [Citation omitted.] Combined with its detailed policing of sites, these activities are sufficient to establish ... the right and ability to control participating websites.

Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1174 (C.D. Cal. 2002).

In all of these cases -- which concern conduct both online and offline -- the courts specifically found that the ability to police those using premises or online systems controlled by the defendant established the requisite “right and ability to control.” As stated by Judge Keeton in *Polygram*, quoting from the House Report in adopting the Copyright Act of 1976: “That is, defendants are found to have

‘control’ over a performance if they ‘either actively operate or supervise the operation of the place wherein the performances occur, or control the content of the infringing program.’ *Polygram*, 855 F. Supp. at 1328 (quoting H.R. Rep. No. 94-1476, at 158-60 (1976)) (emphasis, in part, in original).

If the decision below is upheld, it would topple established principles governing liability for infringing activity, at least as applied to the Internet. The decision would allow infringing businesses to operate with impunity on the Internet when the same business model would be unlawful as conducted offline.

The district court based its erroneous ruling on a misinterpretation of Section 512(m), illogical statutory construction, and a misreading of the legislative history of the safe harbor. First, the court held that Section 512(m) requires courts to ignore “the availability of superior filtering systems or the ability to search for potentially infringing files. . . .” *Veoh*, 665 F. Supp. 2d at 1113.

Section 512(m), however, states only that “[n]othing in this section shall be construed to condition the applicability of subsections (a) through (d) on . . . a service provider monitoring its service or affirmatively seeking facts indicating infringing activity. . . .” Section 512(m) does not state, as the district court found, that the DMCA should be read as never requiring a website operator to monitor activity or affirmatively to seek facts indicating infringing activity. Section 512(m) only precludes an interpretation of the safe harbor exceptions that would

“condition” the application of the safe harbors on monitoring. 17 U.S.C. § 512(m).

The vicarious liability exception does not condition the availability of the safe harbor on monitoring or investigation. The vicarious liability exception can be invoked only when more is proven: specifically, the exception to the safe harbor requires that the infringing activity be a direct financial benefit to the service provider and that the service provider has an actual ability to control the infringing activity (which may sometimes be through monitoring or investigation, depending on the facts). Only then does the service provider have a duty reasonably to do those things within its ability to control the infringing activity.⁶

Second, the district court’s consideration of the legislative history of Section 512(c)(1)(B) was flawed. When the vicarious liability language first appeared in an earlier version of the DMCA, Congress expressly stated that “[t]he ‘right and ability to control’ language . . . codifies the second element of vicarious liability.” H.R. Rep. No. 105-551, pt.1, at 26 (1998). As the language of the DMCA went through revisions, one thing remained constant: Congress continued

⁶ The title of Section 512(m), “Protection of privacy,” and related legislative history support the same conclusion. The intention underlying subsection m was merely to confirm that website hosting and similar services do not need to monitor the websites or other content belonging to third parties using their service, thus potentially violating their rights of privacy, in order to take advantage of the safe harbors. *See* S. Rep. 105-190, at 55 (construing earlier version of Subsection (m)); Debra Weinstein, *Defining Expeditious: Uncharted Territory of the DMCA Safe Harbor Provision*, 26 *Cardozo Arts & Ent. L.J.* 589, 598 (2008).

to use the common law vicarious liability language to define the exception to the safe harbor provisions. *Compare* 17 U.S.C. 512 § 512(c)(1)(B); *with* H.R. Rep. No. 105-551, pt.1, at 8 (1998).

In one of the reports discussing the near-final version of the DMCA, cited by the court below, Congress reconfirmed that the exceptions to the safe harbor were intended to incorporate the vicarious liability standards through the following language: “Rather than embarking upon a wholesale clarification of these [vicarious and contributory liability] doctrines, the Committee has decided to leave current law in its evolving state and, instead, create a series of safe harbors” S. Rep. No. 105-190, at 19 (1998) (emphasis added). The district court viewed this language as expressing “an intent to depart from the common law standards.” *Veoh*, 665 F. Supp. 2d at 1115. To the contrary, this language most logically means that Congress intended to adopt the common law language to incorporate that standard and allow it to continue to evolve. If the district court were correct that Section 512(c)(1)(B) is not a statement of the common law vicarious liability standard, Congress not only did not achieve its goal of clarity in adopting the safe harbors, but it actually created more confusion than existed before the DMCA.

Third, as a matter of statutory construction, the district court incorrectly concluded that using the common law standard would nullify the safe harbor. The district court opined that this standard required only an ability to block access to

infringing material, which the court stated any service provider can do by definition.

The district court's reasoning was flawed because the exception to the safe harbor requires that the service provider directly benefit from the infringing activity. The "right and ability to control" infringing activity is not enough to lose safe harbor protection under this exception. It is only those service providers who directly profit from the infringing activity that may have a responsibility to take reasonable steps available to them to control it. This is fully consistent with the common law which Congress intended to leave intact.

CONCLUSION

Congress did not intend the DMCA safe harbor provisions to immunize website operators so that they could freely stream and distribute videos of copyrighted works on the Internet without authorization from the copyright owner. The decision of the court below therefore should be reversed.

Dated: April 27, 2010

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 6,888 words.

DATED this 27th day of April, 2010.

By: /s/ Emilia P. E. Morris

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First- Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following non-CM/ECF participants:

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