

21-2949(L)

21-2974 (CON)

**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* ELECTRONIC FRONTIER FOUNDATION
AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Electronic Frontier Foundation states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Computer & Communications Industry Association states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

Dated: July 19, 2022

By: /s/ Mitchell L. Stoltz
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INTEREST OF *AMICI*¹

The Electronic Frontier Foundation (“EFF”) is a San Francisco-based, member-supported, nonprofit civil liberties organization that has worked for over 30 years to protect free speech, privacy, security, and innovation in the digital world. With tens of thousands of dues-paying members, EFF represents the interests of technology users in court cases and policy debates regarding the application of law to the internet and other technologies.

The Computer & Communications Industry Association (“CCIA”) is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy.²

Amici represent Internet users and technology companies that have a shared interest in a balanced copyright system that protects legitimate innovators and online free speech from the chilling effects of unnecessary legal uncertainty.

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

² A list of CCIA members is available at <http://www.cciagnet.org/members>. Vimeo is a CCIA member, but took no part in the preparation of this brief.

Amici believe that robust and unambiguous safe harbors under 17 U.S.C. § 512 are essential to the continued functioning of the Internet ecosystem, which in turn supports the countless Internet users who depend upon online services to learn, create, organize and share information.

SUMMARY OF ARGUMENT

Congress crafted Section 512 of the Digital Millennium Copyright Act (“DMCA”) with the specific intent of fostering online expression. Section 512 established a predictable legal framework that allowed Internet-based services to manage the risk of crippling liability for copyright infringement by others—a framework that hundreds of thousands of services large and small now rely on when they host, transport, index, or recommend creative works.

Without these safe harbors, service providers would be vulnerable to potentially massive copyright damage awards when, as is virtually inevitable, use of their services implicates exclusive rights of copyright owners. To avoid that risk, these service providers would be likely to block communications that occur via their services—including lawful communications—or shut those services down. Thus, changes to the legal climate for service providers can have profound consequences for free expression online, and proper interpretation of copyright laws as applied to these service providers is a matter of crucial public interest.

Appellants ask this Court to adopt a novel and dangerous interpretation of Section 512 that would make it less certain, less predictable, and far less broadly applicable than it is today. The Court should refuse.

Appellants' claim that the "right and ability to control" provision of 17 U.S.C. § 512(c)(1)(B) should turn on a false dichotomy between a platform's acts of "editorial judgment" and other "common activity" is both legally invalid and practically unworkable. It would effectively collapse the § 512(c) safe harbor into the underlying judge-made test for secondary liability, rendering the safe harbor a dead letter. And it ignores the reality of online content moderation, which cannot be divided into "editorial" and non-"editorial" activity in any consistent way.

Appellants' proposed change to the "red flag knowledge" standard of 17 U.S.C. § 512(c)(1)(A)—adding a presumption that music used in videos is infringing—ignores the wealth of free and easily licensed music available for use in videos, as well as legal protections such as fair use. Further, it would privilege a particular business model for creative work and endorse a view of copyright that is inconsistent with U.S. jurisprudence, one that assumes that every use of a copyrighted work must start with asking permission.

Taken together, Appellants proposals would thwart Congress's intent and reinstate a climate of legal uncertainty that would harm innovative online services

and the speech they foster. In the interest of protecting the millions of Internet users who rely upon online service providers to develop and support platforms for expression, *Amici* urge the Court to reject Appellants' efforts to undermine the Section 512(c) safe harbor, and to affirm the district court's ruling.

ARGUMENT

I. Section 512 Should be Interpreted According to Its Purpose to Protect and Encourage the Development of Platforms for Online Expression.

A. Congress Intended Section 512 to Provide Legal Certainty.

The purpose of copyright law is to “promote the progress of science and useful arts.” U.S. Const. Art. 1 § 8. To achieve that purpose, copyright balances incentives for creative work with “society’s competing interest in the free flow of ideas, information, and commerce.” *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

Section 512 is no exception. Congress knew that online service providers could be misused by some users to facilitate copyright infringement. But it was “loath to permit the specter of liability to chill innovation that could also serve substantial socially beneficial functions.” *UMG Recordings, Inc. v. Shelter Capital Partners, LLC*, 718 F.3d 1006, 1014 (9th Cir. 2013). The need was highlighted by a growing trend of copyright infringement suits against online service providers that challenged their existence. Indeed, the limitations on liability were deemed “absolutely necessary to the immediate survival of ISPs.”

CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544, 555 (4th Cir. 2004). Judge-made doctrines of secondary liability were (and are) often applied unevenly, making it hard for innovators and investors to evaluate the legal risks of operating services that facilitate, among other things, online expression. See 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12B.01[A][1] (Matthew Bender, rev. ed. 2018) (describing conflicting secondary liability jurisprudence prior to 1998).³ And given the potentially astronomical penalties if they guessed wrong, many would simply choose to direct their time and resources elsewhere.

Accordingly, keeping in mind the needs of both rightsholders and users, Congress created a set of safe harbors designed to “provide ‘greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.’” *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (quoting S. REP. NO. 105-190, at 20 (1998)). These statutory safe harbors replaced the conflicting jurisprudence that characterized early judicial efforts to apply secondary liability doctrines to new Internet contexts with detailed provisions that gave rightsholders and service providers relatively

³ Compare *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170-75 (9th Cir. 2007) (discussing secondary liability principles applicable to online service providers) with *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 811-22 (9th Cir. 2007) (Kozinski, J., dissenting) (pointing out contradictions in secondary liability standards as applied to service providers).

precise “rules of the road.” By creating a more predictable legal environment, Congress sought to ensure “that the variety and quality of services on the Internet will continue to expand.” S. REP. NO. 105-190, at 8. And it intended for those safe harbors to protect, inter alia, service providers that direct users to expressive content placed by third parties, or suggest third-party content that users may want to see—i.e., curation—even if some of that content might be infringing. *Id.*

B. Section 512, as Interpreted by This Court and Others, Has Been Successful in Achieving Congress’s Goal.

Congress’s experiment has largely succeeded. Video-sharing sites like Vimeo and YouTube have been joined by Instagram and TikTok, streaming-based services like Twitch, and multimedia platforms like DeviantArt, Pinterest, and the Archive of Our Own. Blogging platforms like CMS Hub, WordPress, Squarespace, Wix, and Blogger have also grown, along with messaging platforms like Slack, Discord, and Mattermost, forums like Reddit, and knowledge resources such as Wikipedia and the Internet Archive.

These services have, in turn, empowered a generation of creators.⁴ Makers of independent films of all types, including educational films, documentaries,

⁴ Michael Masnick & Leigh Beadon, *The Sky Is Rising: 2019 Edition* (2019), <http://skyisrising.com/TheSkyIsRising2019.pdf>; Robert Shapiro & Siddhartha Aneja, *Taking Root: The Growth of America’s New Creative Economy* (2019), <https://www.recreatecoalition.org/wp-content/uploads/2019/02/ReCreate-2017-New-Creative-Economy-Study.pdf>.

fictional works, and commentaries, use services like Vimeo to distribute and market their works.⁵ Aspiring musicians post their performances on video-sharing sites as a means of seeking commercial support.⁶ Remix videos, a genre that is particularly popular among creators who are underrepresented in American mass culture, use excerpts from film and television, including music, to talk back to that culture and imagine the ways it could change.⁷

All of these intermediaries depend on the certainty, consistency, and administrability of the safe harbors, as construed by this Court and others.

C. Appellants' Interpretation of Section 512(c)(1)(B) Renders the Statute a Dead Letter, Which This Court has Rejected and Which Congress Did Not Intend.

Appellants ask this Court to upend two decades of progress, based on a new interpretation of Section 512(C)(1)(B) that runs directly contrary to this

⁵ See, e.g., Wong Fu Productions, <https://www.youtube.com/user/WongFuProductions/videos> (last accessed July 19, 2022); Terror Films, <https://www.youtube.com/c/TerrorfilmsNet1031/featured> (last accessed July 19, 2022); Movie Central, <https://www.youtube.com/c/MovieCentral/featured> (last accessed July 19, 2022).

⁶ See Isis Briones, *Twelve Major Artists Who Got Their Start on YouTube*, Teen Vogue (Mar. 29, 2016), <https://www.teenvogue.com/story/best-artists-discovered-on-youtube>.

⁷ See Comments of the Organization for Transformative Works on the Department of Commerce Green Paper, at 29-38 (Nov. 15, 2013), *available at* http://www.ntia.doc.gov/files/ntia/organization_for_transformative_works_comments.pdf.

Court's own precedent and the practical reality of online content management. The Court should refuse that request.

Ten years ago, this Court construed Section 512's "control" provision to require "something more" than "the ability to remove or block access to materials posted on a service provider's website." *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 38 (2d Cir. 2012). It concluded Congress intended only for companies that exert "substantial influence over the activities of users" to lose the benefits of the safe harbor under § 512(c)(1)(B). *Id.* at 48. Anything less would collapse the § 512(c) safe harbor into the substantive standard for vicarious liability, producing a "catch-22" and rendering "the statute internally inconsistent." *Id.* at 37-38; *see also UMG Recordings, Inc. v. Shelter Capital Partners*, 667 F.3d 1022, 1045 (9th Cir. 2011). Such an outcome would defeat Congress's purpose of providing legal certainty to digital services and their users. *See Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (quoting S. REP. NO. 105-190, at 20 (1998)). Appellants acknowledge this "catch-22," Appellants' Br. at 29 (citing *Viacom* at 38), and yet offer a test which would recreate the very same "predicament" the *Viacom* court intended to escape.

According to Appellants' preferred interpretation of the "right and ability to control" branch of § 512(c)(1)(B), the exercise of "editorial judgment" by online platforms should constitute "substantial influence" that potentially

disqualifies them from Section 512 protection under the control provision. Appellants' Br. at 30. No court has ever adopted that standard, and for good reason. For one, the "substantial influence" standard adopted in *Viacom* requires an inquiry into whether the service provider's actions helped foster infringement on the service. That can take the form, as the *Viacom* court explained, of inducing infringement via "purposeful conduct and expression" or providing "detailed instructions regard[ing] issues of layout, appearance, and content." 676 F.3d at 38 (citations omitted). Simply exercising editorial judgment—for example by removing instances of objectionable content or helping curate or organize content on the service—falls far short of that standard. Indeed, to be protected by Section 512, platforms must remove material when they have "red flag knowledge" of infringement—a form of editorial judgment. *See id.* at 31-32. And more generally, making efforts to remove objectionable content of various forms (including potentially infringing content) or helping users more readily locate desirable content—simply does not amount to "control" over infringing activity, or substantially influencing users to engage in infringement.

To the contrary, virtually every platform that accepts uploaded content makes "editorial judgments" in the course of making and enforcing community standards, to protect user safety as well as copyright holders' interests. Indeed, taking steps to limit copyright infringement is itself an exercise in editorial

judgment. It cannot be that such efforts disqualify service providers from Section 512 protections.

To the contrary, these efforts to monitor, arrange, and remove content—whether to protect user safety, to serve copyright holders’ interests, or to make online services useable—are all “common activities of service providers” that Section 512 was expressly designed to protect. *See* S. REP. NO. 105-190, at 19 (1998) (Section 512 “create[s] a series of ‘safe harbors’ for certain common activities of service providers.”). Indeed, Congress explicitly acknowledged that Section 512 was “not intended to discourage the service provider from monitoring its service,” H.R. REP. NO. 105-796, at 73 (1998), and recognized the “valuable role” that “human editors and reviewers” play in “assisting Internet users to identify and locate the information they seek.” S. REP. NO. 105-190, at 48.

Not coincidentally, Congress enacted 47 U.S.C. § 230 (“Section 230”), shortly before it passed Section 512. One of the central purposes of that statute was to give online platforms broad leeway to review and remove objectionable content from their systems. *See, e.g., Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (“Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services.”); *Barnes v. Yahoo!, Inc.*, 570 F. 3d 1096, 1099-1100 (9th Cir. 2009) (“The statute is designed at once to promote the free exchange of

information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material.”). As this Court has expressly held, Section 230 protects the “editorial decisions regarding third-party content that interactive computer services have made since the early days of the Internet.” *Force v. Facebook, Inc.*, 934 F.3d 53, 66-67 (2d Cir. 2019).

The services have always decided, for example, where on their sites (or other digital property) particular third-party content should reside and to whom it should be shown. . . . Internet services have also long been able to target the third-party content displayed to users based on, among other things, users’ geolocation, language of choice, and registration information. And, of course, the services must also decide what type and format of third-party content they will display, whether that be a chat forum for classic car lovers, a platform for blogging, a feed of recent articles from news sources frequently visited by the user, a map or directory of local businesses, or a dating service to find romantic partners.

Id. at 67-68.

It would make little sense to suggest that Congress enacted a robust protection for the editorial judgments of online platforms—seeking to encourage “self-regulation” and “voluntary monitoring”—yet then crafted a scheme under which those very activities would strip the platforms of their statutory protection against copyright liability.

II. Appellants’ Proposed Test Would Interfere with Industry-Standard Practices in Content Moderation.

Beyond being inconsistent with the statutory scheme, Appellants’ approach is simply unworkable. Appellants seek to draw a line between “editorial

judgments” (which, on their theory, would amount to disqualifying “control”) and “common activity,” such as removing “*blatantly* illegal content” or a real-estate website “glanc[ing] at photographs to ensure they actually depict houses” (which would not). Appellants’ Br. at 31 (emphasis supplied).

This approach creates at least two fundamental problems.

First, this test would burden federal courts with interminable inquiries into the level of subjective judgment involved in moderating content, requiring them to make arbitrary but potentially case-dispositive distinctions among myriad content-moderation practices. Does a service provider forfeit Section 512 safe harbors if it removes obscenity or violent threats against users? Is such content sufficiently *blatantly* illegal to count? What if a service forbids legal pornography and seeks to find and remove such content? Is that a disqualifying “subjective” judgment under Appellants’ scheme? What if Etsy removes listings that it thinks are not handmade artisanal products? Is that close enough to removing photographs that don’t depict houses? What about if a service provider uses algorithms to remove what the software considers to be spam content or bot accounts? Is that sufficiently “cursory”? At the same time, appellants’ test would force service providers to attempt to predict how courts would rule on these questions, subject to potentially enormous statutory damages if they guess wrong.

Faced with the specter of massive copyright liability based on their content moderation decisions, platforms might decide to avoid the risk by not doing that review and allowing harassing or abusive content on the service. Alternatively, they may choose to substantially over-block content to avoid any appearance or possibility of infringement, undermining the value of those platforms as vehicles for online expression.

Second, and relatedly, Appellants' novel test misunderstands the pervasiveness and significance of online content moderation. At the very least, every publicly available site must take action to remove content prohibited by federal law. Many sites must make decisions about how to manage content that, while lawful in the United States, may violate laws abroad. And most platforms establish and enforce granular acceptable use policies or community guidelines about what content and behavior is and is not permitted. *See, e.g., NetChoice, LLC & Computer & Commc 'ns Indus. Ass'n v. Att'y Gen., State of Fla.*, 34 F.4th 1196, 1213 (11th Cir. 2022). That includes enforcing policies that prohibit a wide range of lawful content that is deemed offensive to many in the community: content that is flagged as pornography, hate speech, terrorist propaganda, or is excessively violent.⁸ Other platforms may simply want to ensure that the content

⁸ The volume of objectionable content online is difficult to fathom, with leading platforms removing many billions of pieces of content every year. For example, in

they host reflects the purpose of their site, such as supporting discussions about knitting,⁹ or a social media platform for members of the armed services.¹⁰

Such moderation requires platforms to engage in a great deal of editorial decision-making that, to best protect online expression, must be based on a careful analysis of the content at issue. Appellants try to dismiss content moderation as “basic site maintenance” that “entails only cursory, non-editorial review.” Appellants’ Br. at 31. In reality, content moderation activities are time- and resource-intensive business functions that require complex judgment calls about both legal and policy compliance.

just the first quarter of 2022, YouTube terminated more than 4.4 million channels with nearly 100 million videos, more than 3.8 million individual videos, and more than 940 million comments. *Google Transparency Report*, YouTube Community Guidelines enforcement, <https://transparencyreport.google.com/youtube-policy/removals?hl=en> (last accessed July 19, 2022). Facebook took action on 1.8 billion pieces of spam content, 31 million pieces of adult nudity and sexual activity content, 21.7 million pieces of violence and incitement content, and 16.5 million pieces of child sexual exploitation content. Meta Transparency Center, *Community Standards Enforcement Report: Q1 2022 report*, <https://transparency.fb.com/data/community-standards-enforcement/> (last accessed July 19, 2022). TikTok removed over 100 million videos for violations of its community guidelines and terms of service. TikTok, *Community Guidelines Enforcement Report, January 1, 2022 - March 31, 2022*, <https://www.tiktok.com/transparency/en-us/community-guidelines-enforcement-2022-1/>.

⁹ Ravelry, <https://www.ravelry.com> (last accessed July 19, 2022).

¹⁰ RallyPoint, <https://www.rallypoint.com/> (last accessed July 19, 2022).

For example, YouTube’s policy on content with educational, documentary, scientific, or artistic merit (“EDSA”) permits “videos that might otherwise violate our policies” to stay on the service “if the content offers a compelling reason with visible context for viewers.”¹¹ Accordingly, while the platform does not allow videos containing “[n]udity that is meant to be sexually gratifying (like pornography),” it does allow nudity with “scientific value, like a video with imagery of a medical professional conducting a physical examination,” or artistic value, like “a photographer exhibiting nude portraits or a music video featuring nude or semi-nude dancers.” *Id.* Determining whether a video qualifies for the EDSA exception is “nuanced” and “tricky,” and requires human reviewers to look at “the video title, descriptions and the context provided in the video’s audio or imagery.” *Id.* These determinations go far beyond “ cursory, non-editorial review,” Appellants’ Br. at 31, yet they are essential if the platform hopes to meet community expectations, including protecting free expression while attempting to limit abusive or otherwise unwelcome content.

Further, if a reviewer decides that a particular piece of problematic content should be allowed, the reviewer may have to make additional editorial decisions

¹¹ Michael Grosack, *A Look at How We Treat Educational, Documentary, Scientific, and Artistic Content on YouTube*, YouTube Official Blog (Sept. 17, 2020) <https://blog.youtube/inside-youtube/look-how-we-treat-educational-documentary-scientific-and-artistic-content-youtube>.

regarding where and how it should be displayed (e.g., whether it should be posted with a warning message, blocked from children’s accounts, demoted in search results or news feeds, etc.). For example, human reviewers must make determinations about whether content “may not be appropriate for all audiences” and should therefore be age-restricted.¹² This requires more than a “glance[.]” at the video that is “so cursory as to be insignificant,” Appellants’ Br. at 31. Instead, it requires the reviewer to rely on their own understanding and training concerning what content might upset or otherwise negatively impact children in order to make an informed judgment.

Finally, many service providers facilitate access to a massive amount of content with new material pouring in constantly. Without some order and organization, users may not be able to identify and access the content that is relevant and interesting to them. To prevent that, reviewers must frequently make editorial judgments regarding how to tag, arrange, and otherwise curate all kinds of content in ways that help users find what they’re looking for. “[C]urat[ing] uploaded content,” Appellants’ Br. at 31, is a necessary part of many platforms’ operation, and drawing the line at “basic” moderation (i.e., the removal of

¹² YouTube Community Guidelines, Taking Action on Violations, <https://www.youtube.com/howyoutubeworks/policies/community-guidelines/#taking-action-on-violations> (last accessed July 19, 2022).

content), would severely restrict their ability to help users make full use of their service.

In short, Appellants' contention that "drawing the line at editorial judgments" would provide courts with "a clear rule of decision based on objective criteria" is woefully misguided. Appellants' Br. at 32. This line does not exist: content moderation frequently requires service providers to engage in complex editorial decision-making, both to remove content that does not meet community guidelines and to arrange, curate, and direct users to content that does. Moreover, Appellants' proposed rule would substantially discourage platforms from taking actions that might make their services safer and more useful for users.

At a time when policymakers and the public are increasingly calling on service providers to take even more aggressive measures against such undesirable content, Appellants urge a reading of Section 512 that would turn efforts to make Internet communities safer, healthier, and more inclusive into legal liabilities. Such an outcome defies reason. Congress could not have intended to force service providers to choose between retaining safe-harbor protections and moderating content to address harassment and abuse and help users find new works.

III. Uses of Music Are Often Fair or Licensed.

With respect to the “red flag knowledge” provision of 17 U.S.C. § 512(c),¹³ Appellants are seeking to relitigate issues this Court already resolved in *Viacom* and the instant case. This Court’s holding that “[t]he difference between actual and red flag knowledge is [] not between specific and generalized knowledge, but instead between a subjective and an objective standard” is particularly important, because it avoids creating “an amorphous obligation to ‘take commercially reasonable steps’ in response to a generalized awareness of infringement.” *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012). The district court applied the rule correctly in this case, holding that red flag knowledge requires the plaintiff to show 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*, No. 09-cv-10101, 2021 WL 2181252, at *4 (emphasis added).

Appellants attempt to bypass that standard by insisting that services will always know that uses of music must be unlawful. As with their proposed “editorial judgment” test, this theory does not match reality. Indeed, this Court expressly rejected any such idea in the prior appeal in this case. Moreover,

¹³ The provision requires that a service provider “is not aware of facts or circumstances from which infringing activity is apparent,” as a condition of the safe harbor.

Appellants ask this Court to put a thumb on the scale in favor of a particular business model, to the detriment of online expression.

A. Music for Videos Can Be Licensed, Encouraged by Artists, or Fair Use.

Appellants' contention that obtaining a license to use music is "difficult or impossible" for users of services like Vimeo paints an incomplete and misleading picture, for several reasons. Appellants' Br. at 56; *see* Br. of Nat'l Music Publishers Ass'n et al., at 4 ("NMPA Br.").

First, licensed music is readily available to video creators and such music is not easily distinguishable from "popular" or "major label" music. Diverse collections of recorded music are available for licensing by video creators under a variety of licenses, including one-time payments and open licenses such as Creative Commons. For example, Soundstripe, AudioJungle, and PremiumBeat license large libraries of music for use in videos with a single upfront transaction. SoundCloud, Freesound, and ccMixter provide collections of music that carry Creative Commons licenses, requiring no negotiation or payment. As Appellants note in their brief, Appellants' Br. at 56, Vimeo itself has at times helped users obtain licenses for "free and non-major-label music." This music spans numerous genres and is often of high technical and aesthetic quality.

Neither the rights ownership nor the licensing status of music are easily determined simply by listening to it, or even by reading the credits of a video.

Even rightsholders, who are best positioned to know both the ownership and licensing status of music, mistakenly demand takedowns of music they don't own or control, or even request takedowns of their own content.¹⁴ When rightsholders themselves cannot accurately identify infringement, a legal presumption that a service provider can readily identify "obvious" infringement is obviously unwarranted.

Through their description of the complexity of licensing, Appellants and their *amici* are asking this Court to adopt, with different words, essentially the same test that the Court already rejected in this case: a presumption that "famous" or "recognizable" music was in fact recognized by a service provider's reviewers. *See Capitol Records, LLC v. Vimeo LLC*, 826 F.3d 78, 96 (2d Cir. 2016). Appellants now argue that "major music companies" are unlikely to grant licenses to amateur video creators. Appellants' Br. at 55-56. And *Amici* NMPA et al. argue for reviewers' presumed knowledge of "popular music" or a "hit song." NMPA Br. at 6. They do not explain why a reviewer, even one who is herself a video

¹⁴ *See* Michael Andor Brodeur, *Copyright bots and classical musicians are fighting online. The bots are winning.*, Wash. Post (May 21, 2020), https://www.washingtonpost.com/entertainment/music/copyright-bots-and-classical-musicians-are-fighting-online-the-bots-are-winning/2020/05/20/a11e349c-98ae-11ea-89fd-28fb313d1886_story.html; *DMCA Mystery: Did Epic Games Send a Takedown to Itself?*, EFF Takedown Hall of Shame (Oct. 8, 2018), <https://www.eff.org/takedowns/dmca-mystery-did-epic-games-send-takedown-itself>.

creator or a video connoisseur, should be presumed to know what is “popular,” or a “hit,” or the product of a “major music company” across numerous eras and styles of music. *See Capitol Records, LLC v. Vimeo LLC*, 826 F.3d 78, 96 (2d Cir. 2016).

Second, Appellants and their *amici* assume that the videos on sites like Vimeo are a monolith of “amateur productions.” Appellants’ Br. at 6; NMPA Br. at 4. In fact, professional video producers at small and mid-sized businesses also post videos online.¹⁵ These businesses will generally have more knowledge of copyright law and licensing themselves, and a stronger incentive to ensure that their uses of music are licensed or otherwise lawful. Thus, for a significant population of uploads, NMPA’s example of “an amateur user posting a home-recorded video,” Appellants’ Br. at 4, who finds licensing infeasible and chooses to proceed without licenses is inapt.

Third, artists or their representatives sometimes encourage the public to make videos that include their music, such as dance or lip-sync videos.¹⁶ Rightsholders even upload their own content under false names to encourage

¹⁵ *See, e.g.,* Vimeo, *Creative Professionals Video Solutions*, <https://vimeo.com/solutions/creative-professionals-solutions> (last accessed July 19, 2022).

¹⁶ Kevin Ashton, *You didn’t make the Harlem Shake go viral—corporations did*, Quartz (Mar. 28, 2013), <https://qz.com/67991/you-didnt-make-the-harlem-shake-go-viral-corporations-did/>.

viewing.¹⁷ The website of the licensing body ASCAP advises musicians to “be everywhere” with their music, including “music discovery platforms and torrent blogs.”¹⁸ Campaigns like these are part of the facts and circumstances that are known to reviewers for platforms like Vimeo. The existence of such campaigns makes infringing uses still harder to distinguish from permitted ones.

Fourth, fair use can and does apply to many substantial uses of music in videos. *See, e.g., Estate of Smith v. Graham*, 799 Fed. App’x 36 (2d Cir. 2020) (35-second sample used in rap song); *Red Label Music Publ’g, Inc. v. Chila Prods.*, 388 F. Supp. 3d 975, 984-85 (N.D. Ill. 2019) (establishing historical context in documentary); *Threshold Media Corp. v. Relativity Media, L.L.C.*, 166 F. Supp. 3d 1101 (C.D. Cal. 2013) (plot device in fictional film); *Lennon v. Premise Media Corp.*, 586 F. Supp. 2d 310 (S.D.N.Y. 2008) (illustration of a point of view); *Italian Book Corp. v. American Broadcasting Cos., Inc.*, 458 F. Supp. 65 (S.D.N.Y. 1978) (incidental music in news coverage). Fair use is context-sensitive: for two different uses of the same song, one may be infringing where the other isn’t. Reviewers can’t be expected to know or do a full fair use

¹⁷ Zahavah Levine, *Broadcast Yourself*, YouTube Official Blog (Mar. 18, 2010), <https://blog.youtube/news-and-events/broadcast-yourself/>.

¹⁸ James Moore, *Five Ways To Go Viral With Your Music*, (July 30, 2014), <https://www.ascap.com/help/career-development/wcm-5-ways-to-go-viral-with-music>.

analysis in the course of content moderation, particularly for unrelated content policies like hate speech.

Because fair uses of copyrighted works are “expressly authorize[d]” by the Copyright Act, rather than being an infringement that the law excuses, the red flag knowledge standard should not presume its absence without particularized facts. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1152 (9th Cir. 2016).

On a platform like Vimeo, one video will frequently vary from the next in one or more of the preceding ways, and these differences will not be apparent to a reviewer making aesthetic judgments about videos or enforcing terms of service. A catchy, familiar-sounding tune may come from a one-stop source beyond the major labels, and be fully licensed. A video that appears “amateur” may in fact be produced as viral marketing by a professional studio, and be fully licensed. Or it may be unlicensed, but created with the encouragement of the artist. Finally, it may be fair use, especially if the video is educational or critical in nature.

Therefore, it is simply incorrect that the difficulty of obtaining licenses to use major-label music in user-uploaded video on platforms like Vimeo constitutes “facts and circumstances from which infringing activity is apparent” for all videos that use music, or even all videos that appear “amateur.”

B. Appellants’ Theory Would Give Legal Force to Particular Business Models.

Even if Appellants and their major-label cohorts have made their music “confusing” and “painful” to license, Appellants’ Br. at 56, this Court should not create a rule of law that privileges the licensing model they describe over other models. As described above, high-quality recorded music in numerous genres *is* readily available for use in videos, including through fee-based sources and open licenses like Creative Commons. And video creators also rely on fair use.

If the Court were to hold that the “confusing” and “painful” experience of licensing major-label music is such a universal norm that any video reviewer must equate the use of “popular” music with infringement, however, then the business practices of Appellants and other major music companies would gain a privileged position under the Copyright Act. Rightsholders who *want* their music to be widely used in online video, whether for a small fee or for attribution alone, will be thwarted as platforms like Vimeo are forced to remove videos containing their music whenever a reviewer believes the music might be “popular.” The gauntlet of complex rightsholder searches and individual negotiation that *amici* NMPA et al. describe, while not the only way to use music in videos today, would increasingly become so. This Court should not put its thumb on the scale in favor of Appellants’ business model by establishing it as part of the standard for red flag knowledge.

C. Section 512 Does Not Require or Invite Blanket Licensing

The complexity of major label music licensing described by Appellants and their *amici* existed at the time of the DMCA’s enactment and was known to Congress. It was part of the burden of legal uncertainty for users of copyrighted works that led to the enactment of Section 512. In other words, Congress intended for platforms to be able to rely on Section 512 to limit their liability without the need to obtain blanket licenses on behalf of their users. *Amici NMPA et al.*’s argument that the existence of such blanket licenses justifies a narrowing of the safe harbor further illustrates why Appellants’ proposed interpretation of the safe harbor would render it useless.

CONCLUSION

Section 512, as interpreted by this Court to date, has allowed numerous platforms for user-uploaded content to thrive and to empower a generation of creators—a dynamic that “promote[s] the progress of science and useful arts.” Narrowing the safe harbor through either of Appellants’ legal theories would reverse the progress that Section 512 has made possible.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify as follows:

1. This Brief of *Amici Curiae* Electronic Frontier Foundation and Computer & Communications Industry Association in Support of Defendants-Appellees and Affirmance complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 27(d)(2) and Second Circuit L. R. 27.1 because this brief contains 5,555 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365, the word processing system used to prepare the brief, in 14-point font in Times New Roman font.

Dated: July 19, 2022

By: /s/ Mitchell L. Stoltz
Mitchell L. Stoltz

CERTIFICATE OF SERVICE

I certify that on this 19th day of July 2022, I electronically filed the foregoing Brief of *Amici Curiae* Electronic Frontier Foundation and Computer & Communications Industry Association using the Court's CM/ECF system which will send notification of such filing to all parties of record.

Dated: July 19, 2022

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