

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 – MGB 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
District Court Case No. 07-05744
Honorable A. Howard Matz, District Judge

**BRIEF FOR AMICI CURIAE
BROADCAST MUSIC, INC. AND
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS
IN SUPPORT OF APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici* Broadcast Music, Inc. and the American Society of Composers, Authors and Publishers submit the following corporate disclosure statements:

The American Society of Composers, Authors and Publishers is an unincorporated membership association of composers of music, authors of lyrics, and music publishers. As an unincorporated entity, it is not required to file a disclosure under Federal Rules.

Broadcast Music, Inc. has no parent corporation. The only publicly held company that directly or indirectly owns 10% or more of its stock is Gannett Co., Inc., through an indirect, wholly owned subsidiary.

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BRIEF FOR *AMICI CURIAE*

Broadcast Music, Inc. (“BMI”) and the American Society of Composers, Authors and Publishers (“ASCAP”) submit this *amici curiae* brief in support of Appellants, UMG Recordings, Inc., et al. All parties have consented to the filing of this brief.

I. INTEREST OF *AMICI CURIAE*

Amicus Curiae, Broadcast Music, Inc. (“BMI”), is a music performing rights society as defined in the Copyright Act, 17 U.S.C. § 101. BMI issues blanket licenses to music users for the public performing rights of its affiliated songwriters’, composers’ and music publishers’ musical works, collects license fees on behalf of its affiliates, and distributes those fees as royalties to those BMI affiliates whose works have been performed on media such as cable television, radio, and the Internet. BMI licenses the non-dramatic public performing right in approximately 6.5 million musical works on behalf of its affiliates, which comprise over 400,000 American songwriters, composers, lyricists, and music publishers. Through affiliation with foreign performing rights societies, BMI also represents in the United States thousands of works of many of the world’s foreign writers and publishers of music.

Typical BMI licensees include Internet music services and websites, mobile entertainment services, television and radio broadcasting stations, broadcast and

cable/satellite television networks, cable system operators and direct broadcast satellite services, restaurants, night clubs, universities and colleges, hotels, concert promoters, background music services, municipalities, sports arenas, and other businesses that perform music publicly. Given the vast number and variety of musical works in the BMI repertory, BMI's licenses provide music users with legal and efficient access to public performance licenses for the quantity and variety of music the public demands.

BMI also protects its affiliates' works from infringement by ensuring that businesses that perform music publicly are licensed to do so. In part, this entails monitoring the public performance of musical works on the Internet, in bars and restaurants and in other establishments open to the public. The ability of BMI to protect the rights of its affiliates is of critical importance to the economic well-being of the songwriters and composers that BMI represents.

Formed in 1914 at the behest of composing legends Victor Herbert, Irving Berlin and John Phillip Sousa, *Amicus Curiae* ASCAP was the first performing rights organization in the United States. Its mission is to enable American music authors to receive fair remuneration for the public performance of their work. ASCAP's more than 380,000 songwriters, lyricists, composers, music publishers, and foreign society members grant the society a non-exclusive right to license non-dramatic public performances of their works. ASCAP in turn offers blanket

licenses to parties seeking to perform these works, conferring on licensees the right to perform, for the stated term, any and all of the millions of musical works composed by ASCAP members. Like BMI, ASCAP licenses public performing rights to a wide variety of users, including internet service providers, wireless providers and websites, television and radio stations, restaurants, hotels, and sports arenas.

The Digital Millennium Copyright Act (“DMCA”) secures protections both for rights holders, including the songwriters and publishers whose rights are represented by *Amici*, and for online service providers (“service providers”). Through its safe harbor provisions, the DMCA shields an innocent service provider in certain circumstances from monetary liability related to infringing content that the service provider does not know of or control. See ALS Scan, Inc. v. Remark Communities, Inc., 239 F.3d 619, 625 (4th Cir. 2001) (“The DMCA’s protection of an innocent service provider disappears at the moment the service provider loses its innocence.”). However, the safe harbor provisions also require a service provider who would otherwise qualify for the protection of a safe harbor to remove or disable access to infringing content upon notification from a copyright owner and to take further steps to avoid repeated infringements.

The District Court’s decision, if affirmed, would render the notice and takedown process ineffective because the court held that copyright owners must

always provide information about specific instances of infringement in order to properly notify service providers. UMG Recordings, Inc. v. Veoh Networks Inc., 665 F. Supp. 2d 1099, 1109-1111 (C.D. Cal. 2009). This ruling conflicts with the plain language of the statute, which allows rights holders to trigger the service provider's obligation to monitor for, and remove, infringing content by providing the service provide with a notice containing a representative list of infringed works. *Amici's* interests are thus directly affected by the District Court's decision to the extent that it improperly purported to eliminate service providers' responsibility to monitor for infringing content when copyright owner notifications have provided the service provider with reason to know of infringing activity.

The licensing activities of BMI and ASCAP are governed by Consent Decrees entered into by each performing rights organization ("PRO") with the United States Department of Justice. See United States v. Broad. Music, Inc., et al., 1996 Trade Cases (CCH) 71,941 (S.D.N.Y. 1966), amended by 1996-1 Trade Cases (CCH) 71,378 (S.D.N.Y. 1994); see also United States v. American Society of Composers, Authors and Publishers, 2001-2 Trade Cases (CCH) 73,474 (S.D.N.Y. 2001). These Consent Decrees both provide, among other things, that music users desiring to obtain repertoire-wide licenses from the PROs may automatically do so upon written request. If the parties cannot negotiate a rate, the rate will be set by the U.S. District Court judge designated for that PRO in the

Southern District of New York. BMI and ASCAP blanket licenses are thus readily available to internet services that publicly perform music, including so-called “user-generated content” services such as Veoh. *Amici* strongly assert that the statutory safe harbors in 17 U.S.C. § 512 should play no role in a proceeding to establish reasonable rates under one of the Consent Decrees, because the safe harbors are only applicable as limitations on infringement remedies.¹ If the conditions for safe harbor eligibility are not appropriately construed by the courts, service providers will have fewer incentives to seek or pay for licenses under the Consent Decrees. Thus, the erroneous ruling below, if affirmed, will likely generate unnecessary litigation between PROs and internet services about the scope of the safe harbors. Such an outcome would significantly harm composers of musical works and impede the growth of legitimate online businesses that would be forced to compete with services attempting to profit from musical works without paying for the privilege.

¹ BMI and ASCAP respectfully urge the Court to clearly articulate that the 17 U.S.C. § 512 safe harbors are mere remedial limitations to infringement claims, and are not complete defenses to infringement allegations. See S. Rep. No. 105-190 (1998), at 55 (“Enactment of section 512 does not bear upon whether a service provider is or is not an infringer when its conduct falls within the scope of section 512.”); Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1098 (W.D. Wash. 2004) (“The DMCA safe-harbors do not render a service provider immune from infringement.”).

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Section 512(c) of the DMCA,² the safe harbor for hosting by a service provider at the direction of a user, permits rights holders like *Amici* to notify the service provider of infringement by providing a *representative list* of unauthorized works found on a website. 17 U.S.C. §512(c)(3)(A)(ii). Such a list is necessary as a tool because entities like *Amici*, who represent hundreds of thousands of songwriters and many millions of musical works, cannot reasonably monitor every upload to a website. The use of a representative list to notify a service provider of multiple instances of infringement allows the music industry in general, and *Amici* in particular, to alert a service provider to infringement on its site without engaging in a constant and elusive game of chasing particular infringers who upload content to a website.

Once a representative list of infringements is provided, the service provider is on notice that its service is being repeatedly used for infringing activity, and the notice can constitute a “red flag” regarding future infringements, to which the service provider must respond in order to claim safe harbor status. The notice likewise triggers the service provider’s duty to use its own monitoring technology to take reasonable action to investigate and stop infringing activity by removing the content and/or disabling the offending user’s access.

² Unless otherwise indicated, all statutory references are to the DMCA.

Contrary to the representative list procedure authorized by the DMCA, the District Court ruled that the burden to identify each and every instance of infringing material on an internet site rests with copyright owners. Veoh, 665 F. Supp. 2d at 1110.³ This ruling is unsupported by the plain language of the DMCA, by the case law applying it, and by its legislative history.

This Court's analysis of the DMCA's notice and take-down procedure in Perfect 10, Inc. v. CCBill, LLC, 488 F.3d 1102, 1111-13 (9th Cir. 2007), is integral to preserving the rights of *Amici* and protecting their members and affiliates from copyright infringement. That analysis is entirely consistent with finding constructive – or “red flag” – notice, based on a notice containing a sample of infringed works, which serves to prevent the service provider from engaging in willful blindness to avoid actual knowledge of specific infringing works. To qualify for the safe harbor, the service provider must at that point take some action to investigate and to remove the infringing content or disable the offending user's

³ The District Court's direct discussion of the representative list provision could be read to construe the notice in this case to be inadequate only by virtue of identifying artists rather than works. Indeed, as *Amici* license songs, and not specific recordings, identification of artists is not crucial. But in the context of the opinion as a whole, particularly its reliance on CCBill, 488 F.3d 1102, for the proposition that the rights holder bears the exclusive burden of policing service providers' hosting of infringing content, it seems clear that the District Court concluded that the service provider need address only the individual works actually identified in the notice, rather than locate and remove the balance of the works exemplified by the representative list. As explained below, this renders the representative list procedure meaningless.

account. To the extent that this obligation shifts a burden to the service provider, this balancing of obligations was specifically intended by Congress. In this fashion, the DMCA strikes a balance between rights holders and service providers.

In contrast, under the District Court’s interpretation of the statute, copyright owners would be compelled to police every upload to every site on the Internet, while service providers would have no duty to implement or use filtering tools or other technology to diminish infringing activity on their site. Cf. Metro-Goldwyn-Mayer Studios, Inc., v. Grokster, Ltd., 545 U.S. 913, 939 (2005) (the failure of defendants to even attempt to develop “filtering tools or other mechanisms to diminish the infringing activity . . . underscores [their] intentional facilitation of their users’ infringement”). This interpretation disrupts the balance carefully constructed under in the DMCA, placing an impossible burden of perpetual and repetitive notice obligations on creators – and condoning conduct in which a service provider buries its head in the sand despite actual or constructive knowledge of infringement on its servers. This is unquestionably not what Congress intended. See S. Rep. No. 105-190, at 7, 10 (the DMCA was enacted following months of “comprehensive negotiations” between service providers and copyright owners); H.R. Rep. No. 105-551 (II) (1998), at 21 (Congress recognized at the time of its passage that the DMCA “balanced the interests of content owners,

on-line and other service providers, and information users”). The District Court’s judgment should be reversed.

III. ARGUMENT

A. TO AVAIL ITSELF OF THE DMCA SAFE HARBORS, A SERVICE PROVIDER MUST TAKE ACTION ONCE IT HAS NOTICE OF “RED FLAGS” OF INFRINGEMENT THROUGH A REPRESENTATIVE LIST OF INFRINGING WORKS.

Among other statutory conditions for the section 512(c) safe harbor,⁴ a service provider must take action when it obtains actual or constructive, i.e. “red flag,” notice of infringing activity on its site. In such cases, the service provider must “act expeditiously to remove, or disable access to the material.” 17 U.S.C. § 512 (c)(1)(iii). The notice requirements of the DMCA expressly provide that “if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site” may be provided as notification of claimed infringement. 17 U.S.C. § 512(c)(3)(ii).⁵ This provision contemplates that a service provider must review its website for infringing material

⁴ As appellants have fully explained in their brief, the infringing public performance of musical compositions by Veoh was not an “infringement of copyright by reason of the storage [of those works] at the direction of a user,” and therefore the lower court erred in holding that the section 512(c) safe harbor even applied to this infringement. See Appellants’ Brief, section II. *Amici* support that argument, but offer their perspectives as independent reasons for reversal of the District Court’s decision.

⁵ The DMCA safe harbors also require that the notice contain certain other elements that are not believed to be at issue in the appeal, such as the signature of the person authorized to act on behalf of the copyright owner, that are therefore not addressed by the *Amici*. See 17 U.S.C. § 512(c)(3).

upon receipt of the notice containing a representative list of infringements, including reviewing the website for infringements of works that are not contained in the representative list. In other words, a notice containing a representative list of copyrighted works serves as a red flag of infringement that obligates a service provider to remove infringing material on an ongoing basis. See id.; see also H.R. Rep. No. 105-551(I) (1998) (a red flag includes any “information of any kind that a reasonable person would rely upon” to indicate infringement). As the Fourth Circuit has noted, the “requirements are written so as to reduce the burden of holders of multiple copyrights who face extensive infringement of their works.” ALS Scan, 239 F.3d at 625.

The District Court correctly acknowledged that such a representative list of works provides valid notice to the service provider of infringing material. Veoh, 665 F. Supp. 2d at 1110. The court then distinguished the notices provided by UMG from sufficient notice under the statute by cataloging what the court found to be technical deficiencies in UMG’s notices, which, according to the court, included only artists and not works. Id. However, the court went on to add that under its reading of CCBill, 488 F.3d 1102, the burden of identifying the precise location of specific copyright violations rests with the copyright holder, not the service provider. Veoh, 665 F. Supp. 2d at 1111.

Amici submits that the court erred. The District Court’s holding, if affirmed, would eviscerate the representative list provision. It would violate a fundamental precept of statutory interpretation: that statutes should be construed “so as to avoid rendering superfluous” any statutory language. Astoria Federal Savings & Loan Ass’n v. Solimino, 501 U.S. 104, 112 (1991).

While a notice of specific infringing works requires a service provider to act “expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity” in order to avail itself of the DMCA safe harbors, 17 U.S.C. § 512(c)(1)(C), this is but one way in which a service provider is directed to take action to confront piracy. If a service provider obtains actual knowledge of infringement or detects red flags that the service provider has been made aware of during the process of dealing with prior notifications or notifications that include representative lists of works, the service provider is also compelled to act in order to claim the safe harbor. 17 U.S.C. § 512(c)(1)(A)(iii). In simple terms, the service provider cannot bury its head in the sand and ignore blatant copyright infringement while claiming a safe harbor under the DMCA. See In Re: Aimster Copyright Litigation, 334 F.3d 643, 650 (7th Cir. 2003) (“Willful blindness is knowledge, in copyright law (where indeed it may be enough that the defendant *should* have known of the direct infringement, as it is in

the law generally.)” (internal citations omitted); id. (“a deliberate effort to avoid guilty knowledge is all that the law requires to establish a guilty state of mind”).

This is evidenced not only by the plain language of the statute, but also by the legislative history which illuminates the fact that the DMCA safe harbor defense is closed to a defendant that “becomes aware of a ‘red flag’ [and] takes no action.” H.R. Rep. No. 105-551(II), at 53; Congressional Record, Volume 143 (1998), Remarks by Hon. Howard Coble (“If the exemption were limited to actual knowledge, it would provide an incentive to look the other way and deliberately avoid learning of the infringement”); see also Columbia Pictures Industries, Inc. v. Fung, 2009 U.S. Dist. LEXIS 122661 at 62-63 (C.D. Cal. Dec. 21, 2009) (“According to the widely-cited House and Senate Report on the law, ‘if the service provider becomes aware of a “red flag” from which infringing activity is apparent, it will lose the limitation of liability if it takes no action [citations omitted]”). The red flag test was meant to adopt a balancing standard whereby if a service provider “becomes aware of information that causes suspicion, [it] should have some obligation to check further.” Congressional Record, Volume 143 (1998), Remarks by Hon. Howard Coble. This complements the notion that “[t]he common element of its safe harbors is that the service provider must do what it can reasonably be asked to do to prevent the use of its service by ‘repeat infringers.’” Aimster, 334 F.3d at 655 (citing 17 U.S.C. § 512(i)(1)(A)).

The District Court's reading of CCBill erroneously interprets this Court's ruling in a manner that contravenes the statutory language and Congressional intent. CCBill declined to impute a requirement to act when a service provider is provided deficient notice. CCBill, 488 F.3d at 1113. Conversely, the Veoh court made clear it would impose no burden on the service provider even when sufficient notice is provided. Veoh, 665 F. Supp. 2d at 1109-1111. In CCBill, the Ninth Circuit found that without substantial compliance with the DMCA notice, the copyright owner could not compel a service provider to investigate potential infringement on its site. CCBill, 488 F.3d at 1113. Thus, the Court's holding in CCBill was limited to placing the burden "squarely on the shoulders of the owners of the copyright" to provide sufficient and appropriate notice under section 512(c)(3) of the DMCA. Id. It did not, as the District Court found, refuse to shift the burden to a service provider upon receipt of effective notice under the DMCA. See id. ("Since Perfect 10 did not provide effective notice, knowledge of infringement may not be imputed to CCBill . . . based on Perfect 10's communications"). Indeed, such a refusal runs contrary to the DMCA.

B. AN AFFIRMANCE OF THE DISTRICT COURT'S RULING WOULD HAVE A CHILLING EFFECT ON THE RIGHTS OF SONGWRITERS, COMPOSERS AND MUSIC PUBLISHERS.

Amici have a particular interest in having this Court reverse the District Court's judgment. If the DMCA is interpreted to impose notice requirements of

crippling specificity before a service provider can be compelled to meet its copyright responsibility, then the Court has failed to embrace the letter and spirit of the law. As computer processor speeds, network bandwidth, and computer storage space have increased exponentially, and as high-speed broadband Internet connections have become widely adopted by the public, unauthorized digital transmissions of music over the Internet on sites such as Veoh have become prolific. Under the District Court's ruling, Internet service providers like Veoh that rely on content uploaded by users and contain tremendous amounts of music could profit from direct exploitations of music while availing themselves of the DMCA safe harbors. Without the ability to effectively police the unauthorized public performance of their music, "the probable scope of copyright infringement [facing *Amici's* affiliates and members] is staggering." Grokster, 545 U.S. at 923.

IV. CONCLUSION

For the reasons set forth above and in Appellants' briefs, this Court should reverse the judgment of the District Court.

Respectfully submitted,

DATED: April 27, 2010

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PROOF OF SERVICE

I hereby certify that 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 on April 27, 2010.

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 3 calendar days, to the following non- CM/ECF participants:

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