14-1048-cv(L)

14-1049-cv(CON), 14-1067-cv(XAP), 14-1068-cv(XAP)

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

(Caption continues on interior cover)

On Appeal from the United States District Court for the
Southern District of New York, No. 09-cv-10101 (Abrams, J.)

BRIEF *AMICUS CURIAE* OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
IN SUPPORT OF VIMEO, LLC

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July 30, 2014

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-Appellees-Cross-Appellants,

v.

VIMEO, LLC, a Delaware Limited Liability Company, a/k/a VIMEO.COM, CONNECTED VENTURES, LLC, a Delaware Limited Liability Company,

Defendants-Appellants-Cross-Appellees,

and

DOES, 1-20 inclusive,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the Computer & Communications Industry Association states that it does not have a parent corporation and that no publicly held corporation has an ownership stake of 10% or more in CCIA.

/s/ Matt Schruers
Counsel for *Amicus Curiae*

July 30, 2014

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INTEREST OF *AMICUS* [1]

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] CCIA's members, many of whom offer services allowing users to submit content of all types, depend upon robust and unambiguous safe harbors under the Digital Millennium Copyright Act ("DMCA"). CCIA submits this brief urging clarity around the question of whether pre-1972 sound recordings are covered by the DMCA to the same extent as all other copyrighted content. The answer to this question should be: yes.

SUMMARY OF ARGUMENT

The DMCA safe harbors have proven to be extraordinarily important protections for the U.S. Internet economy. Regarding the proper construction of those safe harbors, and in particular the questions of "red flag" knowledge and willful blindness, CCIA refers to the briefs submitted by other *amici* at this time.

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[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 *amicus* and its members have made such a contribution. All parties have consented to the filing of this brief.

[2] A list of CCIA members is available at http://www.ccianet.org/members.

This brief addresses the question of whether the DMCA's safe harbors apply as equally to pre-1972 sound recordings as they do to other materials protected by copyright laws. Answering this question in the affirmative, it contends that the DMCA provides safe harbors from *all* copyright liability, not merely safe harbors from *federal* copyright liability.

When enacting the DMCA safe harbors, codified at 17 U.S.C. § 512,[3] Congress intended to promote the development of the Internet by reducing the liability risk that Internet service providers face from third-party copyright infringement. As the Senate concluded in 1998, "limiting the liability of service providers [would] 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).

Opining otherwise on this appeal would (a) contravene Congress's intention in enacting the DMCA; (b) require making statutory interpretations that are at odds with the construction of Title 17; (c) be inconsistent with some of the plaintiffs' own practices in submitting DMCA takedown notices targeting pre-1972 sound recordings; and, (d) conflict with international obligations of the United States.

[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.

ARGUMENT

I. The Plaintiffs' Position Cannot Be Reconciled With Congress's Stated Rationale for Enacting Section 512.

In 1998, Congress concluded that "by limiting the liability of service providers, the DMCA [would] 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). In fact, this turned out to be an understatement. Today the U.S. Internet sector leads the world. Internet services represent an extraordinary portion of the U.S. economy and exports, and provide substantial economic benefits to multiple sectors. As early as 2009, the Internet was adding an estimated $2 trillion to annual GDP, over $6,500 per person, according to the National Economic Council. Exec. Ofc. of the President, Nat'l Econ. Council/OSTP, *A Strategy for American Innovation: Driving Towards Sustainable Growth and Quality Jobs*, Sept. 2009, at 5, *available at* http://www.whitehouse.gov/administration/eop/nec/StrategyforAmericanInnovation. The value of the global Internet economy is projected to reach $4.2 trillion in a few years. David Dean *et al.*, *The Internet Economy in the G-20: The $4.2 Trillion Growth Opportunity* (Boston Consulting Grp. 2012), at 3, *available at* https://www.bcg.com/documents/file100409.pdf.

The plaintiffs' interpretation of the DMCA, if adopted, would run contrary to Congress's stated goal of ensuring this growth, and the economic benefits

arising from it. Rather than reducing the liability risks that Internet service providers face from third party copyright infringement, so that those providers could continue to expand the value and quality of their service, the plaintiffs' position would *increase* the liability risk. Service providers would remain protected by the DMCA safe harbors with respect to works covered by federal copyright law, but would achieve no such protection with respect to pre-1972 sound recordings. This cannot be what Congress intended.

The DMCA safe harbors sought to make manageable an otherwise potentially unmanageable liability risk. At the time of the DMCA's enactment, Congress made clear that it was providing "greater certainty to service providers concerning their legal excposure 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)). The plaintiffs' position, if adopted, would run counter to this clearly stated intention as well. While the DMCA safe harbors would bring "greater certainty" with respect to works protected by federal copyright law, under the plaintiffs' interpretation no such certainty would be brought with respect to pre-1972 sound recordings.

Congress was well aware that federal copyright law extended copyright protection to all types and forms of works, and that proactively monitoring for those works was impossible. Indeed, Congress explicitly worried that Yahoo's

then-index of only 800,000 web pages could not reasonably be monitored. H. REP. NO. 105-551, pt. 2, at 558 (1998). And whatever worries Congress had in 1998 have magnified in an era where online services receive 5,700 tweets per second (Twitter), 100 hours of video per minute (YouTube), and 2.5 billion pieces of content per day (Facebook), on a Web containing tens of billions of search-indexable pages. *See* Raffi Krikorian, *New Tweets per second record, and how!*, The Twitter Engineering Blog, Aug. 16, 2013, *available at* https://blog.twitter.com/2013/new-tweets-per-second-record-and-how; YouTube Statistics, *available at* https://www.youtube.com/yt/press/statistics.html (last accessed July 29, 2014); Sriram Sankar, Soren Lassen, & Mike Curtiss, *Under the Hood: Building out the infrastructure for Graph Search*, Facebook Engineering Notes, Mar. 6, 2013, *available at* https://www.facebook.com/notes/facebook-engineering/under-the-hood-building-out-the-infrastructure-for-graph-search/10151347573598920.

Congress thus created the Section 512 safe harbors, under which online services could avoid liability for monetary damages if they assisted rights-holders by expeditiously removing allegedly infringing content upon receiving a valid notice. But the plaintiffs appear to read this history differently. They contend that even as Congress stated it was providing business certainty, and enacting a law that limited liability risks, it was nonetheless still leaving online services exposed to

common law copyright suits throughout the 50 states, with respect to a large swath of copyrighted works that are not readily identified: pre-1972 sound recordings. This interpretation contradicts Congress's stated purpose in limiting liability, and is wholly inconsistent with the description of Section 512 as a series of safe harbors.

While larger online services may be able to afford the prospective litigation rush that the plaintiffs invite, others will not. These legal ambiguities would fall most heavily on small innovators and new start-up innovators, who, having lost the safe harbors' legal protection, may be too burdened by litigation risk to launch in the first place. State court litigation will ultimately not serve rights-holders either. Under the DMCA, copyright holders receive a great benefit: the ability to expeditiously purge allegedly infringing material from the Internet without legal action. No filing fee is required, and legal counsel is not necessary. While large rights-holders may be able to afford prosecuting expensive copyright litigations, smaller rights-holders are less able to do so. DMCA takedowns remedy this problem. The plaintiffs' position, if accepted, would strip smaller rights-holders of their ability to rely on the DMCA notice-and-takedown procedures with respect to pre-1972 sound recordings. Thus, turning back the clock to the uncertain years before 1998 would not only unwind Congress's efforts to establish certainty, it would also disadvantage those who do not have the litigation budget to litigate issues in federal court.

II. The Copyright Office Report Which the District Court Relied Upon Misquotes Federal Copyright Law.

There is no logical reason why Congress would protect online services from liability with respect to some works, but leave them exposed to such liability with respect to others. Not only does such a regime defy logic, this defies the definition of "safe harbors."

In its report regarding the relationship between the DMCA safe harbors and pre-1972 sound recordings, the Copyright Office concurred with this, observing that it "sees no reason – and none has been offered – why the Section 512 'safe harbor' from liability for monetary and some injunctive relief should not apply to the use of pre-1972 sound recordings." Register of Copyrights Maria Pallante, *Federal Copyright Protection for Pre-1972 Sound Recordings*, U.S. Copyright Office (2011), at 130. It further opined that "there is no policy justification to exclude older sound recordings from section 512." *Id.* These are reasonable findings; if DMCA compliance earns a service protection from some – but not all – liabilities, the statute's protections can hardly be described as safe harbors.

Despite these observations, the Copyright Office ultimately concluded that Congress intended for the DMCA not to cover pre-1972 sound recordings. Why did the Copyright Office reach this unreasonable conclusion? Because it mistakenly believed that "'infringement of copyright' . . . is defined in Section 501(a) as the violation of 'any of the exclusive rights of the copyright owner as

provided by sections 106 through 122.'" *Id.* at 131. Based on this misunderstanding, the Copyright Office concluded that "infringement of copyright" was a defined term of art, saying that it "could not be more clear" that by using "infringement of copyright" in section 512, Congress was limiting the safe harbor solely to *federal* infringement. *Id.*

Unfortunately, the Copyright Office erred. "Infringement of copyright" is not defined in Section 501(a). In fact, Section 501(a) does not even *contain* the word "infringe*ment*," anywhere. *See* 17 U.S.C. § 501(a). Section 501(a) instead refers, non-exclusively, to "an infring*er*." *Id.* And while the phrase "infringement of copyright" appears in the general title of Section 501, it appears nowhere in sub-section (a). *Id.* Even assuming that the Copyright Office received any deference in interpreting the plain language of the Copyright Act, it should only be with respect to language that the relevant sub-section actually contains. *See Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 951, 946-47 (2d Cir. 1975) ("the Copyright Office has no authority to give opinions or define legal terms").

The plaintiffs themselves unsuccessfully advanced this argument – that Section 501 defined "infringement of copyright," as used in Section 512, to include only federal copyrights – before the district court in the *Mp3tunes* case. *See Capitol Records, Inc. v. Mp3tunes, LLC*, 821 F. Supp. 2d 627, 641 (S.D.N.Y. 2011). There, the district court read the statute and held that Section 501(a)

"simply states that anyone violating the rights established by sections 106 through 122 is an *infringer*, without suggesting it is all inclusive." *Id.* (emphasis supplied).

The *Mp3tunes* court observed that any contrary interpretation would "spawn legal uncertainty and subject otherwise innocent internet service providers to liability for the acts of third parties," since "it is not always evident (let alone discernable) whether a song was recorded before or after 1972." *Capitol Records, Inc.*, 821 F. Supp. 2d at 642. The court thus concluded that it is "beyond dispute" that Section 512 "encompasses violations of both federal and state protections." *Id.* at 641.

III. Section 301 Does Not Limit the Scope of the DMCA Safe Harbors.

The plaintiffs' argument rests on Section 301(c), which states that for pre-1972 sound recordings, "any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067." 17 U.S.C. § 301(c). However, a plain reading of Title 17 favors Vimeo's position.

As Vimeo's brief explains, Br. at 50-52, preventing the plaintiffs from proceeding against Vimeo does not annul rights, nor do the safe harbors limit remedies. If Congress actually intended to enact safe harbors excluding pre-1972 sound recordings, it had far more obvious ways to limit Section 512 to apply only to rights under Title 17. Congress "does not… hide elephants in mouse holes." *American Library Ass'n v. FCC*, 406 F.3d 689, 704 (2005) (quoting *Whitman v.*

Am. Trucking Ass'n, 531 U.S. 457, 468 (2001)). Had Congress aimed to limit the Section 512 safe harbors to only federal copyrights arising under Title 17, it could have made clear that Section 512 applied only to works receiving copyright protection "under this title," the phrase Congress has used throughout Title 17 to refer to the metes and bounds of the Copyright Act. *See e.g.*, 17 U.S.C. §§ 104, 105, 109(a); § 114(d)(4) (nothing in Section 114 affects remedies "under this title" pursuant to certain exclusive rights); § 115(c)(3)(I) (certain claims of infringement "under this title" precluded). *Cf. Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013). Because the safe harbors are not limited to claims "under this title," the Court should decline the plaintiffs' invitation to read those words into the statute.

Even if the Court should find that the plain language of Sections 301(c) and 512 conflict, it should construe the law in favor of the later-enacted provision. *See United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998) ("a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended"). Congress's decision not to preempt pre-1972 sound recordings occurred in 1976. *See* Copyright Act of 1976, Pub. L. 94-553, Oct. 19, 1976, 90 Stat. 2541. Section 512, on the other hand, was enacted in 1998. *See* Digital Millennium Copyright Act, Pub. L. 105-

304, Oct. 28, 1998, 112 Stat. 2860. To the extent these provisions disagree, the more recent liability limitations of Section 512 should govern.

IV. The Plaintiffs Have Acknowledged that the DMCA Applies to Pre-1972 Sound Recordings.

Online services and rights-holders throughout the economy have continuously conducted themselves as if the DMCA applied to pre-1972 works. While the plaintiffs assured the district court that "pre-'72 recordings do not fall under the DMCA because they're not federally copyrighted recordings," *see* Transcript 7/18/2013 at 90, the plaintiffs have taken the opposite position in takedown demands issued to online services.

According to the Chilling Effects Database, record labels have invoked the DMCA to request takedown of pre-1972 works.[4] And these record labels include the very plaintiffs in *this case*, requesting takedowns of sound recordings at issue *in this suit*.[5] In one illustrative case, EMI sent takedown notices to DMCA agents

[4] *See, e.g.*, The Beatles / Apple Records, EMI Music NA, *Music DMCA (Copyright) Complaint to Google*, Chilling Effects, May 20, 2010, *available at* http://www.chillingeffects.org/dmca512c/notice.cgi?NoticeID=39968 (DMCA notice regarding Beatles audio recordings). Notably, representations made by rights-holders in takedown demands must be made under penalty of perjury. 17 U.S.C. § 512(c)(3)(A)(vi).

[5] *See, e.g.*, Capitol Records, *Music DMCA (Copyright) Complaint to Google*, Chilling Effects, Apr. 12, 2010, *available at* http://www.chillingeffects.org/dmca512c/notice.cgi?NoticeID=37596 (Capitol Records DMCA complaint regarding sound recordings of Beatles 'Revolver' album); *see also* Capitol Records LLC, Virgin Records America *et al., Music*

targeting the 'Grey Album,' a "mashup" which used sound recordings from the Beatles' White Album without authorization.[6] Ten of the songs identified in the plaintiffs' Schedule B as pre-1972 sound recordings *not* governed by the DMCA were among those allegedly infringed by the Grey Album, which EMI demanded to be taken down, citing the DMCA.[7]

In short, when it has come to some of the plaintiffs' enforcement practices, pre-1972 sound recordings were apparently governed by the DMCA. Now that such an argument proves incompatible with the plaintiffs' case, however, they contend they are not.

V. Excluding Pre-1972 Sound Recordings Would Violate International Obligations of the United States.

Interpreting the DMCA safe harbors to exclude pre-1972 sound recordings governed by state copyright laws would also undermine international commitments of the United States. Obligations modeled on Section 512 are now a mainstay in the United States' free trade agreements, and limiting liability for online service

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DMCA (Copyright) Complaint to Google, Chilling Effects, Oct. 25, 2010, *available at* http://www.chillingeffects.org/dmca512c/notice.cgi?NoticeID=33504.

[6] *See* EMI Recorded Music, North America, *Takedown that Grey Album*, Chilling Effects, Feb. 13, 2004, *available at* http://www.chillingeffects.org/fairuse/notice.cgi?NoticeID=1093 (notice to DMCA agent regarding sound recordings, citing Digital Millennium Copyright Act).

[7] *See id.* The recordings include "Dear Prudence," "Glass Onion," "While My Guitar Gently Weeps," "Happiness Is A Warm Gun," "I'm So Tired," "Piggies," "Rocky Raccoon," "Julia," "Helter Skelter," and "Revolution 9."

providers has been a consistent element of U.S. trade policy for over a decade.[8] As a result, the United States has entered into trade agreements with roughly a dozen nations that require copyright liability limitations similar to the DMCA. Moreover, the U.S. Trade Representative is presently pursuing similar provisions in ongoing trade talks. These obligations do not permit a contracting party to exclude from the safe harbors copyrights issued by political subdivisions, nor do these trade agreements suggest that the word "copyright" should be construed narrowly. To the contrary, most agreements explicitly specify that liability limitations for service providers shall apply not only to "copyright," but must "also include related

[8] *See, e.g.*, United States-Chile Free Trade Agreement art. 17.11(23), June 6, 2003, 42 I.L.M. 1026; United States-Dominican Republic-Central America Free Trade Agreement art. 15.11(27), May 28, 2004, 43 I.L.M. 514; United States-Australia Free Trade Agreement art. 17.11(29), May 18, 2004, 43 I.L.M. 1248; United States-Morocco Free Trade Agreement, art. 15.11(28), June 15, 2004, 44 I.L.M. 544; United States-Bahrain Free Trade Agreement art. 14.10(29), Sept. 14, 2004, 44 I.L.M. 544; United States-Peru Trade Promotion Agreement art. 16.11(29), Apr. 12, 2006, http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text; United States-Colombia Trade Promotion Agreement art. 16.11(29), Nov. 22, 2006, http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text; United States-Singapore Free Trade Agreement art. 16.9(22), May 6, 2003, 42 I.L.M. 1026; United States-Panama Trade Promotion Agreement, art. 15.11(27), June 28, 2007, http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text; United States-Korea Free Trade Agreement, art. 18.10(30), June 30, 2007, 46 I.L.M. 642; United States-Oman Free Trade Agreement, art. 15.10(29), Jan. 1, 2009, http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text.

rights."[9] If Section 512 were interpreted to exclude a large segment of copyrighted works, such as pre-1972 sound recordings, the United States would potentially be in violation of its trade obligations, and this violation might invite similar such violations by our trading partners.

CONCLUSION

The plaintiffs' argument that the DMCA does not apply to pre-1972 sound recordings is contrary to Congressional intent, basic statutory construction, the international obligations of the United States, and even some of the plaintiffs' own previous positions. Accordingly, CCIA urges this Court to overturn the district court's ruling and find that the DMCA safe harbors are available for pre-1972 sound recordings.

Respectfully submitted,
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[9] *See, e.g.*, CAFTA, art. 15.11(27) n.20; Bahrain art. 14.10(29)(a) n.14; Chile art. 17.11(23)(a) n.35; Colombia art. 16.11(29)(a) n.28; Peru art. 16.11(29)(a) n.27; Panama art. 15.11(27) n.23.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 3,123 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.

/s/ Matt Schruers
Counsel for *Amicus Curiae*

July 30, 2014

CERTIFICATE OF SERVICE

I hereby certify, that on this 30th day of July 2014, a true and correct copy of the foregoing Brief of *Amicus Curiae* the Computer & Communications Industry Association was timely filed in accordance with FRAP 25(a)(2)(D) and served on all counsel of record via CM/ECF pursuant to Local Rule 25.1(h).

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July 30, 2014