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17 **UNITED STATES DISTRICT COURT**
18 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

19 STEVEN M. GARDNER, an
20 individual,

21 Plaintiff,

22 v.

23 CAFEPRESS INC., a Delaware
24 corporation, et al.,

25 Defendants.

Case No. 3:13-CV-01108 (GPC) JMA

AMICI CURIAE BRIEF OF THE
ELECTRONIC FRONTIER
FOUNDATION, COMPUTER &
COMMUNICATIONS INDUSTRY
ASSOCIATION, CENTER FOR
DEMOCRACY & TECHNOLOGY,
AND PUBLIC KNOWLEDGE, IN
SUPPORT OF CAFEPRESS INC.'S
MOTION FOR RECONSIDERATION

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1 metadata might qualify as a “standard technical measure” for purposes of the Digital
2 Millennium Copyright Act (“DMCA”), the removal of which would jeopardize
3 availability of DMCA safe harbor protections. Amici believe the court could have
4 resolved these arguments in CafePress’s favor as a matter of law. By forcing the parties
5 to go trial on these issues, the Feb. 26 Order may undermine the purpose of the DMCA
6 safe harbors.

7 The past decade has seen an explosion in growth of platforms for commerce and
8 expression. The success of these platforms depends in turn on the clear legal structure
9 that Congress created when it enacted the safe harbor provisions of the DMCA. In order
10 to galvanize and protect online expression and commerce, Congress set out to “provide
11 ‘greater certainty to service providers concerning their legal exposure for infringements
12 that may occur in the course of their activities.’” *Ellison v. Robertson*, 357 F.3d 1072,
13 1076 (9th Cir. 2004) (citing S. REP. NO. 105-190, at 20 (1998)). Without these safe
14 harbors, service providers would be vulnerable to potentially massive copyright damage
15 awards and onerous litigation costs where use of their services implicates exclusive
16 rights of copyright owners. To avoid that risk, service providers would be likely to over-
17 block and/or closely monitor communications that occur via their services—or simply
18 shut those services down. Thus, changes to the legal climate for service providers can
19 have profound consequences for free expression online, and proper interpretation of
20 copyright laws as applied to online service providers is a matter of crucial public
21 interest.

22 The Feb. 26 Order threatens to disrupt the DMCA framework, creating legal
23 uncertainty that would harm both innovative online services and the free expression they
24 foster. In the interest of protecting the millions of Internet users who rely on online
25 service providers to develop and support innovative platforms for free expression, Amici
26 urge the Court to reconsider its ruling.

1 **ARGUMENT**

2 **I. Congress Created the DMCA Safe Harbors to Reduce the Legal Uncertainty**
3 **that Could Impede the Development of Online Platforms for Expression and**
4 **Innovation**

5 As Senator Ron Wyden observed:

6 [I]t is impossible to overestimate the positive effect that the Internet is
7 having on our world. It is revolutionizing the way people engage with one
8 another, the way commerce is conducted and the way citizens organize. . . .
9 The Internet has advanced the cause of free speech in ways that I believe
would make the nation’s Founding Fathers proud. It has made lies harder to
sustain, information harder to repress and injustice harder to ignore.

10 *Targeting Websites Dedicated To Stealing American Intellectual Property: Hearing*
11 *Before the S. Comm. on the Judiciary*, 157th Cong. (2011) (statement of Sen. Ron
12 Wyden, Member, S. Comm. on the Judiciary).¹

13 The crafters of the DMCA realized that establishing clear rules regarding
14 intermediary liability for the acts of users was essential to the development of the
15 Internet as a platform for free expression as well as commerce. That need was
16 highlighted by a growing trend of copyright infringement suits against online service
17 providers that threatened their very existence.² Indeed, the limitations on liability were
18 deemed “absolutely necessary to the immediate survival of ISPs.” *CoStar Group, Inc. v.*
19

20 ¹ Available at <http://wyden.senate.gov/issues/issue/?id=3ad1419c-9af9-4779-b575-f1b3f48b83dc>.

21 ² See, e.g., Jeffrey R. Kuester & Daniel R. McClure, *SPA v. ISPs: Contributory*
22 *Copyright Infringement in Cyberspace*, INTELL. PROP. TODAY, Feb. 1997, at 8 (describing
23 lawsuits by the Software Publishers Ass’n against online service providers). See also
24 Courtney Macavinta, *Yahoo Message Board Users Sued*, CNET NEWS, Sept. 9, 1998,
25 available at <http://news.cnet.com/2100-1023-215292.html>; Joseph V. Meyers III, Note,
26 *Speaking Frankly about Copyright Infringement on Computer Bulletin Boards: Lessons*
27 *to be Learned from Frank Music, Netcom, and the White Paper*, 49 VAND. L. REV. 439,
478-81 (1996). See also 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON
COPYRIGHT § 12B.01[A][1] (2010) (describing conflicting jurisprudence prior to 1998).

1 *LoopNet, Inc.*, 373 F.3d 544, 555 (4th Cir. 2004). Fears of liability arising from doctrinal
2 ambiguities and the possibility of high statutory damages threatened to impede
3 innovation and deter new market entrants. S. REP. NO. 105-190, at 8 (1998) (“[W]ithout
4 clarification of their liability, service providers may hesitate to make the necessary
5 investment in the expansion of the speed and capacity of the Internet.”). Accordingly,
6 Congress designed the DMCA “to clarify the liability for copyright infringement of
7 online and Internet service providers . . . [by setting] forth “safe harbors” from liability
8 for ISP’s and OSP’s under clearly defined circumstances, which both encourage
9 responsible behavior and protect important intellectual property rights.” S. REP. NO. 105-
10 190, at 67 (additional views of Sen. Patrick Leahy, Member, S. Comm. on the
11 Judiciary).³ These statutory safe harbors replaced the conflicting jurisprudence that
12 characterized early judicial efforts to apply judge-made secondary liability doctrines to
13 new Internet contexts with detailed provisions that gave rightsholders and service
14 providers more precise “rules of the road.”

15 The safe harbors embody a quid pro quo that balances the interests of online
16 intermediaries (and users) against the interests of content owners, and allocates
17 responsibilities among these groups. In exchange for safe harbor protection, service
18 providers must: implement and maintain a DMCA policy that includes a notice-and-
19

20 ³ See also *WIPO Copyright Treaties Implementation Act and Online Copyright Liability*
21 *Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the H. Subcomm. on Courts*
22 *and Intellectual Property*, 105th Cong. 102 (1997) (statement of Rep. Rick Boucher,
23 Member, H. Subcomm. on Courts and Intellectual Property, noting importance of
24 “stability in the law” and giving “the Internet service providers the assurances they need”
25 to invest in the Internet); H.R. REP. NO. 105-796, at 72 (1998) (Conf. Rep.) (Section 512
26 “provides greater certainty to service providers concerning their legal exposure for
27 infringements that may occur in the course of their activities”); H.R. REP. NO. 105-551(I),
at 11 (1998) (“While several judicially created doctrines currently address the question of
when liability is appropriate, providers have sought greater certainty through legislation
as to how these doctrines will apply in the digital environment.”).

1 takedown process, a system to track and deactivate repeat infringers, a counter-
2 notification process, and so on. The statute also clarified the outer limits of a service
3 provider’s obligations—for example, by making it clear that a service provider need not
4 monitor its service or affirmatively look for facts indicating infringing activity in order
5 to enjoy the safe harbor. *See* 17 U.S.C. § 512(m)(1) (2006). Copyright owners, for their
6 part, were given an expedited, extra-judicial procedure for obtaining redress against
7 alleged infringement, paired with explicit statutory guidance regarding the information
8 that must be provided in an “effective” takedown notice to take advantage of this
9 procedure. *See* 17 U.S.C. § 512(c)(3)(A).⁴ As a practical matter, they have also received
10 the opportunity to themselves take advantage of the new and innovative services the safe
11 harbors helped engender.⁵

12 Taken together, the provisions of Section 512 “clarif[ied] the liability faced by
13 service providers who transmit potentially infringing material over their networks [and]
14 ... ensure[d] that the efficiency of the Internet will continue to improve and that the
15 variety and quality of services on the Internet will expand.” S. REP. NO. 105-190, at 1
16 (1998). Congress intended that this quid pro quo would help ensure that online IP
17 enforcement did not come at the expense of stifling expression. 144 CONG. REC. H10618
18 (daily ed. Oct. 12, 1998).⁶ In the words of Senator Leahy, the DMCA represented an
19 “important step toward protecting American ingenuity and creative expression.” S. REP.
20 No. 105-190, at 69 (additional views of Sen. Leahy).⁷ With respect to online expression,
21

22 ⁴ The importance of these procedures is underscored by 17 U.S.C. § 512(c)(3)(B)(i),
23 which states that infringement notices that fail to meet these standards are not to be
24 considered when evaluating a service provider’s knowledge under the knowledge
25 disqualifier set forth in Section 512(c)(1)(A).

26 ⁵ *See, e.g.*, YouTube Statistics, https://www.youtube.com/t/press_statistics.

27 ⁶ *Available at* <http://hrrc.org/File/HR2281StearnsOct12.pdf>.

⁷ *See also* 144 CONG. REC. H7092 (daily ed. Aug. 4, 1998).

1 Amici submit that the DMCA represented an essential step. By improving service
2 providers' ability to rationally assess and manage their legal risk, the DMCA fostered
3 the growth of digital innovation and expression.

4 **II. The Feb. 26 Order Contravenes the Language and Purpose of the DMCA,**
5 **Threatening Online Innovation and Expression**

6 The Feb. 26 Order threatens to rewrite the rules of the road, directly contravening
7 Congressional intent. First, the Court suggests that CafePress may not qualify as a
8 service provider for purposes of section 512 because some aspects of its business
9 allegedly involve the type of active decision-making that may be inconsistent with
10 intermediary status. (See Feb. 26 Order, at p. 8 (concluding that because "CafePress has
11 gone beyond operating a service that merely facilitates the exchange of information
12 between internet users . . . , the Court cannot say, as a matter of law, that CafePress is a
13 'service provider.'").) Second, the Court suggested that metadata may qualify as a
14 standard technical measure as defined in Section 512(i), and CafePress's practice of
15 removing metadata for photos could deprive it of eligibility for the DMCA safe harbors.
16 (See Feb. 26 Order, at pp. 9-10 (concluding there is a dispute of material fact as to
17 whether "CafePress's deletion of metadata when a photo is uploaded constitutes the
18 failure to accommodate and/or interference with 'standard technical measures.'").) With
19 respect to both conclusions, Amici respectfully disagree with the Court's analysis and
20 are concerned that the Court chose not to resolve them as a matter of law. If other courts
21 follow suit, the prohibitive litigation costs the safe harbors were intended to forestall will
22 loom large again. Those costs promise to scare away any service providers without a
23 substantial legal budget, and could hinder the innovation the safe harbors were intended
24 to benefit.

25 *A. CafePress is a "service provider" under section 512(c).*

26 The Court states that it cannot conclude, as a matter of law, that CafePress is a
27

1 service provider within the meaning of Section 512. It appears, however, that the Court's
2 reluctance to do so is based on the fact that CafePress engages in a number of additional
3 activities, such as selling products, that in the Court's view go beyond "operating a
4 service that merely facilitates the exchange of information between Internet users."

5 There are two problems with this conclusion.

6 First, it conflates CafePress's online and offline activities. Of course the DMCA
7 does not shelter CafePress's purely offline conduct, but that should not influence
8 whether it may qualify as a service provider under Section 512 with respect to its online
9 (and related offline) activities. When examining whether an intermediary is a "service
10 provider," courts regularly find that large entities meet the threshold definition of
11 "service provider" despite off-line activities or aspects of their businesses that may be
12 inconsistent with intermediary status. *See, e.g., Hendrickson v. eBay, Inc.*, 165 F. Supp.
13 2d 1082, 1088 (C.D. Cal. 2001) (eBay); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp.
14 2d 1090, 1100 (W.D. Wash. 2004) (Amazon); *Perfect 10, Inc. v. Google, Inc.*, No. CV
15 04-9484 AHM (SHx), 2010 U.S. Dist. LEXIS 75071, at *3, (C.D. Cal. July 26, 2010)
16 (Google). The *Perfect 10* case is instructive. In that case, the court analyzed various
17 functions provided by Google (web search, image search, caching feature, and Blogger
18 platform) and independently evaluated Google's entitlement to safe harbor protection as
19 to each of those functions. *Perfect 10*, 2010 U.S. Dist. LEXIS 75071 at 45; *see also*
20 U.S.C. § 512(n) ("Subsections (a), (b), (c), and (d) describe separate and distinct
21 functions for purposes of applying this section. Whether a service provider qualifies for
22 the limitation on liability in any one of those subsections shall be based solely on the
23 criteria in that subsection, and shall not affect a determination of whether that service
24 provider qualifies for the limitations on liability under any other such subsection."). The
25 Court could have done the same here.

26 Second, as the Court itself recognized, courts have long since concluded that the
27 definition of "service provider" for purposes of section 512(c) is exceedingly broad, and

1 “encompasses a broad variety of Internet activities.” *Corbis Corp. v. Amazon.com, Inc.*,
2 351 F. Supp. 2d 1090, 1100 (W.D. Wash. 2004); *see also In re Aimster Copyright Lit.*,
3 252 F. Supp. 2d 634, 658 (N.D. Ill. 2002) (“‘[S]ervice provider’ is defined so broadly
4 that we have trouble imagining the existence of an online service that would not fall
5 under the definition[.]”); *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 718 F.3d 1006
6 (9th Cir. 2013) (noting that the DMCA contains a narrow definition of “service
7 provider” for the section 512(a) safe harbor and a “broader definition that applies to the
8 rest of section 512”). Courts have specifically rejected the argument—also advanced by
9 Gardner in his brief in opposition to CafePress’s Motion for Summary Judgment—that
10 the section 512(c) safe harbor is only available for “storage” activities. *See UMG*
11 *Recordings, Inc. v. Veoh Networks, Inc.*, 718 F.3d 1006, 1019-20 (9th Cir. 2013)
12 (rejecting the argument that section 512(c) was only applied where “the infringing
13 conduct [is] storage”). Instead, numerous courts have found that the section 512(c) safe
14 harbor was intended to shelter activities that go beyond operating as a mere
15 intermediary. *See, e.g., UMG*, 718 F.3d at 1019-1020 (breaking down videos into
16 smaller chunks, converting into other file formats does not undermine status as a
17 “service provider”); *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 39-40 (2d Cir.
18 2012) (“‘transcoding’ of videos into a standard display format, the playback of videos on
19 ‘watch’ pages [and display of] ‘related videos’” fall within the 512(c) safe harbor); *Io*
20 *Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1146 (N.D. Cal. 2008)
21 (creation of flash files, functionality to download, and screencaps not inconsistent with
22 status as a “service provider”); *Viacom Int’l, Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110,
23 at *10-11 (S.D.N.Y. 2013) (practice of syndicating user-submitted content via third party
24 platforms did not undermine eligibility for safe harbor).

25 The Court’s Feb. 26 Order appears to have employed a cramped reading of the
26 types of functions that a service provider can perform while remaining eligible for safe
27 harbor status. There should be no dispute that CafePress satisfies the threshold definition

1 of “service provider” under section 512(c) with respect to its online activities—it
2 undeniably does. The key question is whether CafePress satisfies the requisite
3 requirements for safe harbor protection *as to particular allegations of infringement or*
4 *functions*, and whether Gardner has produced sufficient evidence to rebut CafePress’s
5 showing that it satisfies the requisite requirements for safe harbor protection.⁸

6 *B. Metadata is not a standard technical measure under section 512(i).*

7 The Court also suggested that CafePress may have run afoul of Section 512(i)
8 because it strips metadata from images as part of the upload process, and such metadata
9 might be a “standard technical measure” as contemplated by the DMCA.

10 A standard technical measure is one that is “used by copyright owners to identify
11 or protect copyrighted works” and “has been developed pursuant to a broad consensus of
12 copyright owners and service providers in an open, fair, voluntary, multi-industry
13 standards process;” is “available to any person on reasonable and nondiscriminatory
14 terms;” and does not “impose substantial costs on service providers or substantial
15 burdens on their systems or networks.” 17 U.S.C. § 512(i). Congress expected that such
16 “provisions could be developed both in recognized open standards bodies or in ad hoc
17 groups, as long as the process used is open, fair, voluntary, and multi-industry and the
18 measures developed otherwise conform to the requirements of the definition of standard
19 technical measures.” S. REP. NO. 105-190 at 52.

20 However, no broad consensus has ever emerged as to any such measure, with
21 respect to metadata or any other technical artifact. *See generally* L. Gallo, *The*
22 *Impossibility of “Standard Technical Measures” for UGC Websites*, 34 COLUM. J.L. &

23 ⁸ Due to space and time constraints, Amici will not address the Court’s Section 512(c)
24 analysis as applied to those particular activities. However Amici submit that the standards
25 applied by the Court appear inconsistent with the 9th Circuit’s ruling in *UMG*, which
26 rejected a narrow, proximate cause-based interpretation of the phrase “by reason of
27 storage,” and found even downloading functionality to come within Section 512(c).
UMG, 718 F.3d at 1019-20.

1 ARTS 283 (2011) (noting that “the term “standard technical measures” remains undefined
2 and possibly undefinable more than a decade after passage [of the DMCA]”). As
3 CafePress notes in its Motion for Reconsideration (Dkt. 52-1, p. 14), Mr. Gardner
4 offered no evidence that metadata qualifies as such a measure. Amici submit that this is
5 because there *is no such evidence* of a “broad consensus” that satisfies the requirements
6 of section 512(i).

7 Indeed, with respect to metadata, industry practices reflect the absence of such a
8 consensus: service providers commonly strip metadata from uploaded images. A 2013
9 study concluded that some of the most popular social networking and photo-sharing
10 sites, such as Flickr, Facebook, and Twitter, remove or minimize metadata from photos.
11 *See* Embedded Metadata Manifesto, *Social Media Sites: photo metadata test results*,
12 *available at* <http://www.embeddedmetadata.org/social-media-test-results.php> (last
13 accessed Apr. 13, 2014); *see also* Facebook Security, *Sharing Photos* (Aug 13, 2013)
14 (post from Facebook security team, noting that “[to] prevent [the sharing of location
15 information] from accidentally happening when you post photos on Facebook, we don’t
16 display location EXIF data in the version of your photo that you share with others”),
17 *available at* <https://www.facebook.com/security/posts/10151511111506886> (last
18 accessed Apr. 13, 2014). The fact that these well-known networks remove, strip, or
19 modify metadata as a practice certainly reflects the lack of a “broad consensus.” If the
20 practice of removing metadata is enough to cast doubt on DMCA safe-harbor eligibility,
21 then thousands of service providers are equally at risk.

22 Casting doubt on the practice of removing metadata may also put users at risk.
23 Commentary both in academic circles and in the news media have stressed that metadata
24 can contain a wealth of private information, including specifically with respect to photos
25 that are uploaded online. *See, e.g.,* Kate Murphy, *Web Photos That Reveal Secrets, Like*
26 *Where you Live*, N.Y. TIMES (Aug. 11, 2010) (noting that by tweeting a photo of his car,
27 well known television host Adam Savage may have revealed his home address),

1 available at <http://www.nytimes.com/2010/08/12/technology/personaltech/12basics.html>
2 (last accessed Apr. 13, 2014); Alex Wilhelm, *Vice leaves metadata in photo of John*
3 *McAfee, pinpointing him to a location in Guatemala*, THE NEXT WEB (Dec. 3, 2012)
4 (speculating as to whether a photo of fugitive John McAfee posted by a journalist may
5 have contained location data and tipped off law enforcement as to McAfee's location),
6 available at [http://thenextweb.com/insider/2012/12/03/vice-leaves-metadata-in-photo-](http://thenextweb.com/insider/2012/12/03/vice-leaves-metadata-in-photo-of-john-mcafee-pinpointing-him-to-a-location-in-guatemala/2012/)
7 [of-john-mcafee-pinpointing-him-to-a-location-in-guatemala/2012/](http://thenextweb.com/insider/2012/12/03/vice-leaves-metadata-in-photo-of-john-mcafee-pinpointing-him-to-a-location-in-guatemala/2012/) (last accessed Apr.
8 13, 2014); Gerald Friedland & Robin Sommer, *Cybercasing the Joint: On the Privacy*
9 *Implications of Geo-Tagging*, available at
10 https://www.usenix.org/legacy/events/hotsec10/tech/full_papers/Friedland.pdf (last
11 accessed Apr. 13, 2014) (discussing studies and academic research regarding the extent
12 to which posts to social networks may contain metadata and which sites remove such
13 data). Stripping metadata from uploaded images helps protect users' privacy and
14 security, and should not be discouraged.

15 C. *Legal uncertainty on these points may foster expensive litigation, stifling*
16 *innovation.*

17 In light of the foregoing, Amici are confident that CafePress will succeed in its
18 defense in this case. Happily, CafePress can afford to mount that defense. However,
19 many smaller service providers will be less well-situated. For those providers, ending a
20 case like this on summary judgment (or earlier) is essential. Unfortunately, the Court's
21 Feb. 26 Order sends a dangerous message to those providers—and their potential
22 adversaries—that no matter how careful they are to stay within the DMCA safe harbors,
23 bare allegations regarding their various products and services or that they have failed to
24 comply with a technical measure, combined with speculation that that measure might
25 meet the 512(i) standard, will be enough to force them to trial or, more likely, a less
26 expensive but still onerous settlement.
27

1 After years of litigation around the country, the contours of the DMCA safe
2 harbors have been more or less resolved. *UMG Recordings, Inc. v. Veoh Networks, Inc.*,
3 718 F.3d 1006, 1031 (9th Cir. 2013) (citing to the Second Circuit’s decision in *Viacom*
4 *Int’l v. YouTube, Inc.*, and affirming grant of summary judgment in favor of service
5 provider based on 512(c) safe harbor). An unfortunate consequence of the cases that
6 have established these contours is that start-up networks have sometimes found
7 themselves buried in litigation costs in the course of trying to establish their entitlement
8 to safe harbor status. Veoh Networks, for example, prevailed at district court and on
9 appeal against UMG Recordings, but was nevertheless forced to declare bankruptcy
10 along the way. See Eliot Van Buskirk, *Veoh Files for Bankruptcy After Fending Off*
11 *Infringement Charges*, WIRED MAGAZINE (Feb. 12, 2010), available at
12 [http://www.wired.com/2010/02/veoh-files-for-bankruptcy-after-fending-off-](http://www.wired.com/2010/02/veoh-files-for-bankruptcy-after-fending-off-infringement-charges/)
13 [infringement-charges/](http://www.wired.com/2010/02/veoh-files-for-bankruptcy-after-fending-off-infringement-charges/) (last accessed Apr. 13, 2014).

14 The Court’s Feb. 26 Order threatens to adjust those contours. Whatever the
15 impact of that threat on CafePress, the consequence may be more dangerous for the
16 many small innovative companies that depend on the DMCA safe harbors for their
17 survival and do not have substantial litigation budgets. Amici respectfully urge the Court
18 to reconsider its decision.

19 CONCLUSION

20 For the foregoing reasons, Amici urge the Court to reconsider its February 26
21 Order, and rule as a matter of law that (1) CafePress is a “service provider” under section
22 512(c) and (2) the practice of removing metadata from photos does not constitute
23 interference with a “standard technical measure” as defined in section 512(i)(2).

24 Dated: April 14, 2014

25 Respectfully submitted

26 /s/ Corynne McSherry

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