

No. 14-56596

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MAVRIX PHOTOGRAPHS LLC,
Plaintiff-Appellant,

v.

LIVEJOURNAL, INC.,
Defendant-Appellee.

On Appeal from the United States District Court for the Central District of
California, Case No 8:13-cv-00517-CJC-JPR, Hon. Cormac J. Carney

**BRIEF *AMICI CURIAE* OF THE COMPUTER & COMMUNICATIONS
INDUSTRY ASSOCIATION, THE AMERICAN LIBRARY ASSOCIATION,
THE ASSOCIATION OF COLLEGE AND RESEARCH LIBRARIES,
THE ASSOCIATION OF RESEARCH LIBRARIES, AND
THE ELECTRONIC FRONTIER FOUNDATION
IN SUPPORT OF LIVEJOURNAL, URGING AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* the Computer & Communications Industry Association, the American Library Association, the Association of College and Research Libraries, the Association of Research Libraries, and the Electronic Frontier Foundation (collectively “*amici*”) state that none of *amici* has a parent corporation and that no publicly held corporation has an ownership stake of 10% or more of the stock of any of *amici*.

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IDENTITY AND INTEREST OF *AMICI*¹

Amici represent diverse constituencies, including Internet users, nonprofits, libraries, and information technology companies. They are united, however, in their interest in a balanced copyright system that protects legitimate innovators and online free speech from the chilling effects of unnecessary legal uncertainty. The “safe harbors” for online service providers enacted in the Digital Millennium Copyright Act of 1998 (DMCA) are a crucial part of that balanced copyright system, setting out “rules of the road” for online intermediaries. Without a vibrant marketplace of intermediaries, Internet users would not have the array of platforms for free expression that are revolutionizing commerce, creativity, and culture. Accordingly, *amici* believe that the resolution of the pending appeal will likely be an important precedent regarding proper application of the DMCA safe harbors and may have important implications for the public interest more generally.

Amici urge the Court to reject Appellant Mavrix’s misguided view of the statutory provisions at issue. Were Mavrix’s views to be endorsed by this (or any other) Court, the profusion of online services that have benefited the public (as well as future ventures) would be imperiled by the threat of multi-billion dollar

¹ No counsel for any party authored this brief in whole or part; no such party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than *amici*, members of *amici*, or counsel made such a contribution. All parties have consented to the filing of this brief.

statutory damages awards. This is precisely the result that Congress meant to avoid when enacting the DMCA’s safe harbor provisions. Nor is a reinterpretation of Section 512 necessary to protect the interests of copyright owners, as the availability of the statutory safe harbors has left ample room for voluntary cooperation between content owners and service providers.

The Computer & Communications Industry Association (“CCIA”) represents more than twenty large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services—companies that collectively generate more than \$465 billion in annual revenues.² Many members of *amicus* CCIA depend upon robust and unambiguous safe harbors from copyright infringement liability provided by the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512. Some depend directly upon the safe harbors to provide legal certainty with respect to the extraordinary amount of content they make available. Other CCIA members provide products and services whose value to consumers relates directly to their ability to access, interact with, and post content to online platforms.

The American Library Association (“ALA”) is a nonprofit professional organization of more than 60,000 librarians dedicated to providing and improving

² A list of CCIA members is available at <https://www.cciagnet.org/members>.

library services and promoting the public interest in a free and open information society. The Association of College and Research Libraries, the largest division of the ALA, is a professional association of academic and research librarians. The Association of Research Libraries (“ARL”) is a nonprofit organization of 125 research libraries in North America, including university, public, government and national libraries. Collectively, these three associations (“the library *amici*”) represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel.

The DMCA safe harbors have also been extremely helpful to the library *amici* in fulfilling their mission of providing their users with access to information. Libraries act as “service providers” within the meaning of 17 U.S.C. § 512(k)(1)(A). Libraries are the only source for free Internet connectivity and Internet-ready computer terminals for many Americans. Although increasingly more Americans at all income levels own Internet-connected mobile devices, it is difficult (if not impossible) to fill out an online job application, or apply for healthcare, on a mobile device. For the tens of millions of Americans that do not otherwise have access to Internet-ready computer terminals, public libraries are the only place they can perform critical activities such as these. The Section 512(a) safe harbor for “mere conduits” has enabled libraries to provide Internet access without the specter of liability for onerous copyright damages because of

infringing user activity.

Libraries also operate websites that host user-generated content and prepare directories that link users to other websites. The safe harbors in Sections 512(c) and (d) shelter libraries from liability for infringing activity by third parties. Any new restrictions on the availability of the DMCA safe harbors could have an adverse effect on the ability of libraries to deliver a critical service to underserved and other user communities.

The Electronic Frontier Foundation (“EFF”) is a leading nonprofit civil liberties organization working to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 20,000 dues-paying members have a strong interest in assisting the courts and policy-makers in striking the appropriate balance between copyright law and the public interest.

Amici believe that robust DMCA safe harbors are essential to the continued function of the Internet ecosystem, including the free expression interests of countless Internet users who depend upon online platforms to express themselves and communicate with one another.

SUMMARY OF ARGUMENT

The modern, Internet-enabled economy depends upon a robust and unambiguous interpretation of the Digital Millennium Copyright Act (“DMCA”) “notice and takedown” safe harbors. Tens of thousands of service providers rely directly upon the DMCA safe harbors, and an even greater number of businesses rely upon those service providers to reach new customers, and compete in the global marketplace at lower costs. These businesses are essential to facilitating Internet-enabled, First Amendment-protected speech, including political speech, as well as online and traditional commerce.

Contrary to Mavrix’s claims, Section 512 of the DMCA allows online platforms and services the flexibility to moderate and review content, which can be valuable to users, services, and third parties alike. In fact, Congress made clear that it did not intend to discourage monitoring, which is bolstered by its prior enactment of the Communications Decency Act Section 230 safe harbor.

Mavrix also misstates the standard for “red flag” knowledge, which Congress made intentionally high. Interpreting the DMCA to require services to determine the status of a potentially infringing uploaded work that may be licensed, fair use, or a “tolerated use” would run afoul of Congress’s intentions, which were to give online services broad leeway to address user-submitted material with regard to objectionable content.

Mavrix invites the Court to embrace theories that, if accepted, would undermine the settled expectations of service providers and the users that depend on their platforms. The Court should decline.

ARGUMENT

I. The DMCA Safe Harbors Are Essential to the Internet and the U.S. Economy.

In 1998, Congress responded to the liability risk that Internet service providers might face from third-party copyright infringement by enacting the limitations in Section 512 of the DMCA. Congress 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*, 718 F.3d 1006, 1014 (9th Cir. 2013), and therefore provided liability limitations to “ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.” S. REP. NO. 105-190, at 8 (1998). The DMCA safe harbors therefore embody Congress’s intent to pave the way for the growth of the Internet as a platform for commerce and expression.³

That intent has been realized, in spades. The Internet economy is expected to generate roughly \$4.2 trillion in the G-20 economies by next year. In the United

³ Section 512 originally comprised Title II of the Digital Millennium Copyright Act, Pub. L. 105-304, Title II, Oct. 27, 1998, 112 Stat. 2860.

States, it makes up an estimated 5% of U.S. GDP.⁴ This extraordinary wealth effect is possible because online platforms expand markets and increase efficiencies for traditional industries across the economy. Tens of thousands of online services and platforms are able to provide this value to the U.S. economy because the liability they face for the vast quantity of content that crosses their networks is appropriately limited.⁵

II. Moderation Is a Valuable Tool for Online Platforms and Services, Which Congress Sought to Encourage.

Online platforms and services vary widely in their operations, including in how they address third party-posted content. In many cases, the volume of content available via their services is incomprehensibly vast; today YouTube users upload 300 hours of video *per minute* and Twitter users generate 500 million tweets per day.⁶ These services nevertheless comply with the DMCA safe harbors, expeditiously taking down content when they receive specific claims of infringement.

⁴ David Dean, *et al.*, BCG, *The Internet Economy in the G-20: The \$4.2 Trillion Growth Opportunity* (2012), <http://www.bcg.com/documents/file100409.pdf>.

⁵ Over 66,000 services have complied with U.S. Copyright Office formalities to receive the protections of the DMCA. See U.S. Copyright Office, Directory of OSP Designated Agents, http://www.copyright.gov/onlinesp/list/a_agents.html.

⁶ See Twitter, *About Twitter*, available at <https://about.twitter.com/company> (last accessed June 22, 2015); YouTube, *YouTube Statistics*, available at <https://www.youtube.com/yt/press/statistics.html> (last accessed June 22, 2015).

Some platforms and services, however, operate at a scale where it remains possible for the intermediary’s editors or moderators to attempt to filter out irrelevant or inappropriate content, or materials that would otherwise make for a less desirable user experience. Congress did not intent to discourage these activities; rather, it explicitly sheltered them.

A. Congress prudently gave online services broad leeway to review user-submitted material for objectionable content, and many online services do so.

While Section 512(m) makes clear that service providers have no obligation to look through user-submitted content for possible infringements, Congress explained that the DMCA was “not intended to discourage the service provider from monitoring its service.” H.R. REP. NO. 105-796, at 73 (1998).⁷

Most online services, including members of *amicus* CCIA, have policies where employees review content posted on their services for illegal or other objectionable material—including obscenity, child pornography, sexually explicit content, hate speech, sexual harassment, bullying, graphic violence, threats, and

⁷ Congress’s goal of removing obstacles to voluntary monitoring is also evidenced by another important safe harbor, Section 230 of the Communications Decency Act, 47 U.S.C. § 230, enacted shortly before the DMCA. In Section 230, Congress gave online services substantial leeway to review and remove objectionable content. *See* § 230(c)(2) (no online service “shall be held liable” on account of “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable”).

spam—that is prohibited by most services’ terms of use. These efforts result in service providers examining user-submitted content—frequently based upon notices by other users—in order to determine whether the content violates a service’s policies. Algorithms and automated technologies can assist, but in many cases there’s no substitute for manual review.

Efforts to remove offensive, objectionable, and illegal material benefit services, their users, and the broader public. Where service providers have cause *and* capability to monitor user-submitted material, Section 512 of the DMCA should not be interpreted to either mandate *or* dissuade such activities. Services that have the capability to moderate user content should be empowered to do so, with the recognition that across the diverse Internet, different sites and services have different capabilities. Certain services are technically constrained, and many lack the resources to affirmatively monitor the nearly incomprehensible volume of communication online. Recognizing this, Congress did not compel sites to monitor, but it did not intend to deter moderation by services that could do so.

To be clear, the protections for moderation apply to service providers sheltered by Section 512(d), such as libraries, as well as those covered by Section 512(c). For example, among their various functions librarians prepare directories that provide users with hyperlinks to websites the librarians conclude in their professional judgment to contain useful information. Like any other information

location tool, a library is sheltered from liability by Section 512(d) if, unbeknownst to the library, a given website to which it directs library patrons contains infringing material.

Given the wide latitude Congress provided to service providers to remove objectionable content, there should be no legal distinction between service providers that inspect incoming content before it is posted, and those who remove objectionable or infringing content after it is posted. The latter type of provider clearly qualifies for a safe harbor if it promptly removes infringing material upon receipt of a DMCA compliant notice. The former type acts at least as responsibly, attempting to prevent improper content from being posted at all. Mavrix's reading of the law would perversely discourage such responsible behavior.

Thus, as a matter of law and sound policy, the DMCA allows services to continue valuable content-review efforts without risking losing the safe harbor because they do not remove material that may be infringing. Congress never intended to force services to choose between preserving their DMCA protections and taking steps to eliminate harmful and even unlawful uses of their services.

B. A website's choice to moderate content does not run afoul of DMCA Section 512(c).

Whereas Mavrix suggests that LiveJournal's content moderation policies are at odds with DMCA Section 512(c) compliance, *see* Mavrix Br. at 31, the fact is that Congress expressly encouraged such policies, *see supra*. As a result,

moderation, curation, and review of third-party content have been features in some online services' copyright protection programs for many years.

Indeed, courts have noted the value of such activity. For example, in *Costar Group v. LoopNet, Inc.*, 373 F.3d 544, 547 (4th Cir. 2004), an employee of the defendant service provider reviewed user-submitted photos to confirm (1) “whether the photograph in fact depicts commercial real estate, and (2) to identify any obvious evidence, such as a text message or copyright notice, that the photograph may have been copyrighted by another.” The Fourth Circuit declined to penalize the service provider for this “gatekeeping function,” since “copyright holders benefit significantly from this type of response.” *Id.* at 556. Online services that take more aggressive steps in attempting to moderate online content should not be penalized for these efforts, since “[i]t is clear that Congress intended the DMCA’s safe harbor for ISPs to be a floor, not a ceiling, of protection.” *Id.* at 555.

Mavrix makes much of active choices in LiveJournal moderation, Br. at 32-33. However, *CoStar* confirms that active involvement is not forbidden. Whether LiveJournal was “simply running an automated process” or “previewing and selecting” content, it did not lose the safe harbors as a result.

Of course, the DMCA includes a restriction that service providers confine activities to “automatic technical process[es]...without selection of the material by

the service provider.” This is a limitation in Section 512(a)(2), however, which pertains to “Transitory Digital Network Communications.” And a caching provider covered by Section 512(b) must also confine its activities to “automatic technical process[es]”, *see* § 512(b)(1)(C).

But LiveJournal did not win summary judgment on Section 512(a) or (b). The district court granted summary judgment on Section 512(c), which pertains to “Information Residing on Systems or Networks At Direction of Users.” Conspicuously, Section 512(c) lacks the “without selection” and “automatic technical process” limitations that appear in Sections 512(a) and (b). Mavrix’s arguments would rewrite the DMCA safe harbors, importing constraints from other subsections into Section 512(c). If Congress had intended for Section 512(c) service providers to be confined as Section 512(a) and (b) service providers are, it easily could have said so. It did not.

C. “Red flag” knowledge is a high bar.

Just as Congress did not want to discourage service providers from voluntarily monitoring their services for inappropriate third-party content, neither did Congress want to encourage service providers to closely parse users’ communications and submissions and make subjective, case-by-case determinations about their individual propriety.

Thus, Congress provided that—absent *actual* knowledge of infringement—a service provider may only be found to infringe if it consciously “turned a blind eye to ‘red flags’ of obvious infringement.” S. REP. NO. 105-190, at 48, 52 (1998); H.R. REP. NO. 105-551, pt. 2, at 58 (1998). Congress deliberately established a high standard for what constituted turning a blind eye to “red flags.” As this Court noted in *Shelter Capital*, “general knowledge that [a site] hosted copyrightable material and that its services could be used for infringement is insufficient to constitute a red flag.” *See Shelter Capital*, 718 F.3d at 1023.

Contrary to Mavrix’s assertions, the fact that a user may submit content that resides elsewhere online is not a “red flag.” Whereas a moderator can in many cases easily determine whether a submission is offensive, inappropriate, or spam, in most cases a moderator will not be able to readily determine whether a specific submission is infringing. Content appearing elsewhere online may be lawful for a variety of reasons unknown to the service. The work may be in the public domain. Content may be licensed or otherwise authorized, or the use may be fair use under Section 107. Uses of content may also be used “tolerated uses,” a concept cited by the Supreme Court last year. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1976 (2014) (citing Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619-20 (2008)). Many well-known content providers tolerate or even actively

encourage users to repost materials, including photos, seeking the “viral” popularity so coveted in social networking.

Indeed, rightsholders have uploaded their own content to online platforms, creating the impression that this use was unauthorized, so as to generate viral promotional buzz online. Discovery in *Viacom v. YouTube* revealed that Viacom employees uploaded clips onto YouTube from their personal accounts in order to create an artificial “buzz” for Viacom products. Jay Yarow, *The Most Damning Information Google Dug Up On Viacom*, Mar. 22, 2010, BUSINESS INSIDER, <http://www.businessinsider.com/google-on-viacom-filings-2010-3?op=1>. Even after the suit was filed, Viacom was uploading its own videos, sometimes under false names, in order to get the promotional value from viral redistribution. See Google, *YouTube’s Summary Judgment Motion Against Viacom*, http://www.google.com/press/youtube_viacom_documents.html (“Viacom’s stealth marketing efforts continued even after it filed the lawsuit.”).

In addition, the submitter may well be the author of the content, even if content appears “professional.” Modern tools and software can allow amateur photographers to create content which appears fully “professional” to the layperson. Because these facts will only be known to the uploader or the rightsholder, the “red flag” standard ensures that online services respond to

specific notices of claimed infringement, but do not have a duty to affirmatively police content while lacking these crucial facts.

In fact, Congress specifically anticipated in 1998 that an online service provider might one day be confronted with recognizable photos of a celebrity, and made clear that in such a situation the provider would not be expected to research the copyright and fair use status of each work depicting a celebrity. It explained:

Absent such ‘red flags’ or actual knowledge, a directory provider would not be similarly aware merely because it saw one or more well known photographs of a celebrity at a site devoted to that person. The provider could not be expected, during the course of its brief cataloguing visit, to determine whether the photograph was still protected by copyright or was in the public domain; if the photograph was still protected by copyright, whether the use was licensed; and if the use was not licensed, whether it was permitted under the fair use doctrine.

S. REP. NO. 105-190, at 48 (1998). For liability to attach in such cases, the “specific infringement must be ‘objectively’ obvious to a reasonable person.” *Viacom Int’l v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012). For this reason, this Court refused to place the burden of assessing whether photographs on a site called “stolencelebritypics.com” were in fact stolen, rather than lawfully acquired photographs being marketed in a suggestive manner. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114-15 (9th Cir. 2007).

All photographs taken today acquire copyright protection from the moment of creation, and absent publicly available data about copyright ownership, ultimately only the rightsholder themselves can definitively know whether a given use of a photograph is unauthorized. To accept Mavrix’s reasoning and require a service provider to make this assessment would shift the burden of policing content onto online services, which Congress explicitly forbade. This is manifest in Section 512(m)(1), which clearly states that service providers need not “monitor[] their services or affirmatively seek[] facts indicating infringing activity.” Courts therefore routinely rebuff copyright plaintiffs’ request to “place the burden of determining whether [materials] are actually illegal on a service provider.” In refusing to do so in *Shelter Capital*, for example, this Court declined to “change course... by adopting a broad conception of the knowledge requirement,” *Shelter Capital*, 718 F.3d at 1022-23, making clear that Section 512 does not impose affirmative investigative duties upon service providers. *Id.* (quoting *CCBill*, 488 F.3d at 1113).

While it is certainly true that copyright owners and service providers must bear burdens under the DMCA, the statute’s notice provisions place the burden to initiate on rightsholders, with the burden to respond falling on service providers. The task of “identifying the potentially infringing material and adequately documenting infringement” falls “squarely on the owners of copyright.” *CCBill*,

488 F.3d at 1113. This allocation of responsibility was not an accident; it was intended to help accomplish the goal of providing “greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.” *See Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (quoting S. REP. NO. 105-190, at 20 (1998)).

III. Reducing Legal Uncertainties for Service Providers Is Critical to Free Expression Online.

Holding online service providers unexpectedly liable for the acts of their users, in contrast to the legal clarity Congress deliberately and presciently provided in Section 512, would be deleterious not only to Internet commerce, but also to free speech online.

In addition to fostering the Internet as an engine for commerce and economic progress, another of Congress’s objectives in enacting the DMCA safe harbors was to “not interfere with freedom of expression” by “not giv[ing] the online service providers an excessive incentive to censor.”⁸ By improving service providers’ ability to rationally assess and manage their legal risk, the DMCA allowed them to make reasonable investments, enabling the growth of digital innovation and expression.

⁸ 144 CONG. REC. H10618 (daily ed. Oct. 12, 1998) (floor statement of Rep. Barney Frank); *see also* 144 CONG. REC. H7092 (daily ed. Aug. 4, 1998) (floor statement of Rep. Barney Frank).

The safe harbors have been incredibly successful at accomplishing what Congress intended. Protected by the DMCA safe harbors, Internet platforms have flourished in the United States and have revolutionized the creation and dissemination of free expression and creativity. Interactive platforms like video hosting services, bulletin boards, and social networking sites have become vital to democratic participation and the ability of Internet users to forge communities, access information, and discuss issues of public and private concern. These tools enable the public to take to virtual soapboxes, and “address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers.” *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853, 870 (1997).

Online services have transformed and democratized domestic and international commerce, culture, and politics in large part because liability limitations such as the DMCA safe harbors have given predictability to the industry. If an online intermediary were to face new liability for content hosted, transmitted, or disseminated through its services, based solely on its decision to moderate some content, it would likely feel compelled to scrutinize and limit user activities in much more drastic ways. While as discussed above some monitoring may be beneficial in some circumstances, excessive monitoring would lead to over-blocking, threatening lawful content and speech in an effort to limit potential litigation. The possibility of liability for the unlawful activities of even a tiny

minority of users may make online intermediaries decide not to offer certain services, even where those services are used predominantly for lawful, non-infringing purposes.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 4,010 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the types style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2015, I electronically filed the foregoing Brief *Amici Curiae* of the Computer & Communications Industry Association, the American Library Association, the Association of College and Research Libraries, the Association of Research Libraries, and the Electronic Frontier Foundation in Support of Defendant-Appellee, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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