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,

and

SHELTER CAPITAL PARTNERS, LLC; SHELTER VENTURE FUND, L.P.; SPARK CAPITAL, LLC; SPARK CAPITAL, L.P.; THE TORNANTE COMPANY, LLC,
Defendants.

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 AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 26.1

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Washington Legal Foundation states that it is a non-profit corporation organized under Section 501(c)(3) of the Internal Revenue Code, has no parent corporation, and has no stock owned by a publicly held corporation.

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STATEMENT OF INTEREST OF THE
WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE

The Washington Legal Foundation (WLF) is a non-profit, public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. In particular, WLF has regularly appeared as an amicus curiae before numerous federal and state courts in favor of protecting the rights of property owners, including owners of intellectual property. See, e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005); Authors Guild v. Google, Inc., No. 05 Civ. 8136 (DC), 2009 WL 4434586 (S.D.N.Y. Dec. 1, 2009).

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

Appellants and Appellee have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a website operated by Appellee Veoh Networks, Inc. ("Veoh") that generates significant advertising revenue (and profits) at the expense of copyright holders such as Appellants UMG Recordings, Inc. and other Universal Music Group companies ("UMG"). This is an important copyright case that likely will have nationwide implications for copyright holders, recording artists, and content producers.

Veoh encourages and facilitates the uploading of videos from Internet users to the Veoh website, including copyrighted videos owned by UMG and others. Veoh then displays these videos or offers them to the public for free download. Veoh profits from this conduct by selling advertisements on the web pages that display the copyrighted videos. The more popular a video, the more users who visit the Veoh website, and the more money Veoh collects in advertising revenues.

The specific issue before this Court is whether Veoh qualifies for a safe harbor created by the Digital Millennium Copyright Act of 1998 ("DMCA"), and now codified at Section 512(c) of the Copyright Act. According to Veoh (and the District Court), Veoh's enterprise falls within the Section 512(c) safe harbor and Veoh therefore enjoys absolute immunity from monetary damages created by its promotion of piracy. This is not the result Congress intended.

Before considering the particular errors in the District Court's analysis, it first is important to understand the context and framework of the DMCA. Congress enacted the DMCA, not to provide broad immunity for websites built on piracy as the District Court's analysis suggests, but rather both to bolster copyright protection and to provide carefully sculpted safe harbors for Internet service providers who have no knowledge or awareness of infringing content passing through their services and no stake in it.

Although the District Court committed several reversible errors, this brief focuses primarily on two fundamental errors of law. First, the District Court incorrectly applied the Section 512(c) knowledge standard in concluding that Veoh did not have actual knowledge of infringing activity and was unaware of "red flags" signaling infringement on its website. The rule of law set forth by the District Court effectively holds that Veoh can—legally—bury its head in the sand, ignore many objective indicia of rampant copyright infringement, and still enjoy complete immunity for any monetary damages (all the while continuing to profit from copyrighted works).

Second, the District Court erroneously concluded that Veoh did not have the "right and ability to control" the infringing activity on its website even though Veoh retained the right and ability to cancel user accounts at its discretion and had available filtering software capable of identifying infringing works.

Accordingly, Amicus WLF respectfully submits that this Court should reverse the District Court.

ARGUMENT

I. CONGRESS ENACTED THE DMCA TO ENSURE VIGOROUS COPYRIGHT PROTECTION IN DIGITAL WORKS

In the 1990s, the Internet was growing in popularity and millions of citizens obtained Internet access at work, school, and home. See generally Reno v. ACLU, 521 U.S. 844 (1997). This new medium posed challenges as well as opportunities, including the potential for widespread copyright piracy due to the relative ease with which near-perfect copies could be made and sent around the globe. In this context, Congress held hearings to evaluate the state of copyright piracy, obtain testimony on the issues facing copyright holders and technology service providers, and consider the proper balance between rights holders and the service providers investing in the infrastructure necessary to develop the Internet. Congress then carefully crafted a law, the DMCA, to address this serious problem.

A. Congress Passed The DMCA In Response To Pervasive Piracy And The Potential For Massive Copyright Infringement On The Internet

Congressional supporters haled the DMCA as "the most comprehensive copyright bill since 1976," which "adds substantial value to our copyright law." 144 Cong. Rec. 25806 (1998) (Rep. Coble). Among other things, the DMCA implemented copyright treaties passed by the World Intellectual

Property Organization, strengthened copyright protection for digital works, and balanced the rights of copyright holders against the needs of companies investing in core infrastructure technologies necessary to develop the Internet. See DMCA, Pub. L. No. 105-304, 112 Stat. 2860 (1998); see also 144 Cong. Rec. 18775 (Rep. Boucher) ("I am pleased to rise today in support of the passage of H.R. 2281, which will extend new protections against the theft of their works to copyright owners.").

During its deliberations, Congress repeatedly highlighted the significant damages copyright holders suffer each year—billons of dollars in lost revenue—due to piracy:

- "Piracy is a large and growing problem for many content providers, but particularly to our software industry. Billions of dollars in pirated material is lost every year and [a]n impact is felt directly to our national bottom line." 144 Cong. Rec. 9239 (Sen. Ashcroft).

- "What has been plaguing this huge and important industry is piracy, the outright theft of copyrighted works. Not piracy on the high seas, it is today's version, piracy on the Internet. American companies are losing nearly $20 billion yearly because of the international piracy of these copyrighted on-line works, and that is what this bill helps to stop." 144 Cong. Rec. 18778 (Rep. Foley).

- "[A]s we look at the problems that we face as a Nation, and as we move rapidly towards this global economy, it is difficult to imagine an issue that is much more important than theft of intellectual property." 144 Cong. Rec. 25808 (Rep. Dreier).

From the earliest committee hearings on the DMCA, Congress recognized that the Internet had the potential to "recklessly facilitate infringement," and that Congress needed to understand how to "best combat the risk of copyright infringement facing content providers on the Internet." The Copyright Infringement Liability of Online and Internet Service Providers: Hearing on S.1146, 105th Cong. 1-2 (1997) [hereinafter Senate Hearings] (Sen. Hatch).

During the final floor debates, members of Congress again characterized the DMCA as copyright legislation designed to stem the tide of piracy:

- "[W]e need this measure to stop an epidemic of illegal copying of protected works—such as movies, books, musical recordings, and software—and to limit, in a balanced and thoughtful way, the infringement liability of online service providers." 144 Cong. Rec. 24464 (Sen. Kohl).

- "Unscrupulous copyright violators can use the Internet to more widely distribute copyrighted material without permission. To maintain fair compensation to the owners of intellectual property, a regime for copyright protection in the digital age must be created." 144 Cong. Rec. 9242 (Sen. Thompson).

- "While digital dissemination of copies will benefit owners and consumers, it will unfortunately also facilitate pirates who aim to destroy the value of American intellectual property." 144 Cong. Rec. 18770-71 (Rep. Coble).

B. **Congress Recognized The Need To Limit The Liability Of Service Providers Investing In The Technological Infrastructure Necessary To Develop The Internet**

Against this backdrop of strengthening copyright protections for rights holders, Congress also recognized the need to appropriately balance the needs of service providers investing in the technological infrastructure necessary to expand the Internet. See S. Rep. No. 105-190, at 8 (1998) ("[W]ithout clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet."); 144 Cong. Rec. 9234 (Sen. Hatch) ("American companies are losing $18 to $20 billion annually due to the international piracy of copyrighted works. But the potential of the Internet, both as information highway and marketplace, depends on its speed and capacity. Without clarification of their liability, service providers may hesitate to make the necessary investment to fulfill that potential.").

Congress recognized that, solely by virtue of the use of computers, service providers such as telephone companies, long distance carriers, and Internet access companies "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.[1] Those incidental, automatically-generated "copies" constituted direct copyright infringement, resulting in potentially infinite copyright liability merely for providing connectivity, networking, or web hosting services.

Shortly before Congress considered the DMCA, several federal district courts considered the application of copyright principles to the online world. In Religious Technology Center v. Netcom On-Line Communication Services, Inc., 907 F. Supp. 1361, 1372 (N.D. Cal. 1995), a district court held that Netcom, an Internet service provider (not a website operator), could not be held liable for direct copyright infringement because it did "not create or control the content of the information available to its subscribers; it merely provide[d] access to the Internet."[2] In reaching its conclusion, the court recognized that Netcom did not "take any affirmative action that directly resulted in copying plaintiffs' works other than by installing and maintaining a system whereby software automatically forwards messages received from subscribers." Id. at 1368. The court noted that

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1 See also Senate Hearings at 29 (testimony of telephone company representative acknowledging that "[w]e have no way of knowing what those trillions of bits of information are flowing over our networks"); H.R. Rep. No. 105-551 (Part II), at 23 (1998).

2 The legislative history accompanying an early draft of the DMCA explains that the bill "essentially codifies the result in the leading and most thoughtful judicial decision to date, [Netcom]." H.R. Rep. No. 105-551 (Part I), at 11 (1998).

"Netcom's actions, to the extent that they created a copy of plaintiffs' works, were necessary to having a working system for transmitting Usenet postings to and from the Internet." Id. Accordingly, the court concluded that Netcom was not liable for direct copyright infringement based upon "incidental copies automatically made" as "part of a process initiated by a third party." Id. at 1368-69.[3]

Other courts had attempted to identify the appropriate scope of liability of website and bulletin board operators who themselves controlled and profited off of copyrighted works. In Sega Enterprises Ltd. v. MAPHIA, 857 F. Supp. 679, 683 (N.D. Cal. 1994), a court imposed copyright infringement liability on the operators of a bulletin board who knowingly profited from the uploading and downloading of unauthorized copies of Sega's copyrighted video games.

Similarly, in Playboy Enterprises, Inc. v. Webbworld, Inc., 968 F. Supp. 1171, 1175 (N.D. Tex. 1997), a court imposed liability on the operator of a subscription-based bulletin board system that provided access to digitized versions of Playboy's copyrighted images. The Playboy court imposed liability, reasoning

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[3] The Court acknowledged, however, that Internet service providers could still be secondarily liable for contributory or vicarious copyright infringement. Netcom, 907 F. Supp. at 1373, 1375 ("Netcom is not free from liability just because it did not directly infringe plaintiffs' works . . . ."). Congress echoed this balance in Section 512(c) by removing safe harbor protection where a service provider has knowledge of infringing activity (Section 512(c)(1)(A)) or receives a financial benefit directly attributable to the infringing activity and has a right and ability to control the activity (Section 512(c)(1)(B)).

that the defendant website operator "gets paid for selling the [copyrighted] images it stores on its computers"—unlike other Internet service providers that sold only Internet access and served as "nothing more than an information conduit." Id.

This distinction between these two categories of conduct—companies that merely provided the technological infrastructure necessary to operate Internet services versus companies that themselves make content available online and benefit from copyright infringement—drove Congress's drafting and ultimate passage of the Section 512 safe harbors. See S. Rep. No. 105-190, at 19.[4]

C. Congress Created Narrow Safe Harbors To Promote The Development Of The Technological Infrastructure Necessary To Expand The Internet, Not To Authorize Widespread Copyright Infringement

Following hearings and extensive debate in both the Senate and the House of Representatives, Congress enacted four safe harbors to structure and limit the potential exposure of service providers offering Internet infrastructure services. Specifically, Congress provided immunity from monetary damages for service

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4 See also 144 Cong. Rec. 9239 (Sen. Ashcroft) ("[T]he affected parties were able to agree to legislative language that protects on-line service providers, or OSPs, from liability when they simply transmit information along the Internet."); 144 Cong Rec. 18774 (Rep. Goodlatte) ("If America's creators do not believe that their works will be protected when they put them on-line, then the Internet will lack the creative content it needs to reach its true potential; and if America's service providers are subject to litigation for the acts of third parties at the drop of a hat, they will lack the incentive to provide quick and sufficient access to the Internet.").

providers engaged in four core Internet functions: "(1) digital network communications, (2) system caching, (3) information stored on service providers, and (4) information location tools." See id.[5] As the four Section 512 safe harbors confirm, Congress focused on immunizing service providers against claims of infringement predicated on passive or automatic technological processes. Congress clearly did not intend to eviscerate settled principles of copyright protection. See H.R. Conf. Rep. No. 105-796, at 72 (1998) reprinted in 1998 U.S.C.C.A.N. 639, 648-649.

The safe harbor at issue in this appeal, Section 512(c), applies to "infringement of copyright by reason of the storage at the direction of a user." 17 U.S.C. § 512(c)(1). As with the other Section 512 safe harbors, Congress was concerned with limiting the liability of services that provide the technological infrastructure necessary for the Internet to function. S. Rep. No. 105-190, at 43 ("Examples of such storage include providing server space for user's web site, for a chat room, or other forum in which material may be posted at the direction of users."). Significantly for the instant appeal, the Senate Judiciary Committee noted that the Section 512(c) safe harbor was not intended to apply to service providers who make content available to the public for the service provider's own benefit:

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5 To qualify for safe harbor protection, a service provider must also satisfy several additional requirements set forth in Section 512.

"Information that resides on the system or network operated by or for the service provider through its own acts or decisions and not at the direction of a user does not fall within the liability limitation." Id. In this case, it is clear from the record below that Veoh was making decisions to enable infringing content to be distributed on its website for its own benefit. (See Appellant's Brief at 53-70.)

Congress also anticipated that service providers may provide core Internet infrastructure services that fall within one of the specific Section 512 safe harbors but also provide other services that do not qualify for a safe harbor:

> Whether a service provider qualifies for the limitation on liability in any one of [the four] subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.

17 U.S.C. § 512(n); see also S. Rep. No. 105-190, at 56; H.R. Rep. No. 105-551 (Part II), at 65. In such cases, the qualifying services—and only those qualifying services—receive safe harbor protection. Put simply, a service provider cannot transform safe harbor protection for a qualifying service into blanket protection immunizing all of the service provider's activities.

* * *

In sum, Congress's objective in enacting the DMCA and its Section 512 safe harbors was not to promote the widespread development of content platforms, much less platforms for hosting infringing content, or to provide a legal loophole immunizing enterprises predicated on piracy. Instead, it was to create specific safeguards for service providers operating the technological infrastructure necessary for the growth of the Internet. See S. Rep. No. 105-190, at 8, 48 (confirming that the safe harbors are not intended to apply to "pirate" websites "where sound recordings, software, movies or books were available for unauthorized downloading, public performance or public display").

II. THE DISTRICT COURT'S 2009 ORDER CONTAINS MULTIPLE ERRORS OF LAW WARRANTING REVERSAL

As Appellants explain in their opening Brief, the District Court's September 11, 2009 Order ("2009 Order") contains multiple errors of law justifying reversal. Amicus WLF respectfully addresses only two of those errors: the District Court's erroneous interpretation of the Section 512(c)(1)(A) knowledge standard (the requirement assessing whether Veoh had "actual knowledge" or an awareness of "facts" or "circumstances" from which infringing activity is "apparent") and the District Court's erroneous conclusion that Veoh did not have the "right and ability to control" the infringing activity.

A. The District Court Erroneously Interpreted And Applied The Section 512(c)(1)(A) Knowledge Standard

In addition to the other mandatory statutory requirements, to qualify for the Section 512(c) safe harbor, a service provider must (i) have no "actual knowledge that the material or an activity using the material on the system or network is infringing," or (ii) "in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent." 17 U.S.C. § 512(c)(1)(A)(i)-(ii).[6] The District Court incorrectly applied both of those knowledge standards. (See 2009 Order at 11-19.)

1. Actual Knowledge: The District Court Applied An Erroneous Standard For Proving Actual Knowledge

The District Court improperly concluded that Veoh did not have "actual knowledge" of infringing activity on its website. (See id. at 16.)

As an initial matter, an infringer such as Veoh can have "actual knowledge" of infringing activity—and a concomitant obligation to promptly remove the infringing material—without receiving a DMCA takedown notice. Indeed, the DMCA legislative history expressly acknowledges as much:

> Section 512 does not require use of the notice and take-down procedure. A service provider wishing to benefit from the limitation on liability under subsection (c) must 'take down' or disable access to infringing material residing on its system or network of which it has actual knowledge or that meets the 'red

[6] If the service provider obtains "actual knowledge" or is "aware of facts or circumstances from which infringing activity is apparent," it may still qualify for the Section 512(c) safe harbor if it "acts expeditiously to remove, or disable access to, the material." 17 U.S.C. § 512(c)(1)(A)(iii). The District Court devoted one sentence to this prong, concluding that "[i]n light of the above discussion, it is apparent that Veoh expeditiously removed infringing videos upon attaining actual knowledge of such videos." (2009 Order at 19.) As Appellants explain, this statement is unfounded in law and fact. (Appellants' Brief at 22-26, 53-70.)

> flag' test, even if the copyright owner or its agent does not notify it of a claimed infringement.

S. Rep. No. 105-190, at 45 (emphasis added).

The summary judgment record below demonstrates that Veoh had actual knowledge of infringing activity on its website, including, among other evidence, acknowledgements by Veoh's own executives and employees that they were aware of infringing activity, among other things. (See Appellant's Brief at 22-24, 61-66) The District Court improperly dismissed this evidence provided by Appellants as evidence of actual knowledge without explanation.[7] The evidence of actual knowledge in this case independently satisfies Section 512(c)(1)(A)(ii) and justifies reversal.

Although the DMCA does not require that a copyright holder provide notice to establish actual knowledge, a DMCA notice is one of the ways in which a service provider may obtain actual knowledge. In this case Veoh received DMCA notices from multiple copyright holders—providing even further evidence that Veoh had actual knowledge of infringing activity. The District Court dismissed this evidence out of hand, concluding that the notices were inadequate because

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[7] In A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1020 (9th Cir. 2001), similar evidence was presented and found to constitute knowledge, including internal documents demonstrating that executives had knowledge that Napster users were engaging in unauthorized downloading and uploading of copyrighted music.

(1) they provided Veoh with "names of artists" and not a "representative list of works" as the statute requires, and (2) "[a]n artist's name is not 'information reasonably sufficient to permit the service provider to locate [such] material.'" (2009 Order at 16 (second alteration in original).)

Contrary to the District Court's hypertechnical interpretation of Section 512(c), the text of the statute explicitly states that a copyright owner is not required to identify every individual infringing work on a site that contains multiple infringing works:

> Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

17 U.S.C. § 512(c)(3)(A)(ii) (emphasis added). Moreover, the standard against which a DMCA notice is to be judged is not rigid, but is "one of substantial compliance" with the statutory requirements. S. Rep. No. 105-190, at 46.

The legislative history further confirms that Congress recognized it would be impractical for copyright holders to provide an exhaustive list identifying every copyrighted work and every act of infringement in cases involving massive infringement:

> Where multiple works at a single on-line site are covered by a single notification, a representative list of such works at that site is sufficient. Thus, for example, where a party is operating an unauthorized Internet jukebox from a particular site, it is not necessary that the notification list every musical composition or

> sound recording that has been, may have been, or could be infringed at that site. Instead, it is sufficient for the copyright owner to provide the service provider with a representative list of those compositions or recordings in order that the service provider can understand the nature and scope of the infringement being claimed.

H.R. Rep. No. 105-551 (Part II), at 55; S. Rep. No. 105-190, at 46.[8]

Consistent with the plain language of Section 512, the legislative history, and the summary judgment record evidence, this Court should reverse the District Court's conclusion that Veoh did not have actual notice of infringing activity on its website.

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[8] Another Court of Appeals has held that a notice providing general information concerning multiple acts of infringement is adequate under the DMCA. In ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F.3d 619, 625 (4th Cir. 2001), the Fourth Circuit reversed a district court's holding that a DMCA takedown notice was deficient because it did not identify every copyrighted work and infringing work. The Fourth Circuit recognized that the "notification requirements are relaxed to the extent that, with respect to multiple works, not all must be identified—only a 'representative' list." Id. The Fourth Circuit further reasoned that the DMCA notification requirements do "not seek to burden copyright holders with the responsibility of identifying every infringing work—or even most of them—when multiple works are involved. Instead, the requirements are written so as to reduce the burden on holders of multiple copyrights who face extensive infringement of their works." Id.

2. "Red Flags" Knowledge: The District Court Erroneously Created And Required UMG To Satisfy A "High Bar" Standard Nowhere Found In Section 512(c)

The District Court also erroneously concluded that Veoh was not aware of "facts or circumstances from which infringing activity is apparent," a standard also known as "red flags" knowledge. (See 2009 Order at 17-19.)

In reaching its conclusion, the District Court created an artificially "high bar for finding 'red flag' knowledge." (Id. at 17.) In doing so, it noted (1) that "providing services to websites named 'illegal.net' and 'stolen celebritypics.com' is not enough to raise a 'red flag'" and (2) "[n]or does it raise a red flag to provide services to websites that claim to provide passwords enabling users to illegally access websites with copyrighted content." (Id.) The District Court further maintained that, even if Veoh's "founders, employees, and investors knew that widespread infringement was occurring on the Veoh system," such "general awareness of infringement, without more" is not enough to constitute "red flags" knowledge. (Id. at 17-18.) The District Court's finding is inconsistent with the language of Section 512(c), the statute's legislative history, and a line of persuasive court decisions.

First, Congress created two separate knowledge standards in Section 512: (1) "actual knowledge" (Section 512(c)(1)(A)(i)) and (2) something less than actual knowledge—awareness "of facts or circumstances from which infringing activity is apparent" (Section 512(c)(1)(A)(ii)). Despite this clear statutory structure, the District Court manufactured such a "high bar" for establishing "facts or circumstances from which infringing activity is apparent" so as to effectively conflate the two knowledge standards. The standard the District Court articulates (without any legal authority)—"willful ignorance of readily apparent infringement"—as applied below, effectively requires actual knowledge. The District Court's erroneous interpretation renders the "red flags" section of the statute virtually meaningless, a result that directly conflicts with settled principles of statutory construction. See Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991).

Second, the District Court's holding directly conflicts with Congress's expressed intention that "[o]nce one becomes aware of such infringement [] one may have an obligation to check further." H.R. Rep. No. 105-551 (Part I), at 26. As the Senate Judiciary Committee noted:

> Subsection (c)(1)(A)(ii) can best be described as a 'red flag' test. As stated in subsection (1), a service provider need not monitor its service or affirmatively seek facts indicating infringing activity (except to the extent consistent with a standard technical measure complying with subsection (h)), in order to claim this limitation on liability (or, indeed any other limitation provided by the legislation). However, 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. The 'red flag' test has both a subjective and an objective element.

S. Rep. No. 105-190, at 44 (emphasis added). In connection with the Section 512(d) safe harbor (which contains an identical "red flags" knowledge standard, see Section 512(d)(1)(B)), Congress noted that "a service provider would have no obligation to seek out copyright infringement, but it would not qualify for the safe harbor if it had turned a blind eye to 'red flags' of obvious infringement." S. Rep. No. 105-190, at 48 (emphasis added); see also id. (giving examples of "red flags" the use of names such as "pirate" and "bootleg").[9]

Third, the District Court's holding directly conflicts with the Seventh Circuit's recognition that "[w]illful blindness is knowledge, in copyright law . . . as it is in the law generally." In re Aimster Copyright Litig., 334 F.3d 643, 650 (7th Cir. 2003). Other district courts likewise have concluded that the DMCA does not "endorse business practices that would encourage content providers to turn a blind eye to the source of massive copyright infringement while continuing to knowingly profit." Perfect 10, Inc. v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1177 (C.D. Cal 2002).[10]

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[9] As with the actual knowledge standard, a service provider seeking the safe harbor's protection is required to respond to "red flags" even without notification from the rights holder. S. Rep. No. 105-190, at 45; see H.R. Rep. No. 105-551 (Part II), at 54.

[10] The Fourth Circuit also reasoned that "[t]he DMCA's protection of an innocent service provider disappears at the moment the service provider loses its innocence . . . . At that point, the [DMCA] shifts responsibility to the service

In short, the District Court's novel "red flags" standard effectively authorizes Veoh to adopt an "ostrich-like refusal to discover the extent to which [their] system[s] w[ere] being used to infringe copyright." See In re Aimster, 334 F.3d at 655. Countenancing the District Court's reasoning would create a system in which any website operator, such as Veoh, that knowingly provides a platform for infringing content, could hide behind Section 512 and escape all monetary liability for copyright infringement—even though it is "generally aware" that the service features infringed copyrighted works and profits handsomely from the availability of those works on its website. This is not the rule of law Congress intended and enacted. Accordingly, this Court should reverse the District Court.

B. The District Court Erroneously Held That Veoh Did Not Have The "Right And Ability To Control" The Infringing Activity

A service provider also loses the Section 512(c) limitation on liability where it 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). The District Court erroneously concluded that Veoh did not have the "right and ability to control such activity," and in so doing

provider to disable the infringing matter." ALS Scan, 239 F.3d at 625 (recognizing that DMCA immunity "is not presumptive, but granted only to 'innocent' service providers"); see also Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1201 (N.D. Cal. 2004) (recognizing that the DMCA limits liability only for "incidental" acts of infringement).

failed to apply binding Ninth Circuit precedent and to respect the expressed intent of Congress. Accordingly, this Court should reverse the District Court.[11]

1. Section 512(c)(1)(B) Codifies The Common Law Vicarious Liability Standard

The language of Section 512(c)(1)(B) directly tracks the elements of common law vicarious liability: (1) "a financial benefit directly attributable to the infringing activity" and (2) "the right and ability to control such activity." Compare 17 U.S.C. § 512(c)(1)(B), with Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 n.9 (2005) (stating that a vicarious liability theory "allows imposition of liability when the defendant profits directly from the infringement and has a right and ability to supervise the direct infringer") and Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788, 805 (9th Cir. 2007) (stating that "[f]or vicarious liability to attach, [] the defendant must have the right and ability to supervise and control the infringement").[12]

The legislative history also confirms Congress's intent to codify the common law vicarious liability standard in Section 512(c)(1)(B):

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[11] The District Court did not reach the "financial benefit" element of the Section 512(c)(1)(B) safe harbor.

[12] In discussing the vicarious liability standard, the Supreme Court and this Court have used the language "right and ability to control" and "right and ability to supervise" interchangeably. See Grokster, 545 U.S. at 930 n.9; Visa Int'l, 494 F.3d at 805.

> The financial benefit standard in subparagraph (B) is intended to codify and clarify the direct financial benefit element of vicarious liability. . . . The "right and ability to control" language in subparagraph (B) codifies the second element of vicarious liability.

H.R. Rep. No. 105-551 (Part I), at 25-26 (emphasis added).[13] Consistent with the plain language of the statute and clear legislative history, this Court previously has concluded that Section 512(c)(1)(B) reflects the common law standard for vicarious liability. Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1117 (9th Cir. 2007) (recognizing that the "direct financial benefit" element "should be interpreted consistent with the similarly-worded common law standard for vicarious copyright liability").

2. The District Court Erroneously Disregarded Binding Ninth Circuit Precedent Holding That A Service Provider's Ability To Block An Infringer's Access Satisfies The "Right And Ability To Control" Element

The District Court acknowledged—and then failed to apply—two controlling decisions of this Court, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1023 (9th Cir. 2001) and Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d

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[13] The District Court discounted this passage because it appears in "an early report by the House Committee on the Judiciary that addressed a version of the DMCA that is significantly different in its text and structure than the version that Congress ultimately adopted." (2009 Order at 24.) Although many provisions of the DMCA were revised during the legislative process, the identical "right and ability to control" language was codified in Section 512(c)(1)(B). Compare H.R. 2281, 105th Cong. § 512(a)(3)(B) (1998), at 25, with 17 U.S.C. § 512(c)(1)(B).

701, 730 (9th Cir. 2007). (See 2009 Order at 24.) This failure is an independently sufficient basis justifying reversal.

In A&M Records, Inc. v. Napster, Inc., this Court held that the "ability to block infringers' access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise." 239 F.3d at 1023. In Napster, this Court recognized that the Napster service "retains the right to control access to its system," and that "the reserved right to police must be exercised to its fullest extent. Turning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability." Id. In assessing Napster's ability to police, this Court emphasized the technological capabilities available to Napster, including its "ability to locate infringing material listed on its search indices, and the right to terminate users' access to the system." Id. at 1024. In light of those abilities, this Court concluded that the plaintiffs demonstrated a likelihood of success on their vicarious copyright infringement claim. Id.[14]

Similarly, in Perfect 10, Inc. v. Amazon.com, Inc., this Court held that, consistent with the Supreme Court's opinion in Grokster, a service provider

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[14] Significantly, Napster concluded that the "right and ability to supervise" element was satisfied even though the "system's current architecture" was unable to evaluate "the content of the indexed files." Napster¸ 239 F.3d at 1024. Veoh has even greater methods of policing its website, such as the Audible Magic filtering software, than the capabilities Napster found to be sufficient.

"exercises control over a direct infringer when he has both a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so." 487 F.3d at 730.

In the current case, the District Court acknowledged that (i) the infringing material resides on Veoh's system, (ii) Veoh retains the right to remove the material at its discretion, (iii) Veoh could have implemented (and did implement) filtering software, and (iv) Veoh had the technological capability to search for infringing content. (2009 Order at 4-5, 19-20.) Applying this Court's settled authority to those facts, Veoh has the "right and ability to control" infringing activity on its system and the practical ability to do so. See Amazon.com, 487 F.3d at 730; Napster, 239 F.3d at 1023. Accordingly, the District Court's holding was incorrect and should be reversed.

3. The District Court's Holding Is Not Supported By Sound Reasoning

Instead of applying the binding decisions of this Court and respecting Congress's stated legislative objectives, the District Court held UMG to a heightened standard unsupported by the plain text of the statute, the legislative history, and the controlling case law of this Circuit. (2009 Order at 23.)

(a) The District Court's "Something More" Justification

Citing a handful of district court opinions, the District Court held that a copyright holder must establish "something more"—in addition to a right to terminate user accounts—in order to establish that a service provider has the "right and ability to control" infringing activity. (2009 Order at 21-24.)[15] The District Court does not explain what, precisely, this "something more" is (or how a plaintiff could demonstrate it).

Ignoring Ninth Circuit precedent, the District Court relied heavily on Perfect 10, Inc. v. Cybernet Ventures, Inc., a district court opinion that (1) provides only a cursory, one-paragraph analysis of the "right and ability to control" element, (2) failed to apply (or attempt to distinguish) this Court's binding opinion in Napster, (3) failed to adhere to Congress's intent to codify the common law vicarious liability standard, and (4) created a heightened "something more" standard by inappropriately importing concepts from outside copyright law, namely contributory patent infringement cases. 213 F. Supp. 2d at 1181. Put simply, there is no legitimate, principled basis to justify the District Court's "something more" standard.

As discussed above, even under this "something more" standard, the record demonstrates that Veoh has the "right and ability to control" infringing activity. Among other things, Veoh has the practical ability to identify and remove

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[15] Cybernet Ventures, Inc., 213 F. Supp. 2d at 1181-82; Ellison v. Robertson, 189 F. Supp. 2d 1051 (C.D. Cal. 2002), rev'd in part, aff'd in part, 357 F.3d 1072 (9th Cir. 2004); Hendrickson v. Ebay, Inc., 165 F. Supp. 2d 1082, 1093-94 (C.D. Cal. 2001).

infringing material by using filtering software and by its regular reviews of content on its website. (See 2009 Order at 4-5, 19-20.) These technological capabilities further demonstrate Veoh's "right and ability to control" the infringing activity, and satisfy the heightened standard the District Court created.

(b) The District Court's "Catch-22" Justification

The District Court also concluded that interpreting the "right and ability to control" prong consistent with the common law vicarious liability standard would create an "odd catch-22." (2009 Order at 20 (relying, in part, on Ebay).) The District Court stated that, to qualify for the Section 512(c) safe harbor, a service provider must (i) have "substantial control over users' access to material on their systems," id. (discussing Section 512(c)(1)), and (ii) comply with takedown notices, which presupposes the ability to "remove, or disable access to, the material that is claimed to be infringing," see Section 512(c)(1)(C). Thus, on the District Court's reasoning, interpreting the "right and ability to control" element consistent with the vicarious liability standard would mean that any service provider qualifying for the safe harbor under Section 512(c)(1)(B) would also "lose[] immunity . . . because it engages in acts that are specifically required by the DMCA." (Id. at 20.)

The District Court's analysis here is flawed, in part, because it analyzes the "right and ability to control" prong in a vacuum without reference to the companion "financial benefit" prong of Section 512(c)(1)(B). A service provider can satisfy the requirements under Section 512(c)(1)(B)—even under the common law vicarious liability "right and ability to control" standard—provided that it does not receive a "financial benefit directly attributable to the infringing activity."[16]

Other courts to consider this issue (including opinions cited by the District Court) have acknowledged that Section 512(c)(1)(B) can be read in harmony with the remainder of Section 512(c) when the "financial benefit" prong is considered. See Ellison v. Robertson, 189 F. Supp. 2d 1051, 1061 (C.D. Cal. 2002) (recognizing that "[t]he Ebay court's analysis somewhat overstates the predicament (ISPs not receiving a financial benefit directly attributable to the infringing activity would not face this 'catch-22'")). Given the clear statutory language and the ability to read Section 512(c)(1)(B) so that it does not conflict with other Section 512(c) provisions, all in light of Congress's expressed intent to codify the common law standard for vicarious liability in Section 512(c)(1)(B), see

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[16] This is precisely the result Congress envisioned: a service provider who has the "right and ability to control" infringing activity should not be able to "receive a financial benefit directly attributable to the infringing activity." See Part I, supra.

H.R. Rep. No. 105-551 (Part I), at 25-26, the District Court's opinion should be reversed.[17]

(c) The District Court's Section 512(m) Justification

The District Court further erroneously concluded that "Veoh's 'right and ability' to implement filtering software, standing alone or even along with Veoh's ability to control users' access, also cannot be the basis for concluding that Veoh is not eligible for the section 512(c) safe harbor" because it would conflict with Section 512(m).[18] (2009 Order at 20.)

Here again, the District Court failed to consider the required "financial benefit" prong. A service provider may satisfy the section 512(c)(1)(B) requirements (using the common law vicarious liability standard) and not "adopt specific filtering technology and perform regular searches," provided that it "does

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[17] The court is obligated to read the two provisions so that one does not eliminate the other, particularly when, as here, the provisions were enacted together. U.S. W. Commc'ns. Inc. v. Hamilton, 224 F.3d 1049, 1053 (9th Cir. 2000).

[18] Section 512(m) provides, in relevant part, 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." 17 U.S.C. § 512(m). Although Section 512(m) does not impose an affirmative obligation on service providers to monitor their systems to receive safe harbor protection, so, too, Section 512(m) does not relieve service providers of their obligation to affirmatively address infringing activity on their systems. See H.R. Rep. No. 105-551 (Part I), at 26 ("Once one becomes aware of such infringement [] one may have an obligation to check further.").

not receive a financial benefit directly attributable to the infringing activity." (Id. at 19, 20); 17 U.S.C. § 512(c)(1)(B). In sum, the text of the statute and its legislative history both confirm that Section 512(c)(1)(B) incorporates the common law vicarious liability standard and does so without conflicting with Section 512(m).[19] Accordingly, the District Court's opinion should be reversed.

[19] In addition, the text of Section 512(m) and the accompanying legislative history confirms that the section was intended as a "protection[] to privacy." 17 U.S.C. § 512(m); S. Rep. No. 105-190, at 55.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.

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Respectfully submitted,

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Dated: April 27, 2010

s/ Christopher G. Clark
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CERTIFICATE 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.

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