

**No. 14-56596**

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

---

**MAVRIX PHOTOGRAPHS LLC,**

*Plaintiff-Appellant,*

v.

**LIVEJOURNAL, INC.,**

*Defendant-Appellee.*

---

*Appeal from the United States District Court for the Central District of California,  
Case No. SACV 13-00517-CJC(JPRx)*

*The Honorable Cormac J. Carney, United States District Judge*

---

**BRIEF OF *AMICUS CURIAE* MOTION PICTURE ASSOCIATION OF  
AMERICA, INC. IN OPPOSITION TO APPELLEE'S PETITION FOR  
PANEL REHEARING OR REHEARING EN BANC**

---

Kelly M. Klaus  
MUNGER, TOLLES & OLSON LLP  
560 Mission Street  
Twenty-Seventh Floor  
San Francisco, CA 94105  
Telephone: (415) 512-4000  
Facsimile: (415) 644-6959

Counsel for *Amicus Curiae* Motion Picture Association of America, Inc.

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the Motion Picture Association of America, Inc. certifies that it has no parent or subsidiary corporations and that no publicly held company owns 10% or more of its stock.

## **RULE 29 STATEMENTS**

This brief is submitted under Federal Rule of Appellate Procedure 29(a) and Ninth Circuit Rules 29-2(a) and 29-2(e)(1) with the consent of all parties.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* Motion Picture Association of America, Inc. states that: (1) no party's counsel has authored this *amicus* brief in whole or in part; (2) no party or party's counsel has contributed money intended to fund the preparation or submission of the brief; and (3) no person other than *amicus*, its members, and their counsel has contributed money intended to fund the preparation or submission of this brief.

## TABLE OF CONTENTS

	<b>Page</b>
I. INTRODUCTION AND INTEREST OF <i>AMICUS CURIAE</i> .....	1
II. ARGUMENT .....	3
A. The Panel’s Construction Of What Conduct Triggers Eligibility For The Section 512(c) Safe Harbor Was Correct And Does Not Merit Rehearing .....	3
B. The Court Should Make Clear That The Voluntary Use Of Content Identification Software For Antipiracy Purposes Does Not Weigh Against A Service Provider’s Eligibility For The Section 512(c) Safe Harbor .....	8
III. CONCLUSION .....	12
CERTIFICATE OF COMPLIANCE .....	13
CERTIFICATE OF SERVICE.....	14

## TABLE OF AUTHORITIES

### Page(s)

### FEDERAL CASES

<i>A&amp;M Records, Inc. v Napster, Inc.</i> , 239 F.3d 1004 (9th Cir. 2001) .....	9
<i>ALS Scan, Inc. v. RemarQ Communities, Inc.</i> , 239 F.3d 619 (4th Cir. 2001) .....	6
<i>Perfect 10, Inc. v. Amazon.com, Inc.</i> , 508 F.3d 1146 (9th Cir. 2007) .....	5, 7
<i>Perfect 10, Inc. v. CCBill LLC</i> , 488 F.3d 1102 (9th Cir. 2007) .....	3
<i>UMG Recordings, Inc. v. Shelter Capital Partners LLC</i> , 718 F.3d 1006 (9th Cir. 2013) .....	<i>passim</i>
<i>Viacom Int’l, Inc. v. YouTube, Inc.</i> , 676 F.3d 19 (2d Cir. 2012) .....	7, 9

### FEDERAL STATUTES

17 U.S.C. § 101(2) .....	5
17 U.S.C. § 106(5) .....	4
17 U.S.C. § 512 .....	1, 3, 4, 8
17 U.S.C. § 512(c) .....	<i>passim</i>

**LEGISLATIVE MATERIALS**

H.R. Rep. No. 105-551(II) (1998) .....	1, 11
H.R. Rep. No. 105-796 (1998) (Conf. Rep.) .....	6
S. Rep. No. 105-190 (1998) .....	1

## **I. INTRODUCTION AND INTEREST OF *AMICUS CURIAE***

The MPAA is a trade association whose members and their affiliates include the largest producers and distributors of motion pictures and television programs in the United States.<sup>1</sup> The MPAA has a strong interest in the proper construction and application of Section 512 of the Digital Millennium Copyright Act, 17 U.S.C. § 512 (“DMCA”). Section 512’s limitations on service providers’ monetary liability directly affect the ability of copyright owners to seek redress for the widespread infringement of their works occurring online. The MPAA has a strong interest in ensuring that the statute is construed, as Congress intended, to create “strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.” H.R. Rep. No. 105-551(II), at 49 (1998); S. Rep. No. 105-190, at 20 (1998).

The panel’s opinion does not merit rehearing. The panel made a factbound determination that there was a disputed fact issue whether the individuals responsible for publicly displaying Mavrix’s copyrighted photographs—LiveJournal’s “moderators”—were LiveJournal’s agents. The panel correctly held that if the moderators were agents, then LiveJournal would be ineligible for the

---

<sup>1</sup> The MPAA’s members are Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures and Warner Bros. Entertainment Inc.

Section 512(c) limitation on liability. Section 512(c) limits a service provider's liability only to the extent it arises "by reason of" "a user[']s" "storage" of infringing material on the service provider's system. 17 U.S.C. § 512(c)(1). If LiveJournal's moderators were agents, then LiveJournal's liability arose by reason of LiveJournal's own actions in publicly displaying Mavrix's images—what the panel called the moderators' "posting" of the images—not its users' storage of those images on LiveJournal's servers.

While it does not merit rehearing, the opinion would benefit from one discrete clarification. Specifically, the opinion indicated that Mavrix might be able to show the "something more" required to establish LiveJournal's "right and ability to control" infringing activity (relevant to LiveJournal's eligibility for the safe harbor under 17 U.S.C. § 512(c)(1)(B)) based on, *inter alia*, LiveJournal's use of software to block infringing material. Slip op. 26, ECF No. 60-1. *See UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1030 (9th Cir. 2013) (construing § 512(c)(1)(B)). Service providers' use of content identification and blocking software for antipiracy purposes has been a valuable mechanism for combatting online infringement. The MPAA doubts the panel meant to discourage service providers from utilizing software for such purposes. A clarification to that effect would help avoid service providers retreating from their efforts in this regard.



## II. ARGUMENT

### A. The Panel's Construction Of What Conduct Triggers Eligibility For The Section 512(c) Safe Harbor Was Correct And Does Not Merit Rehearing

LiveJournal argues that the panel opinion “dramatically reshapes the scope of the ‘safe harbor’” under Section 512(c). Pet. 1, ECF No. 64. In fact, LiveJournal’s position would dramatically alter Section 512(c) by extending eligibility for that provision to service providers whose infringement liability arises by reason of their own actions, not their users’ actions.

Section 512 sets forth four different sections limiting service providers’ monetary liability for copyright infringement. 17 U.S.C. § 512(a)-(d). Each of these so-called “safe harbors” is an affirmative defense. The service provider must prove a number of elements—some applicable to all four sections, some specifically enumerated within each subsection—to claim the benefit of any particular safe harbor. *See generally Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007).

Each safe harbor limits a service provider’s monetary liability that could arise “by reason of” “separate and distinct” functions. 17 U.S.C. § 512(a)-(d), (n). The panel refers to this as the “threshold” issue of eligibility for the relevant safe harbor. Slip op. 4. The threshold for Section 512(c) eligibility is whether the service provider’s liability arises “*by reason of the storage at the direction of a*

*user* of material that resides on a system or network controlled or operated by or for the service provider.” 17 U.S.C. § 512(c)(1) (emphasis added).<sup>2</sup>

The panel held that LiveJournal was not entitled to summary judgment under Section 512(c) because there was a disputed fact question whether LiveJournal faced liability “by reason of” its users’ storage of Mavrix’s photographs or LiveJournal’s own public display of those photographs. *See id.* § 106(5). The answer to this question turned on whether LiveJournal’s moderators were agents or mere users of the service. Slip op. 12-19. The moderators’ role was significant, the panel explained, because the content that LiveJournal’s users submitted (here, photographs) were not automatically displayed to other LiveJournal users. *Id.* 6. In order for the submission to be publicly displayed, a moderator had to review the submission; decide it satisfied LiveJournal’s criteria, which were alleged to favor the display of premium, likely copyrighted, third-party content; and then had to

---

<sup>2</sup> The other sections limits a service provider’s monetary liability for infringement occurring “by reason of the provider’s transmitting, routing, or providing connections for, material through [its] system or network ... or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections,” 17 U.S.C. § 512(a); “by reason of the intermediate and temporary storage of material on [the service provider’s] system or network,” *id.* § 512(b)(1); and “by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools,” *id.* § 512(d).

“publicly post” the submission. *Id.* 7. Only after moderator posted a photograph was it publicly displayed to LiveJournal’s users.<sup>3</sup>

The panel’s holding regarding the moderators’ status raises only factbound issues under the common law of agency. *See id.* 13-19. That question does not warrant rehearing, so LiveJournal instead accuses the panel of rewriting Section 512(c)’s eligibility threshold. LiveJournal insists that the panel improperly restricted 512(c)’s application to cases where the service provider’s liability arises “by reason of” “what a user ‘posts’” rather than “what a user ‘stores.’” Pet. 1-3, 8-10.

LiveJournal’s argument is a red herring. The opinion provides context—which the petition ignores—regarding what it means to “post” content on LiveJournal. As noted, “posting” user-submitted photographs means publicly displaying them. Slip op. 6-7. When the opinion speaks of a moderator “posting” a photograph, the opinion refers to the act of publicly displaying it. If the moderators were LiveJournal’s agents, then LiveJournal, through the actions of

---

<sup>3</sup> “To ‘display’ a work means to show a copy of it, either directly or by means of ... any ... device or process,” and “[t]o ... display a work ‘publicly’ means,” *inter alia*, “to transmit ... a ... display of the work ... to the public, by means of any device or process, whether the members of the public capable of receiving the ... display receive it in the same place or in separate places and at the same time or at different times.” 17 U.S.C. § 101(2) (definition of “[t]o ... display a work ‘publicly’”). An internet site’s display of copyrighted photographs to its users exercises the copyright owner’s exclusive right of public display. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2007).

those agents, was publicly displaying Mavrix's photographs and was doing so because of the photographs' premium value. These facts would make LiveJournal ineligible to seek the benefit of Section 512(c).

The panel's holding is entirely consistent with the text, structure and purpose of Section 512(c). Section 512(c) limits a service provider's potential monetary liability "for 'passive,' 'automatic' actions in which a service provider's system engages through a technological process initiated by another without the knowledge of the service provider." *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) (quoting H.R. Rep. No. 105-796, at 72 (1998) (Conf. Rep.)). The safe harbor's protections "disappear[]," however, "at the moment the service provider loses its innocence." *Id.* By definition, a service provider that prescreens content not to block infringing material, but instead to capture and display high-value, likely copyrighted material, is not an innocent intermediary and so has no claim to the safe harbor.

The panel's opinion is fully consistent with *Shelter Capital*. Pet. 10-12. The court there held that the service provider (Veoh) was not ineligible for the Section 512(c) safe harbor simply because, in between the user's submission of content and its publication, Veoh employed automated processes to convert the format of the submitted content into a format that was "readily accessible to its users." 718 F.3d at 1020 (quotations omitted). The court emphasized that Veoh did "not actively

participate in or supervise file uploading, nor d[id] it preview or select the files before the upload is completed.” *Id.* (quotations omitted). *See also Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 40 (2d Cir. 2012) (recognizing “force” of argument that “transactions do not occur at the ‘direction of a user’ within the meaning of § 512(c)(1) when they involve the manual selection of copyrighted material,” but ultimately finding it unnecessary to apply that principle to facts of the case).<sup>4</sup>

This case does not involve the public display of material through an “automatic processes” “initiated entirely at the volition of [LiveJournal’s] users.” *Shelter Capital*, 718 F.3d at 1020. A service provider that curates its site on a post-by-post basis, essentially choosing to display content that is (at the very least) likely infringing, exercises its own discretion; it does not passively process its users’ submissions. If the service provider exercises that discretion with the intent to solicit and feature premium, likely copyrighted, third-party content—rather than to prevent the display of infringing content or some other legitimate purpose—then

---

<sup>4</sup> A service provider’s use of automated processes may be relevant to, but is not determinative of, the provider’s eligibility for the safe harbor or the provider’s liability for copyright infringement. *See, e.g., Amazon.com*, 508 F.3d at 1171. As discussed in Section II.B, *infra*, a service provider’s use of automated content identification software for antipiracy purposes should not weigh against the provider’s eligibility for the safe harbor. In this case, the panel correctly held that whether LiveJournal violated the public display right was a question for the finder of fact.

it would be inconsistent with Section 512 to hold that the service provider's liability arises "by reason of the storage [of that material] at the direction of a user." 17 U.S.C. § 512(c)(1). *See Shelter Capital*, 718 F.3d at 1020.

In sum, the panel's opinion regarding the threshold eligibility for the Section 512(c) safe harbor is faithful to Congress's intent and binding precedent. There is no reason for the court to rehear the case.

**B. The Court Should Make Clear That The Voluntary Use Of Content Identification Software For Antipiracy Purposes Does Not Weigh Against A Service Provider's Eligibility For The Section 512(c) Safe Harbor**

Although the panel's opinion does not merit rehearing, the panel should take the opportunity to clarify one discrete point discussed in the opinion's guidance for proceedings on remand. The panel should make it clear that a service provider's voluntary use of software to block infringing content for antipiracy purposes does not weigh against eligibility for the safe harbor. Such use of blocking software should not count as the "something more" that precedent requires for a service provider to exercise the "right and ability to control" infringing activity that may trigger ineligibility under 17 U.S.C. § 512(c)(1)(B).

Section 512(c)(1)(B) provides that a service provider may not claim the safe harbor if it "receive[s] a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity." 17 U.S.C. § 512(c)(1)(B). The phrasing of Section 512(c)(1)(B) is

similar to the so-called “common law” test for vicarious copyright infringement. *See, e.g., A&M Records, Inc. v Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001) (“In the context of copyright law, vicarious liability extends ... to cases in which a defendant has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”) (quotations omitted).

In *Shelter Capital*, this court held that, although a service provider’s ability to locate infringing material, remove it, and terminate infringing users’ access to the provider’s system may establish common law vicarious infringement, those same abilities could not disqualify the provider from the Section 512(c) safe harbor. Section 512(c) presumes that a service provider, to be eligible for the safe harbor, must have the right and ability to do these things. *Shelter Capital*, 718 F.3d at 1027. The court reasoned that Congress could not have intended for service providers to be ineligible for the safe harbor by possessing rights and abilities those providers need to be eligible for the safe harbor in the first place. *Id.* The court therefore held that Section 512(c)(1)(B) requires “something more” than having such rights and abilities. *Id.* at 1030; *accord Viacom*, 676 F.3d at 38. Following the Second Circuit’s lead in the *Viacom* case, the court explained that the requisite “something more” could be found where a service provider intentionally induces the infringement of copyrighted material, or where the

service provider exercises “high levels of control over activities of users.” *Shelter Capital*, 718 F.3d at 1030.

Here, in providing guidance in the event the district court were to reach Section 512(c)(1)(B) on remand, the panel explained that a fact finder might find the requisite “something more” based on “LiveJournal’s extensive review process” for new submissions; its use of an “infringement list” identifying sources of content that had been the subject of infringement complaints; and the fact that “LiveJournal went so far as to use a tool to automatically block any posts from one [such] source.” Slip op. 26.

If the opinion’s reference to LiveJournal’s blocking software were taken to mean that a service provider’s utilization of such software establishes the provider’s “right and ability to control” infringing activity under *Shelter Capital*, that result could have negative consequences for efforts to combat infringing activity online.

Content identification software identifies infringing material and may be used to stop or limit the accessibility of that material. Such software has been and continues to be an important tool for combatting infringing material on the internet. In general, such software works by having copyright owners provide reference data for content that service providers can use to establish a match. The software allows for automated instructions as to how the service should treat matching



content, such as blocking the content from being uploaded; or allowing the content to be uploaded while compensating the content's owner for its use. A number of companies have developed technologies that analyze user-submitted audiovisual content to determine whether it matches copyrighted content.<sup>5</sup>

The use of effective content identification technology is a notable instance of copyright owners and service providers working cooperatively to deal with the problem of online infringement—one of Congress's primary goals in enacting the DMCA. H.R. Rep. No. 105-551(II), at 49. The MPAA applauds the development and deployment of these and similar technologies for antipiracy and legitimate business purposes.

The MPAA does not believe that the panel intended its reference to LiveJournal's use of blocking software to indicate that the use of such software for antipiracy purposes weighs against eligibility for the safe harbor. A service provider's utilization of content identification software for antipiracy purposes does not indicate an intent to induce users to infringe copyrighted content, or exert "high levels of control over" user activities—the type of conduct that *Shelter Capital* said would satisfy the statutory "right and ability to control" requirement. *Shelter Capital*, 718 F.3d at 1030.

---

<sup>5</sup> Examples of such automated content recognition technologies include YouTube's ContentID (<https://support.google.com/youtube/answer/2797370?hl=en>), Vobile (<http://www.vobileinc.com>), and Audible Magic (<https://www.audiblemagic.com>).

However, if other courts or parties were to take the panel's reference to mean a service provider employing such technology for antipiracy purposes meets the "something more" requirement, service providers may be less inclined to utilize what has been and remains an important tool for combatting copyright infringement. *See Amicus* Brief of Facebook, Inc. et al. at 13-16, ECF No. 69 (suggesting service provider concern over panel's opinion regarding the use of "software programs that automatically scan user-submitted content while it is in the process of being uploaded").

The panel could alleviate these potential concerns with a simple amendment at Slip op. 26, making clear that a service provider's user of blocking software for antipiracy purposes does not count as the "something more" necessary to show the "right and ability to control" under Section 512(c)(1)(B).

### III. CONCLUSION

The MPAA respectfully submits that the petition for rehearing should be denied, and that the panel should clarify its opinion as discussed in Section II.B, *supra*.

DATED: August 18, 2017

MUNGER, TOLLES & OLSON LLP

/s/ Kelly M. Klaus

Kelly M. Klaus

Counsel for *Amicus* Motion Picture  
Association of America, Inc.

### **CERTIFICATE OF COMPLIANCE**

I certify that this *amicus* brief complies with the type-volume limitation of Ninth Circuit Rule 29-2(c)(2). It contains 2,794 words.

I also certify that this *amicus* brief complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman font in Microsoft Word 2010.

DATED: August 18, 2017

/s/ Kelly M. Klaus

Kelly M. Klaus

Counsel for *Amicus* Motion Picture  
Association of America, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing **Brief of Amicus Curiae Motion Picture Association of America, Inc. in Opposition to Appellee's Petition for Panel Rehearing or Rehearing En Banc** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 18, 2017.

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: August 18, 2017

/s/ Kelly M. Klaus

Kelly M. Klaus

Counsel for *Amicus* Motion Picture  
Association of America, Inc.