

MOTION INFORMATION STATEMENT

Docket Number(s): 10-3270 and 10-3342 Caption [use short title] _____

Motion for: Leave to File Amicus Curiae Brief Viacom Int'l Inc. v. YouTube, Inc.; The Football Ass'n Premier League Ltd. v. YouTube, Inc.

Set forth below precise, complete statement of relief sought:

Public Knowledge respectfully requests leave to file an amicus brief providing the Court with information on the practicality and effectiveness of automated copyright filtering technology for maintaining of DMCA safe harbors.

MOVING PARTY: Public Knowledge OPPOSING PARTY: Plaintiffs-Appellants
 Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

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Court-Judge/Agency appealed from: The Hon. Louis L. Stanton, U.S. District Court for the Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
 Yes No (explain): _____

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No
Has this relief been previously sought in this Court? Yes No
Requested return date and explanation of emergency: _____

Opposing counsel's position on motion:
 Unopposed Opposed Don't Know

Does opposing counsel intend to file a response:
 Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date: _____

Signature of Moving Attorney: /s/ Benjamin J. Kallos Date: 4/7/2011 Has service been effected? Yes No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: _____ By: _____

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VIACOM INTERNATIONAL INC., COMEDY)	
PARTNERS, COUNTRY MUSIC)	
TELEVISION, INC., PARAMOUNT PICTURES)	
CORPORATION, BLACK ENTERTAINMENT)	
TELEVISION LLC,)	10-3270
)	ECF Case
<i>Plaintiffs-Appellants,</i>)	Electronically filed
)	
v.)	Affirmation of
)	Sherwin Siy In
YOUTUBE, INC., YOUTUBE, LLC,)	Support of
GOOGLE, INC.,)	Motion for Leave
)	to File an <i>Amicus</i>
<i>Defendants-Appellees.</i>)	<i>Curiae</i> Brief

Sherwin Siy, duly admitted to practice in the District of Columbia,
under penalty of perjury, hereby declares as follows:

1. I am the Deputy Legal Director of Public Knowledge.
2. I submit this Affirmation in support of Public Knowledge's Motion for Leave to File an *Amicus Curiae* Brief in the above-captioned case.
3. Public Knowledge requested consent to file this *Amicus Curiae* brief from all parties in this action. Defendants-Appellees YouTube, Inc., YouTube, LLC, and Google, Inc. granted consent. Plaintiffs-Appellants

Viacom consented to filing. Proposed Class Plaintiffs-Appellants Premier League et al. declined to consent to filing.

4. Public Knowledge is a nonprofit public interest advocacy organization that represents consumers' rights in Washington, D.C. Public Knowledge works with consumer and industry groups to promote balance in intellectual property law and technology policy, ensuring that the public can benefit from new innovations, fast and affordable access, and the use of content.

5. Public Knowledge has been involved in a number of technology policy and copyright issues over the past several years, including participation as a named plaintiff in *Am. Library Assoc. v. FCC*, 406 F.3d 689 (D.C. Cir. 2005). Public Knowledge has also joined as *amicus curiae* in a number of cases, several of which address important copyright issues. *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186 (2003); *Twentieth Century Fox Film Corp. v. Cablevision Sys.*, No. 07-1480-CV (2d Cir. *amicus* brief filed June 6, 2008); *MDY Ind., LLC v. Blizzard Ent., Inc.*, 2011 U.S. App. LEXIS 3428 (9th Cir. Jun. 17, 2010); *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010). Public Knowledge has also studied the effects of copyright filtering on networks and consumers, publishing a white paper on the topic. Mehan Jayasuria, et. al., *Forcing the Net Through a Sieve: Why Copyright Filtering*

is Not a Viable Solution for US ISPs, (Public Knowledge 2009). The above-captioned case directly impacts the development of services that empower customers to share and distribute information via the Internet, and both parties and proposed *amici* have raised arguments based upon the role and effectiveness of copyright filtering.

6. The submitted brief addresses the practicality and desirability of automated copyright filtering technology. It also describes how those types of technologies can and cannot be effectively integrated into measures taken by a service provider to maintain DMCA safe harbors.

_____/s/_____

Sherwin Siy

April 7, 2011

10-3270-CV

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VIACOM INTERNATIONAL INC., COMEDY PARTNERS, COUNTRY
MUSIC TELEVISION, INC., PARAMOUNT PICTURES
CORPORATION, BLACK ENTERTAINMENT TELEVISION, LLC,

Plaintiffs-Appellants

v.

YOUTUBE, INC. YOUTUBE, LLC, GOOGLE, INC.,

Defendants-Appellees

On Appeal from the United States District Court
for the Southern District of New York
Honorable Louis L. Stanton, District Judge

(Additional Caption on Reverse)

BRIEF OF AMICUS CURIAE PUBLIC KNOWLEDGE IN SUPPORT
OF AFFIRMANCE FOR DEFENDANTS-APPELLEES

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10-3342-CV

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED, on behalf of themselves and others similarly situated, BOURNE CO., CAL IV ENTERTAINMENT, LLC, CHERRY LANE MUSIC PUBLISHING COMPANY, INC., NATIONAL MUSIC PUBLISHERS' ASSOCIATION, THE RODGERS & HAMMERSTEIN ORGANIZATION, EDARD B. MARKS MUSIC COMPANY, FREDDY BIENSTOCK MUSIC COMPANY, dba Bienstock Publishing Company, ALLEY MUSIC CORPORATION, X-RAY DOG MUSIC, INC., FEDERATION FRANCAISE DE TENNIS, THE MUSIC FORCE MEDIA GROUP LLC, SIN-DROME RECORDS, LTD., on behalf of themselves and all others similarly situated, MURBO MUSIC PUBLISHING, INC., STAGE THREE MUSIC (US), INC. THE MUSIC FORCE LLC,

Plaintiffs-Appellants,

and

ROBERT TUR, dba Los Angeles News Service,
THE SCOTTISH PREMIER LEAGUE LIMITED,

Plaintiffs,

v.

YOUTUBE, INC., YOUTUBE, LLC, GOOGLE INC.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Public Knowledge states that it has no parent corporations and no publicly held corporation has an ownership stake in it.

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INTEREST OF AMICUS CURIAE¹

Public Knowledge is a nonprofit public interest advocacy organization that represents consumers' rights in Washington, D.C. Public Knowledge works with consumer and industry groups to promote balance in intellectual property law and technology policy, ensuring that the public can benefit from new innovations, fast and affordable access, and the use of content.

Public Knowledge has joined as *amicus curiae* in a number of cases addressing important copyright issues. *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186 (2003); *Twentieth Century Fox Film Corp. v. Cablevision Sys.*, No. 07-1480-CV (2d Cir. *amicus* brief filed June 6, 2008); *MDY Ind., LLC v. Blizzard Ent., Inc.*, 2011 U.S. App. LEXIS 3428 (9th Cir. Jun. 17, 2010); *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010). Public Knowledge has also investigated the effects of copyright filtering on networks and consumers, publishing a white paper on the topic. Mehan Jayasuria, et al., *Forcing the Net Through a Sieve: Why Copyright Filtering is Not a Viable Solution for US ISPs*, (Public Knowledge 2009). The above-captioned case directly impacts the development of services that empower customers to share and distribute information via the Internet, and both parties and

¹ This brief was not authored in whole or in part by any party to the action nor did any such party or its counsel contribute money that was intended to fund preparing or submitting this brief. There is no person other than the *amicus curiae* who contributed money that was intended to fund preparing or submitting this brief.

proposed *amici* have raised arguments based upon the role and effectiveness of copyright filtering.

SUMMARY OF ARGUMENT

Public Knowledge submits this brief in order to address certain specific issues related to the use and legal significance of content filtering technology in relation to the safe harbor provisions of the Digital Millennium Copyright Act (DMCA). Appellants make several arguments regarding filtering, each amounting to the theory that the existence of filtering technology and YouTube's failure to use it in certain specific ways excludes YouTube from the safe harbor provisions of Section 512. In addition, *Amici* Audible Magic and Vobile ("Filtering *Amici*"), in support of no party, have filed briefs regarding the reliability of their products, apparently in response to the district court's citation of language from a 2009 decision to the effect that filters' determinations of infringement are not reliable enough to be dispositive for purposes of 17 U.S.C. § 512(i)(1)(A). Public Knowledge files this brief to emphasize that (i) whatever the accuracy of automated filtering technology in identifying content, the technology cannot make reliable *legal* determinations about when and whether specific uses of that content are infringing; and (ii) disqualifying YouTube from the safe harbor because it declined to use filters in the ways preferred by Appellants (and perhaps Filtering *Amici*) would effectively make adoption of certain technologies a new prerequisite for the safe harbor, in direct contradiction to both the plain meaning and the purpose of the DMCA.

ARGUMENT

I. Automated Filtering Technologies Cannot Reliably Identify Infringement.

The filtering software touted by Appellants and Filtering *Amici* is designed to identify videos that may be infringing. It does this by comparing the video files uploaded by users with an existing catalog of known copyrighted works supplied by cooperating copyright owners. If some or all of an uploaded video matches video footage in the database, that indicates that the user may have copied at least some material to which a cooperating copyright holder claims ownership.

The district court cited *UMG Recordings, Inc. v. Veoh Networks Inc.* for the proposition that filtering technology “does not meet the standard of reliability and verifiability required by the Ninth Circuit in order to justify terminating a user’s account.” 665 F. Supp. 2d 1099 (C.D. Cal. 2009). Audible Magic “strenuously disagree[s].” (Audible Magic Br. at 3.) But the district court, like the court in *Veoh*, was simply pointing out that automated filters cannot identify infringement with sufficient certainty that a service provider should be required to treat a filter’s results as dispositive for purposes of identifying repeat infringers under 512(i)(1)(a). This proposition should not be controversial; an automated, software-based warning of content matching is a far cry from an actual court ruling that infringement has occurred. Automated filters cannot reliably determine when and whether specific conduct is infringing.

A. Automated Systems Cannot Make the Legal Judgments Necessary To Identify Infringement.

Filtering *Amici* are eager to promote the effectiveness of their software at matching uploaded files to known copyrighted works. However, technical accuracy in identifying content is not the same as legal accuracy in identifying infringement. Identifying whether a given file contains material copied from an existing, copyrighted work is only the beginning of an infringement analysis. For instance, the file could be uploaded with the express or implied permission of the copyright holder, or its presence on the site could be fair or *de minimis* use. None of these common scenarios yields readily to automated analysis.

In the case of permissions, the mere presence of a work within a filtering system's database of copyrighted works does not mean that any given upload is unauthorized. A rightsholder's antipiracy division that wishes to identify uses of its works throughout various online services has a strong incentive to be as complete as possible when submitting its catalog of works to Audible Magic or another filtering service. Meanwhile, various members of public relations and marketing departments, as well as outside contractors hired to promote works through social media, have incentives to allow clips of upcoming movies, individual tracks from upcoming albums, or iconic portions of past works to be uploaded for others to comment on, analyze, promote, and share with other potential customers. *See, e.g.*, YouTube Br. at 42-50; Julia Angwin *et al.*, *Record Labels Turn Piracy into a*

Marketing Opportunity, Wall Street Journal, Oct. 18, 2006, at B1.² Not only are authorized, copyrighted clips released directly by rightsholders themselves, but in some cases, rightsholders' agents or employees have also attempted to make the clips resemble infringing clips, in order to build publicity for a work in progress.

Id.

Authorizations can be granted through practically any means of communication between a rightsholder (or a rightsholder's agent) and the uploader, whether that be in an email, a letter, a negotiated contract, or a phone conversation. In none of these cases would the presence of a license be indicated in the contents of an uploaded file, leaving a filtering system no way to screen out these authorized copies.

A limitation of filtering programs even less solvable by technical means is their inability to determine fair use. *See* Mehan Jayasuria, et al., *Forcing the Net Through a Sieve: Why Copyright Filtering is Not a Viable Solution for US ISPs*, (Public Knowledge 2009).³ Unauthorized uses of copyrighted works are not infringement if they qualify for fair use, typified by commentary, criticism, news reporting, teaching, scholarship, and research. 17 U.S.C. § 107 (2006). Even this list is non-exhaustive, and fair use is determined by weighing at a bare minimum

² http://online.wsj.com/public/article/SB116113611429796022-5EZVscJYWWFqv1AmPvXCiOjJms_20071018.html.

³ www.publicknowledge.org/pdf/pk-filtering-whitepaper-200907.pdf

four extremely open-ended factors, most of which are impossible for an automated system to determine.⁴

The complexity of these factors has made many determinations of fair use notoriously difficult for legal scholars and judges, and much more so for a formula-bound computer. Even with this complexity, however, there are many cases of alleged infringement that require little expertise, but only simple human judgment, in order to make a fair use determination. A movie review incorporating a small portion of the review's subject, a commentary on a politician's speech, or a parody of a song ridiculing the original are all easily picked out as fair use by non-expert humans, while presenting a difficult task for computers. This is because analysis of these factors depends not just upon the identity of the data stored within the file, or even the sounds and images that data represents, but of the actual semantic meaning encoded within the language and imagery used.

Fair use is not the only limitation or exception to copyright protection that requires subjective judgment, either. *De minimis* use, while it may be picked up by an automated filter, is not copyright infringement. The ways in which a particular

⁴ Those four factors are: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use upon the potential market for the copyrighted work. Even the least apparently subjective factor—the amount of the work used—cannot be measured purely by numeric values, as an excerpt of a given length from a work could easily be considered more or less the “heart” of that work. *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 564-65 (1985).

use might be rendered *de minimis* are several. A visual work could be out of focus, not prominently displayed in frame, visible for only a brief period of time, or some combination of the three. *See Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217-18 (2d Cir. 1998). An audio work could be distorted, low in volume, brief, or intermingled with other background sounds and noise. And any work could be captured in passing, as opposed to placed within the allegedly infringing work deliberately.

A filter's inability to correctly determine authorization, fair use, or *de minimis* usage can easily result in over-identification of material as infringing, to a far greater extent than any examination by human beings.

B. Given the High Volumes of Uploads, Automated Filters Would Generate High Volumes of False Positives.

A common factor underlying the separate developments of the DMCA and of automated filtering systems is the sheer volume of content that flows over the Internet and that is submitted to user-generated content sites like YouTube. In light of the tremendous volume, automated filters are likely to generate substantial volumes of "false positives" – content that is mistakenly flagged, either because the filter has misidentified it or because the specific use of the content qualifies for one of the legal defenses described above. The impact on lawful speech could

therefore be considerable, especially if filters automatically impair access to the flagged content.

In their briefs, Audible Magic and Vobile emphasize the reliability of their software in determining whether a file contains material copied from a known copyrighted work. Audible Magic, for instance, notes a 99% correct identification rate, with a false positive rate of “better than 1 in 10,000.” (Audible Magic Br. 10.)⁵ However, this percentage must also be measured against the volume of material to which it is being applied. YouTube claims that 35 hours of video are uploaded each minute of every day. *35 Hours of Video a Minute Uploaded to YouTube*, AFP (Nov. 11, 2010).⁶ Assuming that these videos are limited to 15 minutes in length,⁷ each year would yield at least 73,634,400 uploaded videos. If just 1 in 10,000 are incorrectly identified as matching submitted videos when they do not, this could mean that every year, some 7,363 videos would be flagged for

⁵ Audible Magic does not state whether this reflects a percentage of random input files or files known not to match those in its database, nor does it state what its false-positive rates were during the period in question.

⁶

<http://www.google.com/hostednews/afp/article/ALeqM5hL4UMqXBKBTfJ2PjHINPGpWZe82w>.

⁷ This estimate is admittedly rough, but likely very conservative, as the 15-minute limit (only recently lengthened from 10) is considerably longer than the average video length of approximately 3 minutes. Jordan Golson, *YouTube Rules Web Videos*, PCWORLD (Dec. 13, 2008), http://www.pcworld.com/article/155440/youtube_rules_web_videos.html.

infringements when they did not even match a clip provided by a cooperating copyright holders.

Nor does this number account for other videos mistakenly flagged for uses that were authorized, fair use, or *de minimis*. The number of videos that fall into this category are likely to be substantial. Many YouTube users create videos to comment on current events, critique culture, and criticize public figures. Many of these videos will incorporate existing works under the fair use provision of copyright law. For instance, a search of videos of Hosni Mubarak reveals a number of critical videos uploaded by users around the world, many of them combining copyrighted images from press sources with pop culture imagery and music. *See, e.g., Gamal Mubarak*, uploaded by “mssewidan” on Apr. 15, 2007; *Egypt. Hosni Mubarak*, uploaded by “moudy2005” Apr. 14, 2007.⁸ Political campaigns frequently use clips of copyrighted news coverage of their candidates or their opponents to highlight favorable news or point out inconsistencies. *See* Center for Democracy and Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (Sept. 2010) (“CDT Report”).⁹ Searches for terms such as “media bias,” “movie review,” “video game review”

⁸ <http://www.youtube.com/watch?v=Ri82Lj8-tyQ>;
http://www.youtube.com/watch?v=_rNK3hfeGMc.

⁹ www.cdt.org/files/pdfs/copyright_takedowns.pdf.

and “downfall”¹⁰ return thousands of examples of legal uses of copyright protected content.

Mistakenly flagging thousands of user videos as infringing can chill free speech and harm free expression. This is especially true in situations where flagged videos are automatically blocked, or when being flagged multiple times can result in being banned. *See Copyright Infringement Notification, YouTube.*¹¹ If time sensitive videos making fair use of clips are automatically blocked, their timeliness and impact are lost and they are effectively censored. CDT Report. As such, a site relying on automated content matching, with its thousands of false positives and inability to distinguish fair use, will inevitably reduce the free flow of speech and expression online.

II. The Language and Purpose of the DMCA Do Not Allow Safe Harbors to be Conditioned on Filtering Implementation

Appellants, however, attempt to read a requirement of automated filters into several different portions of the statute. Various, Appellants invite the Court to accept automated filters as: providing knowledge of infringing activity, granting a

¹⁰ Returning examples of fan-made remixes of a scene in the movie “Downfall” featuring Hitler's enraged response to news of losses. Countless remixes of this scene have been used to criticize a wide range of figures and topics, from politicians all over the world to popular media figures and outlets. *See* Virginia Heffernan, *The Hitler Meme*, New York Times Magazine, Oct. 24, 2008, <http://www.nytimes.com/2008/10/26/magazine/26wwln-medium-t.html>

¹¹ http://www.youtube.com/t/dmca_policy.

right and ability to control infringement, a requirement of expeditious removal, and a requirement for termination policies. (Viacom Br. at 33-34, 41, 43; Premier League Br. at 42-43, 50-52, 55-56.) The Court should decline each of these invitations.

Apart from the above-mentioned limitations of automated filters' legal reliability, these various arguments discount several basic facts underlying the DMCA. One is the plain statutory language of 17 U.S.C. § 512(m), which states that nothing shall be construed to condition the application of the safe harbor upon "a service provider monitoring its service or affirmatively seeking facts indicating infringing activity." 17 U.S.C. § 512(m)(1). Despite this clear ban, Appellants attempt to exclude YouTube from the safe harbor based precisely upon its failure to monitor its service. By mischaracterizing the duties imposed by various provisions of the DMCA, they advance a theory of the statute that places these several provisions directly in opposition with the plain prohibition of section 512(m).

Another problem with Appellants' arguments regards their objections to YouTube's selective use of filtering. Appellants state that YouTube began using Audible Magic only for those content owners who had entered into licensing partnerships with YouTube, and not screening all clips with the same system. (Premier League Br. at 22-23; Viacom Br. at 45-46.) Appellants claim that this

selective application of Audible Magic necessarily means that YouTube was willfully blinding itself to infringement, or show a right and ability to control infringement. (Premier League Br. at 42-43, 51-52; Viacom Br. at 41, 45.) In making this argument, however, Appellants object not merely to YouTube's failure to use filtering systems, they object to the *ways* in which YouTube used filters. If limited application of filters creates the inference that a service provider is willfully blinding itself or able to control infringement, service providers who chose to employ filters would, in order to remain within the safe harbor, be required to apply those filters entirely, or not at all. Given that the statute explicitly excludes a mandate on monitoring, the paradoxical upshot of this argument is that service providers should, at the risk of facing infringement liability, avoid any voluntary monitoring or filtering systems.

A. Service Providers' Voluntary Use of Filters Cannot Create the Presumption of Knowledge of Infringement

Appellants insist that YouTube's access to and occasional use of Audible Magic gave it sufficient knowledge to either require action or face exclusion from the safe harbor. Doing otherwise, Appellants claim, constitutes "willful blindness." (Viacom Br. at 37; Premier League Br. at 42-43.) Viacom's brief in particular criticizes YouTube for failing to test Audible Magic by applying it to every video uploaded, "even though the MPAA had offered to reimburse YouTube for the cost

of testing this technology.” (Viacom Br. at 37.) In other words, Viacom believes YouTube should not have the benefit of the safe harbor because it failed to test Audible Magic to Appellants’ specifications. If this line of thought is to be followed, then any service provider approached by a rightsholder willing to pay for Audible Magic must either accept the offer and implement the software on the rightsholder’s terms, or lose the benefit of the safe harbor. For a sufficient sum of money, then, a rightsholder could impose its preferred method of determining infringement upon service providers large or small, or sue that provider for any infringement committed by its users. Such an absurd result cannot be what was intended by the statute, and YouTube cannot categorically be found to be willfully blind simply based upon its particular mode of testing Audible Magic.

Furthermore, there is danger in allowing third parties to define what constitute appropriate steps to combat infringement. Just because a rightsholder is willing to pay for a given technical measure does not make that measure appropriate for incorporation into a site or service. While service providers must be mindful of the need to comply with the DMCA and copyright law, they must be free to innovate and to build services to meet the needs of their customers. If a filtering system will damage the lawful purpose of the service and alienate users with burdensome processes, the fact that it is “free” for the provider to implement should not create an obligation to do so. Radically altering a service at the

insistence of a third party is never free of cost or burden. The DMCA recognizes this by stating that monitoring its services is not a prerequisite for safe harbor protection.

B. Service Providers' Use of Filters Does Not Give them the Ability to Control Infringement

A similar line of reasoning appears in Appellants' arguments about YouTube's right and ability to control infringement. Appellants argue that the availability of Audible Magic gave YouTube the ability to control the infringing activity of its users, thus preventing it from qualifying for the safe harbor under 17 U.S.C. § 512(c)(1)(B). (Viacom Br. at 41, 45; Premier League Br. at 50-53.) This interpretation of the statute again runs up against the plain language of 512(m). The "ability to control" cannot equate to "an ability to institute monitoring practices." To do so would render the statute in contradiction of itself.

The Premier League additionally argues that the presence of Audible Magic creates "something more" than the mere ability to block users that *Veoh* found insufficient to trigger a right and ability to control. (Premier League Br. at 52.) According to the Premier League, Audible Magic provides "pinpoint control" over YouTube's audiovisual inventory. *Id.* As noted above, the precision of this control is at best debatable, certainly when it comes to determining whether or not activity is infringing. In addition, this argument suffers the same problem as the "willful

blindness” argument, in that it would suggest that service providers who used no filters at all could more easily be subject to the safe harbor than a provider who implemented a filter more tentatively than Appellants might desire.

Furthermore, the Premier League’s brief mischaracterizes the state of the law regarding 512(c)(1)(B), stating that courts “have found it applies” where: service providers have an antecedent ability to limit or filter material; are actively involved in the bidding, sale, and delivery of infringing items; or have the right or ability to control vendor sales on their site, preview products prior to listing on their website, edit product descriptions, suggest prices, or otherwise involve themselves in vendor sales on their website. (Premier League Br. at 50-51, citing *inter alia Tur v. YouTube*, 2007 U.S. Dist. LEXIS 50254 (C.D. Cal.); *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1110 (W.D. Wa. 2004).)

However, none of the above-mentioned cases in fact found that the service provider had the right and ability to control infringing activity. The practices cited by the Premier League in *Hendrickson* and *Amazon* are at best mentioned in *dicta* as practices that the service provider *did not engage in*. *Hendrickson*, 165 F. Supp. 2d at 1094; *Amazon*, 351 F. Supp. 2d at 1110. In neither of these cases does the court explicitly state that engaging in such practices would necessarily remove the safe harbor; the courts could just as easily be providing examples of borderline

practices that may or may not trigger the “control and benefit” clause, but that the service providers in their various cases did not do.

Tur declined, absent a more-developed factual record, to rule on the application of the “control and benefit” provision, merely citing *Fonovisa* for the proposition that the provision “*presupposes* some antecedent ability to limit or filter copyrighted material.” *Tur* at *9-10. At no point does the *Tur* court, in its brief opinion, hold that this factual prerequisite for finding an ability to control represented the sum total of the necessary analysis.

The one case the Premier League cites that did in fact apply 512(c)(1)(B) to deny the service provider the safe harbor was *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, in which the service provider actively reviewed allegedly infringing content before approving it. 213 F. Supp. 2d 1146, 1173 (C.D. Cal. 2002) (discussing ability to control in the context of vicarious infringement); *Id.* at 1181-82 (discussing ability to control in the context of the DMCA). While *Cybernet* thus indicates an amount of involvement that would deny a service provider a safe harbor, it gives no guidance on the potential liability of a service provider less involved in selecting infringing content than *Cybernet* was.

In arguing that liability should fall upon a service provider who fails to implement filters according to their dictates, Appellants would therefore discourage service providers from gaining what limited knowledge or control they

may from the filters' application. This cannot be the result desired by Appellants, Filtering *Amici*, and certainly not by Congress. *See Hendrickson*, 165 F. Supp. 2d at 1093-94 (quoting H. Rep. No. 105-796 (Oct. 8, 1998)).

C. Expeditious Removal Does Not Require the Use of Filters

The brief by Viacom additionally suggests that in failing to use filters, YouTube has failed to remove allegedly infringing content expeditiously. (Viacom Br. at 33.) In addition to suffering the failings of the arguments detailed above, this theory, asserted without additional argument, suggests that “expeditious” removal requires a service provider to remove content “during the upload process,” i.e. to remove content before it appears online. The expeditious removal language appears in 17 U.S.C. § 512(c)(1)(A)(iii), which states that a service provider shall not be liable for storing infringing content if it responds expeditiously to remove the material *after* “obtaining such knowledge or awareness” of infringing activity. While “expeditiously” is not precisely defined within the statute, it is difficult to believe that Congress could possibly have intended prescience on the part of service providers.

D. Reasonable Implementation of a Repeat Infringer Policy Does Not Require Filters.

The brief by Premier League additionally argues that by failing to terminate user accounts based on the findings of a filter, YouTube has failed to implement a reasonable repeat infringer policy. (Premier League Br. at 55-56.) This is precisely the line of argument rejected by *Veoh*, for the reasons that actual determinations of infringement, and the serious consequences of user termination, can reasonably rest on more solid grounds than the indication of a computer program.

For its part, Audible Magic “strenuously disagree[s]” with the district court’s statement that the filter “does not meet the standard of reliability and verifiability required by the Ninth Circuit in order to justify terminating a user’s account.” (Audible Magic Br. at 3.) However, Audible Magic does not contest the actual truth of this statement, but simply the implication that its products have been or should be used to terminate accounts.

The district court’s holding and Audible Magic’s statement therefore do not appear to be at odds. Rather, they both recognize the fact that automated filtering software is not or should not be employed to make legal determinations. While the district court’s language, in isolation, may appear to suggest that Audible Magic’s software was being improperly used to make legal determinations, it is clear from

the surrounding reasoning of the opinion that the court was merely indicating that decisions of termination required a minimum level of judgment, indicated in precedent, that automated filters could not be said to meet.

The district court's statement is presented within a citation to *Veoh*. In *Veoh*, the plaintiff recording company claimed that the defendant video hosting site had an inadequate repeat infringer policy because it did not terminate user accounts after Audible Magic's software had flagged and blocked attempted uploads. 665 F. Supp. 2d at 1116. The *Veoh* court rejected this theory not on the basis that Audible Magic's software had failed some numerical test of reliability, but because the Ninth Circuit's baseline for reasonable termination policies, set out in *Perfect 10 v. CCBill*, allows termination policies that are far more selective in flagging repeat infringers. *Id.* at 1117-18; *see also Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1112-13 (9th Cir. 2007).

The *CCBill* rule deemed sufficient a repeat infringer policy that was based upon properly-formed, DMCA-compliant notices. *CCBill*, 488 F.3d at 1110. In *CCBill*, the service provider did not terminate users based on notices sent by rightsholders unless the notices were DMCA compliant, containing a declaration under penalty of perjury that the complainant was authorized to represent the copyright holder and that there was a good-faith belief that the user was infringing. *Id.* at 1111-12. In other words, a service provider's obligation to terminate user

accounts under 17 U.S.C. § 512(i)(1)(A) is not triggered by bare assertions of infringement—such assertions do not make a user the “repeat infringer” specified by the statute. Instead, those assertions must comply with DMCA requirements. A system that requires DMCA-compliant notices to trigger termination is sufficient to preserve the safe harbor, because requiring lower bars for termination could have “drastic consequences:”

A user could have content removed, or may have his access terminated entirely. If the content infringes, justice has been done. But if it does not, speech protected under the First Amendment could be removed. We therefore do not require a service provider to start potentially invasive proceedings if the complainant is unwilling to state under penalty of perjury that he is an authorized representative of the copyright owner, and that he has a good-faith belief that the material is unlicensed.

Id. at 1112. As the *Veoh* court points out, a repeat infringer policy even less stringent than the one in *CCBill* would still pass muster: “Indeed, as the *Corbis* court pointed out, even a *DMCA-compliant* notice is ‘not the *sine qua non* of copyright liability....A copyright owner may have a good faith belief that her work is being infringed, but may still be wrong.’” *Veoh*, 665 F. Supp. 2d at 1117 (C.D. Cal. 2009) (quoting *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1105 (W.D. Wash. 2004)) (emphasis in original). The district court in this case was therefore summarizing the statement of the law outlined in *Veoh*, which was that, since non-compliant infringement notices are insufficiently reliable to trigger a

termination policy, mere flagging by an automated system cannot possibly meet the required standard either.

None of this prevents service providers from instituting more stringent termination policies; it merely assures that the law will not *require* the banning of users absent some process. Filtering *Amici* may rest assured that under the district court's opinion, service providers remain free to use their products, and may even, if they wish, use them as the basis for terminating user accounts; however, the DMCA's repeat infringer policy cannot *mandate* their use as a condition of the safe harbor. While automated filters may perform to increasingly tight specifications for eliminating false matches, they can neither make the necessary judgments for infringement, nor can this numerical reliability in file matching translate into sufficient legal reliability for the courts to require a service provider to accept a computer's decree of infringement in creating a termination policy.

Like the arguments that would have filters categorically determine judicial findings on knowledge, ability to control, or expeditious removal, requiring termination upon flagging by a filter would also discourage voluntary filtering adoption. Service providers concerned about overblocking of misidentified, authorized, fair, or *de minimis* uses would not want to risk alienating their users on the one hand and facing safe harbor denial for overriding filter recommendations. Providers would also be likely to hesitate implementing a complex technical

system if they would be required to roll it out across their service simultaneously or risk expanded infringement liability.

CONCLUSION

For the above-mentioned reasons, Public Knowledge urges the court not to require the adoption of specific technological identification measures as a prerequisite for DMCA safe harbor.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,958 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 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 2008 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2011, a true and correct copy of the foregoing Brief of Amicus Curiae Public Knowledge in Support of Affirmance for Defendants-Appellees and Affirmance was served on all counsel of record in this appeal via CM/ECF pursuant to Second Circuit Rule 25.1(h)(1)-(2).

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