

21-2949(L)

IN THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

CAPITOL RECORDS, LLC, a Delaware Limited Liability Company, CAROLINE RECORDS, INC., a New York Corporation, VIRGIN RECORDS AMERICA, INC., a California Corporation, EMI BLACKWOOD MUSIC INC., a Connecticut Corporation, EMI APRIL MUSIC INC., a Connecticut Corporation, EMI VIRGIN MUSIC, INC., a New York Corporation, COLGEMS-EMI MUSIC, INC., a Delaware Corporation, EMI VIRGIN SONGS, INC., a New York Corporation, EMI GOLD HORIZON MUSIC CORP., a New York Corporation, EMI UNART CATALOG INC., a New York Corporation, STONE DIAMOND MUSIC CORPORATION, a Michigan Corporation, EMI U CATALOG INC., a New York Corporation, JOBETE MUSIC CO., INC., a Michigan Corporation,
Plaintiffs-Appellants,

v.

VIMEO, INC., a Delaware Limited Liability company, AKA VIMEO.COM,
CONNECTED VENTURES, LLC, a Delaware Limited Liability Company,
Defendants-Appellees,

DOES, 1-20 INCLUSIVE,

Defendants.

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

BRIEF OF *AMICI CURIAE* INTELLECTUAL PROPERTY SCHOLARS IN
SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* Intellectual Property Scholars each state that they are individuals.

Dated July 14, 2022

By: /s/ Rebecca Tushnet
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INTEREST OF *AMICI CURIAE*¹

Amici curiae are intellectual property scholars (listed in Appendix A) who write and teach about copyright law. *Amici* have no personal interest in this case; their interest is to ensure the proper application of copyright law, specifically Section 512 of the Digital Millennium Copyright Act, to user-generated content online.

SUMMARY OF ARGUMENT

Section 512(c) of the Digital Millennium Copyright Act, as this Court has previously and correctly interpreted it, reflects at its core a compromise: If service providers act in response to statutorily defined notices received from copyright owners about claimed infringement by third-party content on their servers, they gain a safe harbor from liability for copyright infringement, both direct and secondary. Outside of this process, providers are entitled to a safe harbor from liability if they expeditiously remove material after gaining actual or constructive knowledge that it is infringing.

Because the “notice and takedown” procedure is the centerpiece of the

¹ Pursuant to Fed. R. App. P. 29(c)(5) and Local Rule 29.1(b), amici certify that no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money intended to fund preparing or submitting the brief; and no person other than amici contributed money intended to fund preparing or submitting the brief. The parties have consented to the filing of this brief.

statute, it is not surprising that few factual scenarios give rise to a finding of actual or constructive knowledge of infringement. These situations are, as this Court has held, properly limited to instances in which the service provider, through its employees, gains actual knowledge of the infringing nature of the material or has reason to know that the material is indeed infringing. This requires not simply an awareness of the existence of the material but knowledge of its infringing nature. Given the complexity of copyright infringement determinations—and the existence of licensing and fair use—such knowledge is highly unusual, and the statute does not assume otherwise.

For similar reasons, Section 512’s provision that a provider is not entitled to these safe harbors if it has the “right and ability to control” infringement (in a situation where it receives a financial benefit directly attributable to the infringing activity) must not be equated to ordinary content moderation activities. It would be especially perverse to take a service provider’s voluntary screening and removal of certain material, because of the potential risk of infringement it poses, as reason to hold it liable for anything it missed. Indeed, to do so would directly contravene the principle established by this Court that liability cannot be based on mere awareness of material that is later deemed infringing. Instead, “right and ability to control” should be read according to its roots in *respondeat superior*, that is, as something more like an agency relationship than a user-hosting provider

relationship.

ARGUMENT

I. THE NOTICE PROVISION OF SECTION 512(c) IS THE CENTERPIECE OF THE STATUTE BY DESIGN.

Section 512(c) of the Digital Millennium Copyright Act of 1998 (“DMCA”) reflects a carefully crafted compromise limiting liability for service providers. Section 1201 formed the other half of the legislative bargain that led to the DMCA and focuses on enhancing copyright holders’ ability to protect their copyrighted works.² Section 512, by contrast, provides service providers with a robust safe harbor in instances of infringement initiated by users.

Section 512(c) specifically creates a safe harbor for service providers for material that is stored on the provider’s servers “at the direction of a user” of a

² Compare S. Rep. No. 105-190, at 12 (1998) (“Section 1201(b)(1) is designed to protect the traditional copyright rights of the copyright owner.”) *with id.* at 8 (“[B]y limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.”). This balance—Section 512 on one side, Section 1201 on the other—was the result of a legislative compromise between stakeholders. See Jessica Litman, *Digital Copyright* 115 (2006); *The Digital Millennium Copyright Act at 22: Hearing Before the S. Comm. on the Judiciary Subcomm. On Intell. Prop.*, 116th Cong. 6 (2020) (statement of Jonathan Band PLLC), at https://www.judiciary.senate.gov/imo/media/doc/Band_Testimony.pdf (“Chairman Hatch, in a bold legislative move, merged the two bills into one. He calculated that the entertainment industry would be willing to accept [Section 512] in exchange for [Section 1201]. This calculation proved correct.”).

service—that is, material that a user posts to the platform, rather than material posted by the provider itself. The centerpiece of Section 512 is what has become known as a “notice and takedown” procedure. Under this procedure, a provider who receives a notification of claimed infringement that complies with the statute must expeditiously remove or disable access to the material that the notification claims to be infringing. The provider must also take reasonable steps “promptly to notify the subscriber that it has removed or disabled access to the material” and replace the challenged material within ten to fourteen days of receipt of a counternotification unless the copyright owner has filed an action seeking an injunction against the user. 17 U.S.C. § 512(g)(2).

This structure was by design. Congress was attempting to respond to the concerns of copyright owners about the unauthorized use of protected material on the Internet. But, just as important, Congress recognized that the sheer amount of user-generated content would make it impossible for any provider to accurately or efficiently assess any individual copyright claim. Congress was careful to avoid drafting service providers as private arbiters of copyright cases, especially given difficult questions of ownership and infringement that were likely to arise. *See* 17 U.S.C. § 512(m) (clarifying that there is no general monitoring obligation). Providers, especially smaller providers, simply lack the resources and information necessary to conduct a legal and factual analysis of the claims they receive. *See*,

e.g., Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown in Everyday Practice* 3 (2016) (reporting on large-scale study of multiple providers).

As a result, Section 512 was designed to be largely transactional and claimant-driven. In particular, Sections 512(c)(1)(C) and 512(g) call on the service provider to facilitate the exchange of notifications between a party claiming infringement and the alleged infringer, and to take down material claimed to be infringing (and to replace material that is the subject of a counternotification). By design, these subsections do not ask the provider to make any decisions about the legal status of the material. They create a safe harbor from liability for any “good faith disabling of access to, or removal of, material or activity claimed to be infringing” (regardless of whether the material is ultimately determined to be infringing), so long as the provider notifies the user and responds to any counternotifications as the statute directs; moreover, they do not require the provider to conduct any investigation of the claims in a notice it receives. *See* 17 U.S.C. § 512 (g)(1); *id.* § 512(m) (“Nothing 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, except to the extent consistent with a standard technical measure [used by a copyright owner] complying with the provisions of subsection (i).”).

Congress expressly recognized that notices might be mistaken or overreaching and included both a put-back procedure in Section 512(g) and a cause of action for bad faith notices in Section 512(f). These provisions further confirm that Congress designed a safe harbor system that would not require service providers to evaluate content included in a notice to determine whether it is infringing. If a user files a counternotification, and a dispute remains after the material is restored, the statute provides that parties should seek resolution from a court. 17 U.S.C. § 512(g)(2)(C).

This means that providers have no obligation under the DMCA to proactively search for infringing activity by users on their servers. A provider cannot put its head in the sand and ignore “facts or circumstances from which infringing activity is apparent,” 17 U.S.C. § 512(c)(1)(A)(ii), and if it does gain actual knowledge through some means other than through the notice it must take action, but it is not required to engage in efforts to discover such facts or circumstances. *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 98 (2d Cir. 2016) (“[W]e can see no reason to construe the statute as vitiating the protection of § 512(m) and requiring investigation merely because the service provider learns facts raising a *suspicion* of infringement (as opposed to facts making infringement *obvious*). Protecting service providers from the expense of monitoring was an important part of the compromise embodied in the safe harbor.”).

II. SECTION 512 MAKES CLEAR THAT NOTICE OR AWARENESS OF USER-PROVIDED CONTENT IS NOT THE EQUIVALENT OF KNOWLEDGE OF INFRINGEMENT.

Importantly, as indicated by the structure of Section 512, a provider who receives a notice under Section 512(c)(1)(C) does not thereby automatically gain knowledge of infringement pursuant to Section 512(c)(1)(A)(i) or (ii). If a notice equaled actual or constructive knowledge of infringement under the statute, a provider seeking to claim the safe harbor of Section 512(c)(1)(A)(iii) would be obligated, upon receiving a notice, to remove the material and *keep it down* in order to avail itself of the safe harbor. *See* 17 U.S.C. § 512(c)(1)(A)(iii) (requiring the provider to act “expeditiously to remove, or disable access to, the material”). This would contravene the procedures of Section 512(g)(2), which provide for notice to the user and replacement of the material upon receipt of a compliant counternotification. Accordingly, under the statute, a compliant notice creates a reason to act on a claim of infringement, but not a reason to *know* that the targeted material is infringing.³

³ Congress distinguished material that “*is* infringing,” § 512(c)(1)(A)(i), from material identified in a valid notice that is “*claimed to be* infringing” and should be taken down under § 512(c)(1)(C) (emphases added). If it were otherwise, there would be no reason for Congress to have included Section 512(c)(1)(C)’s removal requirement at all: The provider would already be obligated to remove the material under Section 512(c)(1)(A)(iii) to claim the safe harbor, because a valid notice would give it actual knowledge. But Congress made a different choice. It created a path for a provider to claim the safe harbor once the provider has actual or

Case law and commentary support this reading of the statutory language. *CoStar Grp., Inc. v. LoopNet, Inc.*, 164 F. Supp. 2d 688, 707 (D. Md. 2001) (noting that notice under Section 512 “[does not] automatically equate to knowledge for the purpose of assessing liability”), *aff’d*, 373 F.3d 544 (4th Cir. 2004). *Cf.* Dan L. Burk, *Toward an Epistemology of ISP Secondary Liability*, 24 *Phil. & Tech.* 437, 443 (2011) (“Statutory provisions that involve ‘knowledge’ or acting ‘knowingly’ as the legal requirements for mental state generally contemplate not merely possession of information, but awareness or appreciation of the information.”); Emily Zarins, Comment, *Notice Versus Knowledge Under the Digital Millennium Copyright Act’s Safe Harbors*, 92 *Calif. L. Rev.* 257, 261 (2004) (explaining that a section 512 notice actually serves as a “notice of claim” as opposed to a “notice of actual infringement”).

Section 512(c)(3)(B)(i) reinforces that notice and actual knowledge are distinct. That subsection states that a notification that fails to comply substantially with the provisions of Section 512(c) “shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts and circumstances from which infringing activity is apparent,” as long as the service provider assists in enabling submission of compliant notices pursuant

constructive knowledge of infringement, as well as a separate path for a provider to claim the safe harbor once it receives a notice of infringement.

to § 512(c)(3)(B)(ii). These provisions accomplish two things: (1) they ensure that notice senders cannot achieve a better result by sending deficient notices as opposed to compliant ones, and (2) they reinforce that a notice of claimed infringement must be specific in identifying what the copyright owner claims to own and what is claimed to infringe, rather than putting the burden on the service provider to figure that out.

The wisdom of distinguishing notice from the more rigorous knowledge standard is borne out by over two decades of experience, which has revealed a consistently high level of invalid notices, including abusive and speech-suppressive notices designed to punish political opponents and business rivals.⁴

⁴ Urban et al., *supra*, at 2 (“Nearly 30% of takedown requests were of questionable validity. . . . The analysis further identified significant questions related to the availability of potential fair use defense, complaints grounded on improper (non-copyright) claims, and requests sent to defunct web sites.”); *id.* at 12 (“one in fourteen (7.3%) of takedown requests raised questions of potential fair use defenses,” mostly having to do with remixes and other potentially transformative works); *id.* at 40 (“Although the proportion of problematic requests varied by type of [online service provider], every OSP told stories of takedowns that ignored fair use defenses or that targeted non-infringing material. Several echoed one respondent’s view that ‘many copyright complaints . . . would obviously qualify as fair use; others are complete fabrications to remove content considered undesirable to the filer.’”); *Section 512 of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Statement of Paul Sieminski, General Counsel, Automatic Inc.), available at <https://docs.house.gov/meetings/JU/JU03/20140313/101837/HHRG-113-JU03-Wstate-SieminskiP-20140313.pdf> (describing numerous abuses of takedowns based on disagreement with the posted content); Center for Democracy & Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (Sept. 2010),

As a result of the statutory scheme, for the average DMCA-compliant service (as opposed to services, largely overseas, that are primarily dedicated to infringement), most of the time, knowledge is neither relevant nor present. Most copyright disputes occur through the notice-and-takedown provision of Section 512, and very few through a showing of actual knowledge.

This is a natural and unobjectionable result of Congress’s intent. As this Court has noted, it is entirely consistent with—and even contemplated by—Section 512 for a provider to choose not to proactively seek out potential infringement on its servers but instead to adopt a policy of (1) responding effectively pursuant to the statute to notices it receives and (2) taking down any additional material, however small in number that might be, of which it gains actual or red-flag knowledge of infringement. *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 97 (2d Cir. 2016) (“The fact that Congress was unwilling to extend the safe harbor to circumstances where the service provider did not subjectively know that the posted material infringed, but did know facts that made infringement objectively obvious, does not compel the conclusion that Congress

https://www.cdt.org/files/pdfs/copyright_takedowns.pdf (describing numerous instances of political harassment via takedown notices); Elizabeth Martin, Note, *Using Copyright to Remove Content: An Analysis of Garcia v. Google*, 26 Fordham Intell. Prop. Media & Ent. L.J. 463, 483 (2016) (“[C]opyright is increasingly being used for the purpose of removing content from the Internet. . . . [P]laintiffs pursue copyright claims to suppress derogatory material and not with the actual intent of protecting their intellectual property rights.”).

expected this extension to cover a large number of instances. That is especially so in view of the fact that the purpose of § 512(c) was to give service providers immunity, in exchange for augmenting the arsenal of copyright owners by creating the notice-and-takedown mechanism.”).

III. AS A RESULT, ACTUAL OR RED FLAG KNOWLEDGE UNDER SECTION 512 IS LIKELY TO OCCUR ONLY IN LIMITED CIRCUMSTANCES.

If a copyright owner does not avail itself of Section 512’s notice procedure and therefore infringing material remains on a DMCA-compliant service’s site, the service provider can claim Section 512’s safe harbor if it has neither “actual knowledge” of the infringing material nor “aware[ness] of facts or circumstances from which infringing activity is apparent.” Because the plaintiffs in this case did not avail themselves of Section 512’s notice procedure for the material of which they complain, it is important to recognize the narrowness of this limitation.

A. Actual Knowledge Is a Rigorous Standard

The burden of proof, as this Court held in its earlier decision in this case, falls on the copyright owner to show that the service provider should be disqualified from the safe harbor by reason of its knowledge of specific infringements. *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 94 (2d Cir. 2016). In other words, “a plaintiff seeking to surmount the safe harbor must adduce

facts to demonstrate that the service-provider employee had a sufficient knowledge base to determine that a particular video obviously violated copyright law.” *Capitol Records, LLC v. Vimeo, LLC*, 2021 WL 2181252, at *4 (S.D.N.Y. May 28, 2021); *see also UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1108 (C.D. Cal. 2009) (“[I]f investigation of ‘facts and circumstances’ is required to identify material as infringing, then those facts and circumstances are not ‘red flags.’”), *aff’d*, 718 F.3d 1006 (9th Cir. 2013); S. Rep. No. 105-190, at 49 (1998) (“The common-sense result of this ‘red flag’ test is that on-line editors and catalogers would not be required to make discriminating judgments about potential copyright infringement.”); H.R. Rep. No. 105-551, pt. 2, at 58 (1998) (same).

This Court’s case law establishes two important guideposts for actual knowledge. First, this Court established in *Viacom International, Inc. v. YouTube, Inc.* that knowledge of infringing activity requires knowledge as to specific, identified material, not simply a generalized belief that infringing activity by users is likely to be occurring somewhere on the provider’s servers. *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 30–31 (2d Cir. 2012). And, as noted above, the statute does not require the provider to investigate the infringing status of the material, regardless of the facts that are brought to its attention.

Second, the facts or circumstances from which specific infringing activity

would be apparent must be objectively obvious to a reasonable person. *Id.* at 31; S. Rep. 105-190, at 44 (“[I]n 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.”). Importantly, this Court noted in its earlier decision in the instant case that “[t]he hypothetical ‘reasonable person’ to whom infringement must be obvious is an ordinary person—not endowed with specialized knowledge or expertise concerning music or the laws of copyright.” *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 93–94 (2d Cir. 2016).

Taking these guideposts into account, two things become clear. First, as noted above, the notice provided pursuant to Section 512(c)(1)(C) is not the equivalent of actual knowledge under Section 512(c)(1)(A), nor does such a notice constitute, on its own, “facts or circumstances from which infringing activity is apparent” under Section 512(c)(1)(A)(ii).⁵ Given that even a DMCA-compliant notice does not provide actual or “red flag” knowledge that infringement is present—only a reason to take action to initiate the dispute process between the

⁵ This Court has previously declined, in the context of Section 512(i), to reach the question of whether notices “suffice on their own to prove that the provider was aware of infringement.” *EMI Christian Music Group, Inc. v. MP3tunes, LLC*, 844 F.3d 79, 89 n.5 (2d Cir. 2016).

claimant and the user—it follows that the standard is at least as stringent as to material for which no DMCA notice is sent.

Second, as the district court correctly interpreted this Court’s guidance, actual knowledge or “facts or circumstances from which infringing activity is apparent” is not simply knowledge of the challenged activity itself but rather knowledge of the lawfulness of the activity in question. This conclusion follows from the statutory language and structure—which distinguishes receipt of a claim of infringement from actual knowledge that a user’s activity is infringing, as explained above—as well as the legislative history and case law. *See* R. Anthony Reese, *The Relationship between the ISP Safe Harbors and the Ordinary Rules of Copyright Liability*, 32 Colum. J.L. & Arts 427, 433 (2009);⁶ Goldstein on Copyright § 8.3.2 (2020-2 supp.) (noting that Section 512(c)(1)(A)’s reference to

⁶ *See also* Reese, *supra*, at 434 (“The specific examples in the committee reports make clear that the red flag must signal to the provider not just that the activity is occurring, but that the activity is infringing. . . . In these examples, the [service provider] is obviously more than just aware of facts from which the user’s activity is apparent—the provider has actually seen the user’s material. The examples make clear that this is not enough to meet the ‘aware of facts or circumstances’ test set out in sections 512(c) and 512(d).”) (citing H.R. Rep. No. 105-551, pt. 2, at 57–58 (1998)) (“Absent [additional red flags] . . . , a directory provider would not be . . . aware merely because it saw one or more well known photographs of a celebrity at a site devoted to that person. The provider could not be expected, during the course of its brief cataloguing visit, to determine whether the photograph was still protected by copyright or was in the public domain; if the photograph was still protected by copyright, whether the use was licensed; and if the use was not licensed, whether it was permitted under the fair use doctrine.”).

“infringing material” means that the defendant had to have been aware “that the activities infringed copyright in the work,” not simply aware of the direct infringer’s activities); Edward Lee, *Decoding the DMCA Safe Harbors*, 32 Colum. J.L. & Arts 233, 251–56 (2009) (“red flags” require “a very high burden of proof” given the plain language, purpose, and structure of Section 512; otherwise, the rigorous notice and injunctive relief provisions of the statute would be easily evaded, and “Congress did not want to saddle [ISPs] with the impossible burden of determining what online content infringes copyright”); *cf. Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 765–66 (2011) (applying a similar rule to patent infringement).

The district court followed this principle, which this Court should now reaffirm. *See Capitol Records, LLC v. Vimeo, LLC*, 2021 WL 2181252, at *5 (S.D.N.Y. May 28, 2021) (noting that for a plaintiff to surmount the safe harbor, it must show not only that the defendant “possessed facts that would enable them to identify the presence of copyrighted material” in the challenged material but also that the defendant’s employees “knew how to distinguish infringement from fair or authorized use, and that they were able to do so for each [challenged posting]”).

B. As a Practical Matter, It Is Difficult For a Service To “Know” What Infringes.

It follows that Section 512(c)(1)(A) inherently involves relatively rare

situations, unlike the notice provision of Section 512(c)(1)(C). As a starting point, it is meaningless to say, as Appellants do, that Vimeo employees saw videos with “copyrighted music,” because almost any music that is fixed in a video will be protected by copyright.

The question is whether the use of a work protected by copyright is infringing or not infringing. That is a determination that, in many instances, even a person trained in copyright law can only predict and that may depend on multiple considerations. For example, it is not necessarily the case that the use of an entire work constitutes infringement. As this Court noted in its earlier opinion in this case, merely viewing a video that contains “all or nearly all of a copyrighted song that is ‘recognizable’ would be insufficient for many reasons to make infringement *obvious* to an ordinary reasonable person, who is not an expert in music or the law of copyright.” *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 94 (2d Cir. 2016); *Capitol Records, LLC v. Vimeo, LLC*, 2021 WL 2181252, at *6 (S.D.N.Y. May 28, 2021) (“Because of the fair-use doctrine, the mere use of unlicensed, copyrighted music in a video segment is insufficient on its own to establish a violation of law.”); *see also Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014) (“In the context of news reporting and analogous activities . . . the need to convey information to the public accurately may in some instances make it desirable and consonant with copyright law for a defendant to

faithfully reproduce an original work without alteration.”); *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1153 (9th Cir. 2016) (noting that copyright owners have a duty to consider potential fair use when they find unauthorized uploads).⁷

Likewise, even if a service provider’s employees are generally aware of copyright licensing practices, that awareness is not sufficient to determine whether a particular posting constitutes infringement. A copyright owner might well license on a nonexclusive or limited basis. Even if a service provider’s employee has learned about a specific owner’s licensing practices, that information may not be reliable, current, or complete. The Beatles, for example, were known for never licensing their songs, until they did.⁸ *See also EMI Christian Music Group, Inc. v. MP3tunes, LLC*, 844 F.3d 79, 93 n.8 (2d Cir. 2016) (noting that even though

⁷ Courts in this circuit and elsewhere have found that copying an entire work constitutes fair use in a wide variety of circumstances. *See, e.g., Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (VCR recordings); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (database open to public); *Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003) (evidentiary use); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009) (plagiarism detection software); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) (film posters in historical narrative); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (thumbnails in search engine results); *Walsh v. Townsquare Media, Inc.*, 464 F. Supp. 3d 570 (S.D.N.Y. 2020) (entire image); *White v West Pub’g. Corp.*, 29 F. Supp. 3d 396 (S.D.N.Y. 2014) (entire works made available to the public in an interactive research tool); *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006) (caching entire works).

⁸ *See, e.g.,* Bryce J. Renninger, *How One SXSW Film Did the Impossible and Licensed Four Beatles Songs*, IndieWire.com (Mar. 8, 2013), <https://www.indiewire.com/2013/03/how-one-sxsw-film-did-the-impossible-and-licensed-four-beatles-songs-40309/>.

specific facts of the case made red-flag knowledge possible, this Court “[did] not mean to suggest that a copyright holder may create red-flag knowledge merely by asserting that distribution of its works is ‘never authorized’”). Large copyright owners can easily lose track of what they have licensed—even sending takedown notices for their own uploads.⁹ It is unreasonable to expect a non-copyright owner such as a service provider to have more knowledge than the copyright owner.

Moreover, it is not unusual for a district court and a reviewing appellate court to reach different conclusions about whether a particular use is a fair use. *See, e.g., Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021) (reversing grant of summary judgment for the defendant on fair

⁹ *See, e.g.,* Peter Decherney, *Hollywood’s Copyright Wars: From Edison to the Internet* 226 (2012) (noting that Viacom reportedly sent takedown notices for content it had itself uploaded); Jordan Pearson, *NBC’s Bogus Copyright Claim Got Canada’s ‘Mr. Robot’ Premiere Yanked from Google*, *Vice* (Sept. 4, 2015), <https://www.vice.com/en/article/nzeand/nbcs-bogus-copyright-claim-got-canadas-mr-robot-premiere-yanked-from-google>; Adam Rosenberg, *‘Pixels’ Copyright Notices Took Down the Studio’s Own Trailer*, *Mashable* (Aug. 9, 2015), <http://mashable.com/2015/08/09/pixels-dmca/>; Clicky Steve, *When Bots Go Bad: Automated DMCA Takedown Problems*, *Automattic* (Apr. 9, 2015), <https://transparency.automattic.com/2015/04/09/automated-dmca-fail-when-bots-go-bad/> (discussing takedown of copyright owner’s own website). *See also* Annalee Newitz, *How Copyright Enforcement Robots Killed the Hugo Awards*, *IO9* (Sept. 3, 2012), <http://io9.com/5940036/how-copyright-enforcementrobots-killed-the-hugo-awards> (discussing automated takedown of licensed footage that suppressed a larger broadcast); Emil Protalinski, *Automated DMCA Takedown Requests Are Awful: Microsoft Asked Google to Delete Bing Links, and It Did*, *The Next Web* (Oct. 8, 2012), <https://thenextweb.com/news/automated-dmca-takedown-requests-are-awful-microsoft-asked-google-to-delete-bing-links-and-it-did>.

use grounds and holding that fair use failed as a matter of law), *cert. granted*, U.S. (2022); *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (reversing fair use decision of district court as to 25 of 30 works at issue); *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255 (4th Cir. 2019) (same as *Warhol*). It is not even unusual for a fair use case to be reversed *twice*, with the Supreme Court reinstating a district court holding. *See, e.g., Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). A standard that would require low-level employees to predict the law better than Article III judges is unworkable.

Such uncertainty is particularly likely given that service provider employees reviewing content are not likely to be—nor are they required to be—trained in copyright law. As this Court noted in its earlier opinion in this case, “Even assuming awareness that a user posting contains copyright music, the service provider’s employee cannot be expected to know how to distinguish, for example, between infringements and parodies that may qualify as fair use. Nor can every employee of a service provide be automatically expected to know how likely or unlikely it may be that the user who posted the material had authorization to use the copyrighted music. Even an employee who was a copyright expert cannot be expected to know when use of a copyrighted song has been licensed.” *Capitol*

Records, LLC v. Vimeo, LLC, 826 F.3d 78, 97 (2d Cir. 2016); *see also* Laura A. Heymann, *Knowing How to Know: Secondary Liability for Speech in Copyright Law*, 55 Wake Forest L. Rev. 333 (2020) (explaining the difficulty of “knowledge” of infringement).

None of the foregoing leaves copyright owners without remedies for infringement. Instead, it ordinarily channels them towards using the notice and takedown process and pursuing the direct infringer where appropriate.

C. This Rigorous Standard Serves Important Objectives.

Shielding intermediaries was not something Congress did for simply for the sake of shielding them. Congress sought to make online service providers useful paths by which speakers could reach audiences. This Court’s previous holding preserves important interests in competition and freedom of speech and should not be weakened.

Congress explicitly desired to protect a variety of Internet services. *See* S. Rep. No. 105-190, at 8 (1998) (safe harbors were designed so that “the variety and quality of services on the Internet will continue to expand”). A system primarily governed by the safe harbors, without facile imputation of knowledge from other sources, is a key part of that protection. If it is easy to prove knowledge simply based on general circumstances or allegations about types of copyrighted works, then small services in particular will be at risk of onerous litigation burdens, even

if they ultimately prevail on the merits. Only the large services would be able to survive by implementing expensive automated filters, which come with significant economic and overblocking costs of their own.¹⁰ This harm to competition is the opposite of what Congress intended with the DMCA, which provides space for small services with limited resources while also enabling “DMCA-Plus” negotiated solutions for services that find themselves dealing with too many notices to handle without automation. *See* Urban et al., *supra*, at 58.¹¹

These safe harbors also serve important constitutional interests. Copyright law has limits that prevent it from violating the First Amendment. *See Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003). But if copyright owners can readily evade

¹⁰ *See, e.g.*, Rebecca Tushnet, *All of This Has Happened Before and All of This Will Happen Again: Innovation in Copyright Licensing*, 29 Berkeley Tech. L.J. 1447 (2014) (discussing harms to competition, overblocking, and exploitation of individual creators that come from automated filters); *Hearing on S. 512 of Title 17 Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 6 (2014) (testimony of Katherine Oyama, Senior Copyright Policy Counsel, Google Inc.), available at <https://docs.house.gov/meetings/JU/JU03/20140313/101837/HHRG-113-JU03-Wstate-OyamaK-20140313.pdf> (noting that YouTube spent “more than \$60 million” on its filtering system and that “YouTube could never have launched as a small start-up in 2005 if it had been required by law to first build a system like Content ID.”).

¹¹ *See also* Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* 1 (2011), available at <https://www.analysisgroup.com/globalassets/content/insights/publishing/impact-copyright-policy-changes-venture-capital-investment-cloud-computing-companies.pdf> (noting U.S. advantage in cloud computing services over European countries and connecting this advantage to the legal environment).

the notice process by alleging contributory liability, service providers will have strong incentives to block anything that might risk a claim, fair use or not—the definition of a chilling effect.

The easier it is to cause speech to be silenced, the harder it should be to justify having done so. “Accusations of alleged infringement have drastic consequences: A user could have content removed, or may have his access terminated entirely. If the content infringes, justice has been done. But if it does not, speech protected under the First Amendment could be removed.” *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1112 (9th Cir. 2007).

Because the DMCA essentially functions as a system of extra-judicial injunctions on speech, designed to save legitimately aggrieved copyright holders from the cost and delay of having to seek content-removing injunctions from the courts, it is crucial that these savings do not come at the expense of suppressing non-infringing speech. Removals of user speech not made pursuant to a Section 512-compliant notice are judicially unreviewable, without even the theoretical ability to bring a Section 512(f) claim against an abusive notice. One important safeguard for users’ speech, then, is that “courts must not impute knowledge to ISPs for purposes of contributory infringement unless it is quite clear that infringement has occurred,” lest they risk suppressing speech that would otherwise be protected. Alfred C. Yen, *Internet Service Provider Liability for Subscriber*

Copyright Infringement, Enterprise Liability, and the First Amendment, 88 Geo. L.J. 1833, 1888 (2000).

D. For the Same Reasons, Ordinary Content Moderation Does Not Constitute “Right and Ability to Control” Infringement.

Section 512’s prevents a provider from claiming the safe harbors in cases where the provider has the “right and ability to control” infringement and “receives a financial benefit directly attributable to the infringing activity.” § 512(c)(1)(B). As this Court has previously recognized, this exclusion “requires something more than the ability to remove or block access to materials posted on a service provider’s website.” *Viacom*, 676 F.3d at 38 (internal quotation marks omitted).

Directing the creation of specific content, or inducing infringement, can qualify, but scrutinizing content and failing to remove it—inaction—is not the same thing as the right and ability to control, as the district court correctly recognized. If it were otherwise, then the rigors of the knowledge standard would be rendered irrelevant by the ordinary practices that service providers use to protect their users and ensure that content is appropriate for their service.

Content moderation has many faces. It can involve screening for violence, hate speech, pro-anorexia content, or thousands of other categories of unwanted content. Content moderation can also simply be done to keep users on topic. Ravelry, for example, is a knitting and crochet website. *See* Ravelry.com. The fact

that it strongly constrains the subject matter of posted content—yarn and yarn art-related topics—should not create greater copyright liability. But a standard that treats active enforcement of rules about what specific content is allowed as a “right and ability to control” infringement would have the perverse result of making Ravelry presumptively responsible for infringement on its site because it is a topic-focused site, while sites with no content rules remain protected by the DMCA.

Precedent and sound policy establish that screening for unwanted content does not equate to the “right and ability to control” content that survives that screening for purposes of the DMCA. *See Viacom*, 676 F.3d at 37–38; *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1030 (9th Cir. 2013) (agreeing that using filtering systems does not create a “right and ability to control” for Section 512 purposes); *id.* at 1029 (pointing out that knowledge of the risk of infringement does not create a duty to police the site to the “fullest extent” possible, since that would conflict with Section 512(m)); *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1094 (C.D. Cal. 2001) (“eBay’s voluntary practice of engaging in limited monitoring of its website for ‘apparent’ infringements . . . cannot, in and of itself, lead the Court to conclude that eBay has the right and ability to control infringing activity within the meaning of the DMCA. The legislative history shows that Congress did not intend for companies such as eBay to be penalized when they engage in voluntary efforts to combat piracy over the

Internet.”) (citing H. Conf. Report 105-796, at 73 (Oct. 8, 1998)).

If it were otherwise, service providers would have perverse incentives to avoid screening and allow unchecked content, including copyright-infringing works. *Cf. Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (discussing this moderator’s dilemma). Imposing liability on platforms that moderate because they (arguably) made mistakes in doing so makes the perfect the enemy of the good; it disincentivizes any screening and thereby encourages more unlawful, including infringing, conduct on such platforms.

Given the statutory structure and the need to keep from creating perverse incentives to avoid monitoring, “right and ability to control” within the Section 512 context should be understood as akin to the general tort doctrine of *respondeat superior*, from which this language is derived. *See Viacom*, 676 F.3d at 38 (citing *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146 (C.D. Cal. 2002), which involved commission-based payments to participating websites that were both prescreened before admission to program and regularly rescreened for continuing entitlement to payment); *cf. Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963) (grounding “right and ability to control” in *respondeat superior*; economic relationships that do not rise to the technical definition of employer-employee may qualify, but *respondeat superior* was the model); *Mavrix Photographs LLC v. LiveJournal, Inc.*, 873 F.3d 1045, 1053–54

(9th Cir. 2017) (approving of using agency principles to determine whether moderators’ acts could be attributed to service).

In particular, *influence* over what content is posted—whether knitting-related on Ravelry or “nonpornographic” on sites like YouTube—is insufficient without an employment relationship or other close relationship in which the provider controls user activity beyond simply having the ability to moderate content. Specifically, just as this Court has held that, in order to make sense of the statutory scheme, the ability to *remove* content cannot constitute the “right and ability to control,” the ability to *leave content in place*—that is, making a judgment call allowing a work to remain in the absence of actual knowledge of infringement—is insufficient without some deeper relationship with the user.

CONCLUSION

For the foregoing reasons, this Court should reaffirm its prior holdings, which the district court applied in its ruling.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Fed. R. App. P. 32(g), I hereby certify that:

This brief complies with the type volume limitations of Second Circuit Local Rule 29.1(c) because it contains 6561 words as calculated by the word count feature of Microsoft Word, exclusive of the sections exempted by Fed. R. App. P. 32(f).

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I hereby certify that I electronically filed the foregoing Brief by using the appellate CM/ECF on July 19, 2022. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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