

16-2825-cv (L)

(consolidated with 16-2992-cv)

United States Court of Appeals for the Second Circuit

BWP MEDIA USA INC., DBA PACIFIC COAST NEWS, PACIFIC COAST NEWS,
NATIONAL PHOTO GROUP, LLC,

PLAINTIFFS-APPELLANTS-CROSS-APPELLEES,

v.

POLYVORE, INC.,

DEFENDANT-APPELLEE-CROSS-APPELLANT.

On Appeal from the United States District Court
For the Southern District of New York, No. 13-cv-7867 (RA)

**BRIEF OF *AMICI CURIAE*
THE CONSUMER TECHNOLOGY ASSOCIATION AND
THE COMPUTER & COMMUNICATIONS INDUSTRY
ASSOCIATION
IN SUPPORT OF DEFENDANT-APPELLEE
URGING AFFIRMANCE**

Seth D. Greenstein
CONSTANTINE CANNON LLP
1001 Pennsylvania Avenue, N.W.
Suite 1300 North
Washington, D.C. 20004
Telephone: (202) 204-3500
Facsimile: (202) 204-3501

CORPORATE DISCLOSURE STATEMENT
(Federal Rule of Appellate Procedure 26.1)

The undersigned counsel for Consumer Technology Association and Computer & Communications Industry Association states that neither of these associations has any parent corporation, and no publicly held corporation owns stock in the associations.

Counsel further states that Defendant-Appellee Polyvore, Inc. is a wholly-owned subsidiary of Yahoo! Inc., a publicly held corporation which is a member of *amicus* Computer & Communications Industry Association.

DATE: February 21, 2017 CONSTANTINE CANNON LLP

By: /s/ Seth D. Greenstein
SETH D. GREENSTEIN
Attorney for *Amici Curiae*
The Consumer Technology Association and
The Computer & Communications Industry
Association

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICI</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. The District Court Correctly Applied This Circuit’s Law To Find That There Was No Direct Infringement In The Absence Of Volition By Polyvore	5
II. The Supreme Court’s Guidance In <i>Sony</i> And <i>Grokster</i> Continues To Apply To Internet Services And “Connected Devices”	6
A. There Is No “Imputed Knowledge” Test For Contributory Infringement	7
B. The Court Should Reject The MPAA’s Invitation To Exclude All “Connected Devices” And “Continuing Relationships” From The Supreme Court’s <i>Sony</i> And <i>Grokster</i> Guidance	9
III. Metadata Is Not A “Standard Technical Measure” As Contemplated By DMCA Section 512(i)(1)(B).....	11
IV. Copyright Troll Behavior Should Be Sanctioned By An Award Of Attorneys’ Fees	16
CONCLUSION.....	17
CERTIFICATE OF COMPLIANCE.....	18
CERTIFICATE OF SERVICE	19

TABLE OF AUTHORITIES

Cases

<i>American Broadcasting Companies Inc. v. Aereo, Inc.</i> , 134 S. Ct. 2498 (2014)	5, 6
<i>Arista Records LLC v. Usenet.com</i> , 633 F. Supp. 2d 124 (S.D.N.Y. 2009)	8
<i>Capitol Records, LLC v. Vimeo, LLC</i> , 826 F.3d 78 (2d Cir. 2016).....	14
<i>Cartoon Network LP, LLLP v. CSC Holdings, Inc.</i> , 536 F.3d 121 (2d Cir. 2008)	4, 5, 6
<i>Faulkner v. National Geographic Society</i> , 211 F. Supp. 2d 450 (S.D.N.Y. 2002), <i>aff'd on other grounds, Faulkner v. Nat'l Geographic Enters.</i> , 409 F.3d 26 (2d Cir. 2005)	8
<i>Fox Broad. Co. v. Dish Network, LLC</i> , 747 F.3d 1060 (9th Cir. 2014)	5
<i>Fox Broad. Co. v. Dish Network, LLC</i> , 160 F. Supp. 3d 1139 (C.D. Cal. 2015).....	6
<i>Livnat v. Lavi</i> , 1998 WL 43221 (S.D.N.Y. Feb. 2, 1998)	8, 9
<i>Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.</i> , 545 U.S. 913 (2005).....	<i>passim</i>
<i>Perfect 10, Inc. v. Amazon.com, Inc.</i> , 508 F.3d 1146 (9th Cir. 2007)	9
<i>Perfect 10, Inc. v. Amazon.com, Inc.</i> , 2009 WL 1334364 (C.D. Cal. May 12, 2009).....	9
<i>Perfect 10, Inc. v. Giganews</i> , 2017 WL 279504 (9th Cir. Jan. 23, 2017)	5, 6

Sony Corp. of America v. Universal City Studios, Inc.,
464 U.S. 417 (1984).....*passim*

Statutes

17 U.S.C. § 512(i) 12, 13, 14, 15

17 U.S.C. § 512(i)(1) 12

17 U.S.C. § 512(i)(1)(B) 11

17 U.S.C. § 512(i)(2) 15, 16, 17

17 U.S.C. § 512(i)(2)(A) 16

17 U.S.C. § 512(i)(2)(C) 16

Miscellaneous

Copyright Remedies: Hearing Before the Subcomm. on Courts, Intellectual
Property, and the Internet of the H. Comm. on the Judiciary,
113th Cong. 51 (2014) (statement of Matt Schruers, Vice President
for Law & Policy, Computer & Commc’ns Indus. Ass’n)..... 2

Letter from Michael E. Petricone, Senior Vice President, Gov’t Affairs,
Consumer Tech. Ass’n, to Hon. Bob Goodlatte, Chairman, and Hon.
John Conyers, Jr., Ranking Member, House Judiciary Comm.
(Jan. 31, 2017) 3

Matthew Sag, *Copyright Trolling, An Empirical Study*,
100 Iowa L. Rev. 1105 (2015)..... 2, 16

Pam Samuelson, *The Generativity of Sony v. Universal: The Intellectual
Property Legacy of Justice Stevens*,
74 Fordham L. Rev. 1831 (2006) 7

Rastislav Lukac, ed., *Single-Sensor Imaging: Methods and Applications
for Digital Cameras* (2009) 15

S. Rep. No. 105-190 (1998) 12

Tr. of Oral Arg., <i>BWP Media USA, Inc. et al. v. Polyvore, Inc.</i> , No. 13-CV-7867(RA) (S.D.N.Y. July 7, 2016)	14
U.S. Copyright Office Section 512 Public Roundtable Tr. (May 13, 2016)	13
U.S. Copyright Office, <i>Section 512 Study: Request for Additional Comments</i> , 81 Fed. Reg. 78,636 (Nov. 8, 2016)	13

INTEREST OF *AMICI*¹

Consumer Technology AssociationTM (“CTA”) is the trade association representing the \$292 billion U.S. consumer technology industry, which supports more than 15 million U.S. jobs. More than 2,200 companies – 80 percent are small businesses and startups; others are among the world’s best known brands – enjoy the benefits of CTA membership including policy advocacy, market research, technical education, industry promotion, and standards development. CTA also owns and produces CES[®] – the leading trade show for all consumer technologies.²

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.³

¹ No counsel for any party authored this brief in whole or part; no party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than *amici* made such a contribution. Counsel for Polyvore consented to the filing of this brief; counsel for BWP did not respond to repeated inquiries for consent.

² A complete list of the Consumer Technology Association’s members is available at <http://cta.tech/Membership/Membership-Directory.aspx>.

³ A complete list of CCIA members is available at <https://www.ccianet.org/members>. Defendant-Appellee Polyvore is a subsidiary

Both CTA and CCIA have emphasized the importance to innovators of the “safe harbor” provided by the Supreme Court’s *Sony* requirements for proving contributory infringement where products or services have both noninfringing and infringing uses.⁴ Each has had a longstanding concern over “troll” behavior that has abused both the copyright law and the processes of the Digital Millennium Copyright Act. In testimony before the House Judiciary Committee *amicus* CCIA noted that in 2013 “shotgun-style multi-defendant John Doe complaints comprised the majority of copyright cases in over 20% of the nation’s federal trial courts.”⁵ Last month *amicus* CTA advised the House Judiciary Committee to avoid “enabling baseless and nuisance litigation by [troll] organizations set up

of Yahoo! Inc. Yahoo! is a member of *amicus* CCIA but was not involved in the preparation of this brief.

⁴ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 440-42 (1984) (“Sony”); *see also Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 934-35 (2005) (“Grokster”).

⁵ *Copyright Remedies: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 51(2014) (statement of Matt Schruers, Vice President for Law & Policy, Computer & Commc’ns Indus. Ass’n). Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 Iowa L. Rev. 1105, 1108-09 (2015) (“Sag”), *available at* <https://ilr.law.uiowa.edu/print/volume-100-issue-3/copyright-trolling-an-empirical-study/> (“Of the 3817 copyright law suits filed in 2013, over 43% were against John Does and more than three-quarters of those related to pornography.”).

specifically to exploit” courts and legal processes, in pursuit of unearned statutory damages.⁶

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case in which a well-known copyright “troll” plaintiff is trying to keep a meritless suit alive, despite having sent no takedown notices prior to filing its complaint, failing to take the discovery necessary to prove its case, and abandoning its secondary liability claims at summary judgment. This is perhaps unsurprising given plaintiff’s conduct in prior cases. *See* Polyvore Br. at 12-13. This Court should reject BWP’s effort to undermine this Circuit’s precedent on the volitional conduct requirement for direct infringement; decline its invitation to misconstrue Section 512(i)’s “standard technical measure” provisions contrary to the reading of the U.S. Copyright Office and BWP’s own *amicus*; and direct an award of attorneys’ fees and costs in favor of Polyvore.

What is more surprising, however, is the effort by *amici curiae* the Motion Picture Association of America (“MPAA”) and the Copyright Alliance to use BWP’s meritless appeal as a vehicle to revise the Supreme Court’s and this Circuit’s law on contributory infringement. On contributory infringement the

⁶ Letter from Michael E. Petricone, Senior Vice President, Gov’t Affairs, Consumer Tech. Ass’n, to Hon. Bob Goodlatte, Chairman, and Hon. John Conyers, Jr., Ranking Member, House Judiciary Comm. (Jan. 31, 2017), *available at* <https://judiciary.house.gov/wp-content/uploads/2017/01/Consumer-Technology-Association.pdf>.

MPAA, in a mashup of language from various holdings and *dicta*, asks this Court to invent a doctrine of “imputed knowledge” (Br. at 15), so it can find contributory infringement in the absence of culpable conduct. There is no such doctrine. Even if there were, it would be of no help to BWP here, which failed to oppose Polyvore’s summary judgment motion on contributory infringement.

But *amici* the MPAA and the Copyright Alliance go further still. The Supreme Court rulings in *Sony* and *Grokster* stand for the proposition that, where a service or product has substantial noninfringing uses, to find contributory infringement there must be either active inducement of culpable behavior, or some *intent* (actual or imputed) to participate in or aid known infringing conduct of another. *Sony*, 464 U.S. at 440-42; *Grokster*, 545 U.S. at 934-35; *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 132 (2d Cir. 2008) (“*Cablevision*”). There is nothing to suggest that this rule should be different for an Internet website such as Polyvore. Yet the MPAA and the Copyright Alliance urge this Court to ignore those precedents whenever a defendant has a “continuing relationship” with its customers. The MPAA goes so far as to suggest that the *Sony* safe harbor should be denied to any so-called “connected device.” Needless to say, this would upend a crucial aspect of the established copyright framework on which the entire technology industry relies. Accepting these propositions is not only

unnecessary to the resolution of this appeal, but would also inflict immense harm to innovation and consumers, and to the law.

ARGUMENT

I. The District Court Correctly Applied This Circuit’s Law To Find That There Was No Direct Infringement In The Absence Of Volition By Polyvore.

The District Court correctly relied on *Cablevision* in assigning causation to users who exercise volition, rather than to providers of services or devices. In a similar Ninth Circuit case, *Fox Broad. Co. v. Dish Network, LLC*, 747 F.3d 1060 (9th Cir. 2014), the Ninth Circuit affirmed a district court’s post-*Aereo*⁷ reliance on *Cablevision* in finding that a claim of direct infringement was unlikely to succeed. As in this case, in *Fox* the defendant’s “program create[d] [a] copy only in response to [a] user’s command,” and therefore did not meet the direct liability requirement “that the defendant cause the copying.” *Id.* at 1067 (citing *Cablevision*, 536 F.3d at 130).

The Ninth Circuit recently reaffirmed this analysis, and rejected the very argument now made by BWP, in *Perfect 10 v. Giganews*. The court confirmed that “the volitional conduct requirement is consistent with the *Aereo* majority opinion. . . . [T]he *Aereo* Court did not expressly address the volitional-conduct requirement for direct liability under the Copyright Act, nor did it directly dispute

⁷ *American Broadcasting Companies Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

or comment on Justice Scalia’s explanation or doctrine. . . . [I]t would be folly to presume that *Aereo* categorically jettisoned it by implication.”⁸

The volitional conduct requirement is crucial to separating the realm of direct infringement from that of secondary liability. For technology companies that distribute goods and offer services used by millions of customers, the border between these two realms is of vital importance. It cannot be that the creation of a general-purpose technology exposes an innovator to strict liability for every copyright misdeed by a customer who uses the technology. As the Ninth Circuit held, such a rule would turn the concept of causation on its head. This Court should reaffirm that *Cablevision* remains the law of this Circuit and put to rest the notion that *Aereo* changed the law by implication.

II. The Supreme Court’s Guidance In *Sony* And *Grokster* Continues To Apply To Internet Services And “Connected Devices.”

Despite the appellant having abandoned its argument that Polyvore is a contributory infringer, *amici* the MPAA and the Copyright Alliance attempt to use this meritless appeal as a vehicle to ask this Court to depart from Supreme Court guidance. They urge this Circuit to rule that (1) despite *Sony* and *Grokster*, the

⁸ *Perfect 10, Inc. v. Giganews*, 2017 WL 279504 (9th Cir. Jan. 23, 2017), slip op. at 15 (citing *Fox Broad. Co. v. Dish Network, LLC*, 160 F. Supp. 3d 1139, 1160 (C.D. Cal. 2015)).

appropriate test for contributory infringement is “imputed knowledge,”⁹ and (2) no online service or connected device is entitled to the Supreme Court’s guidance on contributory infringement where there is a “continuing relationship” with direct infringers. This is contrary to what the Supreme Court has said, and is not the law in this Circuit.

A. There Is No “Imputed Knowledge” Test For Contributory Infringement.

The Supreme Court’s *Sony* decision embodies the “staple article of commerce” defense to contributory infringement: the vendor of a technology that is merely capable of a substantial noninfringing use cannot be held contributorily liable for infringement by customers. The Supreme Court has subsequently referred to this as “the *Sony* safe harbor.”¹⁰ It has been called the “Magna Carta” of the technology industry.¹¹ There is no “imputed knowledge” limitation to the *Sony* safe harbor. Nothing in this case or in precedent provides any basis for pronouncing an “imputed knowledge” rule as the law in this Circuit.

The only support the MPAA can muster from within this Circuit is language from *Usenet*, a case in which the court had *already found* inducement as a matter

⁹ MPAA Br. at 3 (“*Sony-Betamax* provides a lens through which to examine contributory liability claims that ... seek to impute knowledge of infringing activity”).

¹⁰ *Grokster*, 545 U.S. at 939 & n.12.

¹¹ Pam Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 *Fordham L. Rev.* 1831, 1850 (2006).

of imputed *intent*.¹² In adding a redundant finding of contributory infringement, the *Usenet* court cited¹³ *dictum* from a pre-*Grokster* case, *Faulkner v. National Geographic Society* (also cited by the MPAA, Br. at 8). In that case, the district court’s actual holding was that “Plaintiffs ... may not hold Kodak liable as a contributory infringer as a matter of law.”¹⁴

The *Usenet* court also cited *dictum* from *Livnat v. Lavi* – another case in which the court did *not* find contributory infringement. Language not quoted by the MPAA reveals that the court there in fact *was guided by Sony in granting summary judgment for the defendant*:

Participation sufficient to establish a claim of contributory infringement may not consist of merely providing the “means to accomplish an infringing activity . . .” In order for liability to be imposed, the alleged contributory infringer must make more than a “mere quantitative contribution” to the primary infringement. ... The authorization or assistance must bear a direct relationship to the infringing acts, *and the contributory infringer must have acted in concert with the direct infringer*.¹⁵

Holdings in other circuits are also not persuasive that this Circuit should adopt an “imputed knowledge” standard so as to impose liability on purveyors of

¹² *Arista Records LLC v. Usenet.com*, 633 F. Supp. 2d 124, 150-54 (S.D.N.Y. 2009).

¹³ *Id.* at 154-56.

¹⁴ *Faulkner v. Nat’l Geographic Soc’y*, 211 F. Supp. 2d 450, 475 (S.D.N.Y. 2002), *aff’d on other grounds*, 409 F.3d 26 (2d Cir. 2005).

¹⁵ *Livnat v. Lavi*, 1998 WL 43221, at *3 (S.D.N.Y. Feb. 2, 1998) (emphasis supplied) (citing *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)).

services and devices with substantial non-infringing uses and users. Even in *Perfect 10 v. Amazon*, on which the MPAA also relies (and which did not produce any judgment of contributory liability) the court’s inquiry was whether “intent may be imputed” based on “actual knowledge”¹⁶ In any event, those out-of-circuit rulings would be of no help to BWP in this case, as it failed to come forward with any additional evidence of intent *or* knowledge to rebut Polyvore’s summary judgment motion. Accordingly, this is not a case where the Court needs to decide whether additional evidence of knowledge or intent would be enough to overcome the *Sony* safe harbor in a non-inducement contributory infringement context.

B. The Court Should Reject The MPAA’s Invitation To Exclude All “Connected Devices” And “Continuing Relationships” From The Supreme Court’s *Sony* And *Grokster* Guidance.

The MPAA’s closing footnote illustrates the novel and ambitious nature of the doctrine it asks this court to adopt:

The MPAA’s argument that *Sony-Betamax* at a minimum does not apply in the digital context should not be taken to imply that the MPAA believes *Sony-Betamax* always applies to physical products.¹⁷

¹⁶ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1171-72 (9th Cir. 2007). On remand the case was dismissed on other grounds. *Perfect 10, Inc. v. Amazon.com, Inc.*, 2009 WL 1334364 (C.D. Cal. May 12, 2009). (*Amici* would urge that the remand regarding contributory infringement in *Perfect 10* was one that “tread[s] too closely” to the *Sony* safe harbor and so should not be adopted as precedent in this Circuit. *See Grokster*, 545 U.S. at 939 n.12, and discussion below.)

¹⁷ MPAA Br. at 27 n.13.

Adopting the MPAA's strained argument that *any* continued digital access between an infringer and a host or device must nullify *Sony* and *Grokster* would cause havoc for providers of online services and devices. Fortunately, the MPAA's attempt to relegate these decisions to an analog era conflicts with both their facts and their language.

The suggestion that Supreme Court jurisprudence changed with respect to digital device connectivity is disproved by *Grokster*. *Grokster* was itself a "digital context" case involving connected devices. The defendant mass-distributed a software service to run on computers in the home. The Court *elaborated upon Sony* in the context of active inducement of infringement. The Court held that three indicia of intent, *if considered together*, could establish culpability by the *Grokster* defendants: (1) specifically aiming to satisfy a known demand for infringement, (2) declining to develop "filtering" tools related to their software product, *and* (3) affirmatively encouraging high-volume infringing use, to drive their own ad revenue.

With respect to whether the failure to develop "filtering" tools could establish the relevant intent to induce, the Court explicitly cautioned:

Of course, in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device

otherwise was capable of substantial noninfringing uses. Such a holding would tread too close to the *Sony* safe harbor.¹⁸

So, contrary to the MPAA's extraordinary request of this Court to ditch the *Sony* safe harbor in "digital contexts," the Supreme Court, in its most recent case involving the use of home devices in the context of an online service, clarified that (1) *Sony* still provides a "safe harbor" from liability for contributory infringement, and (2) a finding of "contributory infringement liability" cannot be based on a failure to take affirmative steps – even where *knowledge* might be imputed – unless there is *also a finding of a culpable intent*.¹⁹

In the absence of *any* evidence of Polyvore's intent, BWP abandoned its secondary liability claim and has not pursued it on appeal. *Amici* ask this Court not to grant the MPAA's request to revive it through a legally baseless "imputed knowledge" doctrine. The consequences for innovation and for consumers would be immense.

III. Metadata Is Not A "Standard Technical Measure" As Contemplated By DMCA Section 512(i)(1)(B).

BWP contends that Polyvore cannot utilize the Section 512 safe harbor because its system did not preserve file metadata. BWP contends this constitutes a

¹⁸ *Grokster*, 545 U.S. at 939, 937 n.12.

¹⁹ "*Sony's* rule limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product. But nothing in *Sony* requires courts to ignore evidence of intent if there is such evidence." *Id.* at 934.

failure to accommodate so-called “standard technical measures.” *See* 17 U.S.C. § 512(i)(1). This argument is specious. Industry stakeholders and even the U.S. Copyright Office agree that no measures satisfying Section 512(i)’s precise definition currently exist.

When the DMCA was enacted in 1998, Congress was optimistic that technical solutions to online infringement could be developed. In 1998, the Senate Judiciary Committee said that it “believes that technology *is likely to be* the solution” and therefore “strongly urges all of the affected parties expeditiously to commence voluntary, interindustry discussions to agree upon and implement the best technological solutions available to achieve these goals.” S. Rep. No. 105-190, at 52 (1998) (emphasis supplied). This exhortation was forward-looking. Congress “anticipate[d] that these provisions *could be* developed,” *id.* (emphasis supplied), and that these “standard technical measures” would diminish the need to rely on takedown demands. Congress may have overestimated the extent of inter-industry consensus, however. While many online platforms innovated with their own solutions for content protection on top of DMCA compliance, no “standard technical measures,” as contemplated and defined by this subsection of the statute, have emerged.

Three months ago, the U.S. Copyright Office noted as much in the Federal Register. It pointed out that “the failure to adopt standard technical measures under

Section 512(i), nearly two decades after passage of the DMCA,” had been observed by several participants in roundtables studying Section 512. It speculated whether the Copyright Office might have a “role... to play in encouraging or supporting the adoption of such standard technical measures,” so as to fulfill Congress’s expectation. *See* U.S. Copyright Office, *Section 512 Study: Request for Additional Comments*, 81 Fed. Reg. 78,636-40 (Nov. 8, 2016). In fact, last May the current Acting Register of Copyright and the CEO of *amicus* the Copyright Alliance,²⁰ in an official roundtable discussion sponsored by the Copyright Office, agreed and bemoaned that in 18 years since the enactment of Section 512(i) *no such standard has yet been developed*. *See* 512 Study Roundtable Tr., May 13, 2016, at 19-21.

Even without statements of the U.S. Copyright Office that this forward-looking section has yet to be fulfilled, BWP’s argument fails. Before Polyvore had a burden to prove that it complied with a particular measure, it was BWP’s burden to prove that some technology fulfills Section 512(i)’s specific requirements for a “standard technical measure.” BWP could not and did not. To require defendants to first prove that such a measure exists and satisfies the statute would in reality be asking them to “prove” the *non-existence* of any measures with which they failed

²⁰ *Amicus* the Copyright Alliance has not endorsed the “standard technical measure” argument in its brief.

to comply. “The service provider cannot reasonably be expected to prove broad negatives;” *see Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 94 (2d Cir. 2016).²¹

The ramifications of endorsing BWP’s last-minute metadata claims are vast. All digital files contain at least some metadata. Different file types support different classes of metadata, which include containers for different types of information. For example, a TIFF image file can support EXIF tags, while a GIF image file cannot. BWP *does not* argue that some types of metadata, for some file types, constitute “standard technical measures.” It does not differentiate in any way. BWP argues here, in the same language it presented to the district court, an interpretation of Section 512(i) that would sweep in *all* metadata, on all files, everywhere. BWP Br. at 44; *see also* BWP Counsel Declaration, Ex. B, Dist. Ct. Dkt. No. 85, Dec. 21, 2015, at 2). This would potentially render the DMCA’s safe

²¹ This Court is obliged to deal with the copyright merits of this case only because the district court, in reading the *Vimeo* decision issued the week before, apparently was concerned that the record did not reflect that defendant met its burden to show compliance with “standard technical measures.” As *amici* discuss above, it would be impossible to do so, because – as the Copyright Office, its Acting Register, and even the head of *amicus* the Copyright Alliance have observed – no such measure exists. Though this issue is before the Court tangentially at best (since there are other grounds for affirmance), a simple clarification – that the *Vimeo* language on burden pertained to *red flag* knowledge and not necessarily to Section 512(i) – would enable district courts to hear suits such as this one without asking the defendant to “prove a negative” (Tr. of Oral Arg. at 20, 30, 39-41, *BWP Media USA, Inc. et al. v. Polyvore, Inc.*, No. 13-CV-7867(RA) (S.D.N.Y. July 7, 2016)).

harbor provisions a dead letter for virtually every online service provider, as the service provider would (in BWP's view) have the burden of proving that the metadata on every file uploaded or transmitted by a user remained untouched.

Even assuming that the U.S. Copyright Office and *amicus* the Copyright Alliance overlooked some standard technical measure that satisfies Section 512(i)(2), metadata cannot be such a measure. First, metadata *predates* Section 512. If Congress had intended Section 512(i) to include metadata, it knew how to say so. It would not have exhorted parties to develop something that already existed.

Second, not only does metadata predate the DMCA; it also predates the Internet. Metadata therefore predates Internet service providers. Section 512(i)(2)(A) requires that “service providers” must have *participated in the formulation* of the measure. Specific file formats and data architectures that BWP refers to – such as TIFF, JPEG, and EXIF – were developed in the 1980s or early 1990s.²² The statute cannot sensibly be construed as including common and pre-existing metadata as a technical measure for “copyright owners and service providers” to develop “in an open, fair, voluntary, multi-industry standards

²² Rastislav Lukac, ed., *Single-Sensor Imaging: Methods and Applications for Digital Cameras* 354-55 (2009).

process.”²³ It simply strains credulity to suggest that these generic pre-Internet file architectures were what Congress was referring to in 1998 in a forward-looking, Internet-related statute.²⁴

IV. Copyright Troll Behavior Should Be Sanctioned By An Award Of Attorneys’ Fees.

As a cross-appellant, Polyvore has made a persuasive case²⁵ that this plaintiff has engaged in the sort of “troll” behavior that has flooded and plagued federal district courts.²⁶ This litigation provides an example of broad-brush, unsupported charges, minimal or no investment in discovery, and the absence of a single “takedown” request under DMCA Section 512 – in response to which, Polyvore would have removed “the allegedly infringing content within one business day.” (JA 86, 106; *see* Br. at 11, 61.)

²³ 17 U.S.C. § 512(i)(2)(A).

²⁴ Even assuming pre-Internet metadata structures constitute a “standard technical measure” for purposes of Section 512(i)(2), the statute only requires accommodation insofar as those measures “do not impose substantial costs on service providers or substantial burdens on their systems or networks.” *See* Section 512(i)(2)(C). Service providers’ systems may not preserve metadata through which users may inadvertently reveal personally identifying information, such as location. Such metadata may be removed for the same reason that federal courts advise counsel to remove sensitive metadata before uploading PDFs to the e-filing system. Compelling retention of this data would constitute a “substantial burden” under Section 512(i)(2)(C).

²⁵ Br. at 57-63.

²⁶ “While patent trolls hog the limelight, a particular type of copyright troll has been taking over the dockets of several United States district courts” Sag, at 1107.

Instead of assuming its proper burden under the law to assert rights in its own content, this plaintiff has tried to “game” *both* the DMCA, by pointing to a non-existent “technical measure” available to Polyvore; and copyright law, by hoping through its minimal investment in this litigation that this Court will decide to ignore its own precedent. Appellee is correct that a remand for calculation of fees and costs is the appropriate answer from this Court for plaintiff’s imposition on this Circuit’s courts and on the DMCA processes established by law.

CONCLUSION

The judgment of the District Court should be affirmed and the case should be remanded for calculation of fees and costs.

Respectfully submitted,

/s/ Seth D. Greenstein

Seth D. Greenstein
CONSTANTINE CANNON LLP
1001 Pennsylvania Avenue, N.W.
Suite 1300 North
Washington, D.C. 20004
(202) 204-3500 (Telephone)
(202) 204-3501 (Facsimile)

Attorney for *Amici Curiae*
The Consumer Technology Association and The
Computer & Communications Industry
Association

CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) as modified by Fed. R. App. P. 32(e), Local Rule 29.1(c), and Local Rule 32.1(a)(4)(A) because this brief contains 3,945 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
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 in Times New Roman, 14-point font.

DATED February 21, 2017

/s/ Seth D. Greenstein
Seth D. Greenstein
CONSTANTINE CANNON LLP
1001 Pennsylvania Avenue, N.W.
Suite 1300 North
Washington, D.C. 20004
(202) 204-3500 (Telephone)
(202) 204-3501 (Facsimile)

Attorney for Amici Curiae
The Consumer Technology Association and The
Computer & Communications Industry
Association

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2017, I electronically filed the foregoing Brief *Amici Curiae* of Consumer Technology Association and Computer & Communications Industry Association, in Support of Defendant-Appellee, with the Clerk of the Court for the United States Court of Appeals for the Second 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.

DATED: February 21, 2017

/s/ Seth D. Greenstein

Seth D. Greenstein

Attorney for *Amici Curiae*

The Consumer Technology Association and The
Computer & Communications Industry
Association