

No. 03-1911

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

**COSTAR GROUP, INC. AND
COSTAR REALTY INFORMATION, INC.**

Plaintiffs-Appellants,

v.

L.COPNET INC.,

Defendant-Appellee

**On Appeal from the United States District Court
for the District of Maryland**

BRIEF OF AMICI CURIAE

**BMG MUSIC, EMI MUSIC NORTH AMERICA, SONY MUSIC
ENTERTAINMENT INC., UNIVERSAL MUSIC GROUP,
UNIVISION MUSIC LLC, COLUMBIA PICTURES INDUSTRIES,
INC., METRO-GOLDWYN-MAYER STUDIOS INC., PARAMOUNT
PICTURES CORPORATION, TWENTIETH CENTURY FOX FILM
CORPORATION, AND UNIVERSAL CITY STUDIOS LLLP
IN SUPPORT OF APPELLANT AND REVERSAL.**

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In accordance with Local Rule 26.1, *amici* certify that the following are all of the corporate parents and other publicly held companies owning 10% or more of the stock of any member of *amici*: Bertelsmann, Inc.; Bertelsmann Music Group; Ariola Eurodisc, Inc.; EMI Group PLC; Fox Entertainment Group, Inc.; Metro-Goldwyn-Mayer Inc.; The News Corporation Limited; Sony Corporation; Univision Communications Inc.; Viacom Inc.; and Vivendi Universal, S.A.

SOURCE OF AUTHORITY TO FILE

Pursuant to Rule 29(a), *amici* represent that both CoStar and LoopNet have consented to the filing of this brief.

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INTRODUCTION

This appeal presents an important if narrow question regarding the application of copyright law to the Internet. In this case, appellee LoopNet was sued for publishing on its real estate advertising website copyrighted photographs owned by appellant CoStar. In granting summary judgment on the claim of “direct infringement,”¹ the court below relied on a 1995 decision of the United States District Court for the Northern District of California that devised a special exemption from direct copyright liability for “passive” Internet service providers (“ISPs”) and electronic bulletin board service operators. *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

In so holding, the District Court overlooked the fact that *Netcom*’s judge-made “safe harbor” was superseded by the subsequent statutory scheme Congress created to address this same problem. Three years after the *Netcom* decision, Congress passed the “Online Copyright Infringement Liability Limitation Act,” which was enacted as Title II of the landmark Digital Millennium Copyright Act of 1998 (“DMCA”). Like most legislation, the DMCA strikes a balance between competing interests: while the statute provides copyright immunity for

¹ The District Court denied LoopNet’s motion for summary judgment on CoStar’s additional claim that LoopNet was secondarily liable for the conduct of its customers who submitted CoStar’s photographs for publication. *CoStar Group Inc. v. LoopNet, Inc.*, 164 F. Supp. 2d 688, 708 (D. Md. 2001). While *amici* disagree with the District Court’s analysis of the “contributory infringement” claim, *amici* understand that this ruling is not on appeal.

certain “passive” online conduct, it also includes important protections for copyright owners, among them the right to demand that services or websites like LoopNet expeditiously remove, or disable access to, infringing material.

The District Court rejected LoopNet’s assertion that it had complied with the DMCA “safe harbor,” but nevertheless found LoopNet immune from CoStar’s claim for direct infringement based on the broader, pre-DMCA *Netcom* decision. This was error. Under the District Court’s reasoning, a website operator, on notice that its site offered unauthorized copies of music and films, could refuse to disable access to these works, yet still assert an immunity defense to a direct infringement claim. Affirming this holding would render meaningless the DMCA’s safeguards for content owners, would deprive them of an important tool in the fight against online piracy, and upset the careful balance of interests struck by Congress in the DMCA. Accordingly, the decision of the District Court in granting summary judgment to LoopNet on the direct infringement claim should be reversed.

INTEREST OF THE AMICI

For those who produce and distribute creative works, the advent of the Internet has been a time of great promise and great risk. The same digital media that facilitate the use and enjoyment of photographs, software, music, and filmed entertainment also empower those seeking to profit unlawfully by making and distributing perfect copies of these copyrighted works. As a number of courts have observed, the massive copyright piracy that is the dark side of the Internet “is well-recognized and ‘has reached epidemic proportions.’” *In re Verizon Internet Servs.*, 257 F. Supp. 2d 244, 265 (D.D.C. 2003) (quoting *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1123 (N.D. Cal. 2002)).

The *amici* who submit this brief are the creators, owners, and distributors of much of the copyrighted entertainment enjoyed by Americans and people the world over, and are among the principal victims of this piracy epidemic.

Amici BMG Music, EMI Music North America, Sony Music Entertainment Inc., Universal Music Group, and Univision Music LLC (collectively, the “Recording Industry *Amici*”) create, produce, and/or distribute a substantial amount of all legitimate sound recordings in the United States and own the copyrights in those works. They consider the prevention of illegal copying and distribution of their copyrighted sound recordings to be one of the most significant challenges that they face.

Amici Columbia Pictures Industries, Inc., Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corporation, Twentieth Century Fox Film Corporation, and Universal City Studios LLLP (collectively, the “Motion Picture *Amici*”) own, produce, and/or distribute a substantial amount of all filmed entertainment, including motion pictures and television programming. Like the Recording Industry *Amici*, each of these companies owns famous intellectual property and relies heavily on state and federal laws for the protection of that property.

Unfortunately, anonymous Internet copyright pirates are now disrupting the music and filmed entertainment industries on an ever-increasing scale. Piracy of copyrighted music costs artists, producers, songwriters, record store retailers, and others in the recording industry hundreds of millions of dollars annually. With respect to filmed entertainment, it has been estimated that between 400,000 and 600,000 times each day there is an unauthorized download of a copyrighted motion picture.

The Recording Industry and Motion Picture *Amici* have participated either as parties or as *amici* in much if not most of the significant litigation in which important Internet copyright issues have been raised and decided. *See, e.g., Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios,*

Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. 2003); *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634 (N.D. Ill. 2002), *aff'd* 334 F.3d 643 (7th Cir. 2003); *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000). *Amici* respectfully submit that they have useful experience and insight that would aid the Court in resolving the question presented by this appeal.

ARGUMENT

I. IN TITLE II OF THE DMCA, CONGRESS BALANCED COMPETING CONCERNS OVER ONLINE COPYRIGHT INFRINGEMENT.

Prior to enactment of the DMCA in 1998, courts (particularly the district courts) grappled with the application of traditional copyright principles to the Internet. One of the first such cases was *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993), where Playboy sued the proprietor of an electronic bulletin board service who permitted his customers to post copies of Playboy's copyrighted photographs. *Id.* at 1554. The bulletin board operator sought to escape liability on the ground that he was unaware of the infringement. Rejecting this defense, the court explained that under the Copyright Act "even an innocent infringer is liable for infringement." *Id.* at 1559.

Two years later the *Netcom* case was decided by a district court in California. The defendants included an electronic bulletin board service operator as well as an Internet service provider ("ISP"), which, unlike the bulletin board did not host subscriber content on its computers but rather acted as "a conduit" transporting digital files from one Internet location to another. *Netcom*, 907 F. Supp. at 1372. The *Netcom* court expressed concern that direct infringement liability could attach to an ISP or bulletin board operator based on its automated copying and transmission of postings containing unauthorized copies of the

plaintiff's copyrighted works. *Id.* at 1367-68. Citing that concern, the court created a new liability rule for direct infringement claims : "Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party." 907 F. Supp. at 1370.

The *Playboy* and *Netcom* decisions were not reviewed by a Court of Appeals and were widely seen as in conflict with each other.² In response, Internet service providers and others with similar concerns petitioned Congress for legislation to clarify the law and eliminate uncertainty over their exposure for copyright infringements occurring on their systems. Congress responded by introducing draft legislation in the summer of 1997 and conducting hearings shortly thereafter. *See generally The Copyright Infringement Liability of Online and Internet Service Providers: Hearing on S. 1146 Before the Senate Comm. on the Judiciary*, 105th Cong. 45-55 (1997) ("Hearing on S. 1146") (proposed legislation); *WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the*

² *See, e.g.* Daniel R. Cahoy, *Comment: New Legislation Regarding On-Line Service Provider Liability for Copyright Infringement: A Solution in Search of A Problem?*, 38 IDEA 335, 344 (1998); Timothy L. Skelton, *Internet Copyright Infringement and Service Providers: The Case for a Negotiated Rulemaking Alternative*, 35 San Diego L. Rev. 219, 244 (1998); Mark S. Torpoco, *Mickey and the Mouse: The Motion Picture and Television Industry's Copyright Concerns on the Internet*, 5 UCLA Ent. L. Rev. 1, 29 (1997).

Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 105th Cong. 22-25 (1997) (“*Hearing on H.R. 2281 and 2280*”).³ As explained by the Register of Copyrights, “providers of on-line and internet access services remain concerned about the lack of certainty in how courts will develop the application of these doctrines, and their exposure to lawsuits in the interim.” *Hearing on H.R. 2281 and 2280*, at 53 (prepared statement of Hon. Marybeth Peters, Register of Copyrights). One legislator who heard this testimony described “a golden opportunity to set the ground rules for copyright liability with respect to the on-line environment.” *Id.* at 102 (Rep. Boucher, Member, House Comm. on the Judiciary).

The Internet business community supported draft legislation that largely tracked the *Netcom* liability rule. *See Hearing on H.R. 2281 and 2280*, at 22-25. It met stiff resistance on a number of fronts. A broad coalition of copyright owners from the software, motion picture, and recording industries, all of whom were suffering, and would continue to suffer from Internet copyright piracy opposed the enactment of broad immunity for all Internet operators, regardless of their knowledge of or involvement in the infringements. *See Hearing on H.R.*

³ Congress at the time was considering other legislation that would ultimately become part of the DMCA. Most important was legislation implementing the World Intellectual Property Organization (“WIPO”) Treaties of 1996, which enacted enforcement provisions to bolster digital copy-protection measures utilized by copyright owners. *See* 17 U.S.C. § 1201-1205 (2000).

2281 and 2280; Hearing on S. 1146. A leading copyright scholar urged that any legislation distinguish between immunity for “conduit” ISPs and immunity for electronic “bulletin board services and similar sites,” the latter being “poor candidates for exemption” in light of their “greater capacity to supervise and control the content of their sites. . . .” *Hearing on H.R. 2281 and 2280*, at 311 (statement of Prof. Jane C. Ginsburg, Columbia University). Representatives of the Internet business community acknowledged that the task of combating Internet copyright piracy would have to be one of “joint responsibility between copyright owners and ISPs,” and that “[w]hen ISPs acquire actual knowledge that their services are being misused for infringing purposes, they should be obligated to take reasonable steps to halt further abuse.” *Hearing on S. 1146*, at 32 (statement of Roy Neel, Unites States Telephone Association).

Following the hearings there were “comprehensive negotiations” involving Congress as well as “copyright owners and Internet and online service providers to resolve the issue of service provider liability.” S. Rep. No. 105-190, at 7. The resulting “compromise” was applauded by a representative of the online business community who explained that “the arguments which had previously divided the parties” were resolved after “the content and service provider industries began face-to-face negotiations and were able to approach the remaining key issues with increased knowledge, creativity, and insight.” *The WIPO Copyright Treaties*

Implementation Act: Hearing on H.R. 2281 Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce, 105th Cong. 50-52 (1998) (statement of George Vradenburg III, Ad Hoc Copyright Coalition). Congress accepted the compromise, perceiving it as “preserv[ing] 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, pt. 2, at 49; *see also* S. Rep. No. 105-190, at 20 (intended purpose of Title II was to get ISPs and copyright owners “to cooperate to detect and deal with copyright infringements that take place in the digital networked environment”).

As enacted by Congress, Title II of the DMCA struck a balance of interests; it incorporated some elements of the immunity created in *Netcom*, but not all of it, and provided additional protections for copyright owners. Under § 512(a), ISPs that serve a “passive conduit” function can retain the direct liability limitation established in the *Netcom* case. However, firms like LoopNet that store content on their systems were made subject to a different set of rules, set forth in § 512(c), which placed several conditions on the exemption from liability. Generally speaking, “service providers” under this section of the statute were obligated, upon proper notice from a copyright owner or its authorized agent, to “respond[] expeditiously to remove, or disable access to, the material that is claimed to be

infringing or to be the subject of infringing activity.” 17 U.S.C. § 512(c)(1)(c).⁴

“Service providers” seeking the safe harbor of § 512(c) are also subject to the further requirement that they must not have “actual knowledge that the material or an activity using the material on the system or network is infringing.” 17 U.S.C. § 512(c)(1)(A)(i).

Congress imposed other requirements on “service providers” in exchange for these liability limitations. It gave copyright owners the right to serve a “subpoena to identify infringer” on any type of “service provider” in order to learn the identity of Internet users suspected of infringement. 17 U.S.C. § 512(h); see *In re Verizon Internet Servs.*, 240 F. Supp. 2d 24, 27 (D.D.C. 2003). Congress also required all “service providers” to adopt and follow a “policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.” 17 U.S.C. § 512(i)(1)(A).⁵

The “compromise” Congress enacted in the “Online Copyright

⁴ The statute defined “service provider” two different ways. One definition applies to “conduit” ISPs who seek immunity under § 512(a). The other, broader definition applies to “provider[s] of online services or network access, or the operator of facilities therefor,” who seek the protection of the other DMCA “safe harbors,” including the conditional protections of § 512(c).

⁵ Non-compliance with the DMCA “safe harbor” did not render a service provider automatically liable for infringement. Congress provided that other copyright defenses, such as the statute of limitations, could be asserted against a claim for copyright infringement. See 17 U.S.C. § 512(l).

Infringement Liability Limitation Act” is like any compromise—no participant in the negotiations received everything it wanted. In particular, providers of “online services” that, like LoopNet, host content on websites received more conditional protection than did the “passive conduits” covered by § 512(a). Their protection was conditioned on first meeting a set of requirements intended to provide copyright owners with reasonable protections not articulated by the district court in that case. All “service providers,” however—“conduits,” “bulletin boards,” and the like—were relieved of the principal concern that they articulated at the outset of the legislative process—the uncertainty associated with the piecemeal, judicially imposed development of the rules governing online copyright infringement.

II. THE DMCA SUPPLANTS *NETCOM*’S JUDGE-MADE “SAFE HARBOR” FOR “PASSIVE” INTERNET CONDUCT.

Copyright law “is a creature of federal statute.” *M. Kramer Mfr’g Co. v. Andrews*, 783 F.2d 421, 432 (4th Cir. 1986); accord *Microsoft Corp. v. Grey Computer, Inc.*, 910 F. Supp. 1077, 1084 (D. Md. 1995); *Digital Communications Assocs., Inc. v. Softklone Distrib., Corp.*, 659 F. Supp. 449, 454 (N.D. Ga. 1987). As such, courts have consistently reminded litigants that in matters of copyright, “it is not our role to alter the delicate balance Congress has labored to achieve,” *Stewart v. Abend*, 495 U.S. 207, 230 (1990), and that “it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.” *Eldred v. Ashcroft*, 537 U.S. 186, ___, 123 S. Ct. 769, 787 (2003).

As explained in Section I, the issue of liability limitations for Internet businesses is one on which Congress “labored” prior to enacting the DMCA. Indeed, Congress did so at the behest of the Internet business community, which sought legislation that would eliminate the uncertainty arising from the federal courts’ fashioning of *ad hoc* liability rules. Congress accepted the invitation “to set the ground rules for copyright liability with respect to the on-line environment.” *Hearing on H.R. 2281 and 2280* at 102 (statement of Rep. Rick Boveher, Member, House Comm. on the Judiciary). Those “ground rules,” now codified in 17 U.S.C. § 512, gave the Internet business community much of the protection it requested, imposed conditions on that protection (in the form of obligations owed to, and for the benefit of, copyright owners) and left no room for additional, more expansive judge-made “safe harbors” within which Internet operators can seek immunity from infringement claims.

[W]here Congress has established an extensive regulatory network and expressly announced its intention to occupy the field, federal courts should not create additional rights under the rubric of federal common law.

Cummings v. Briggs & Stratton Retirement Plan, 797 F.2d 383, 390 (7th Cir. 1986); accord *Eastern States Health & Welfare Fund v. Philip Morris, Inc.*, 11 F. Supp. 2d 384, 402 (S.D.N.Y. 1998). On the subject of copyright immunity for Internet operators, Congress has left no “interstices” for the courts to fill. See *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 90 (2d Cir. 1998)

(conflict rule created where Copyright Act “contains no provision relevant to the pending case concerning conflicts issues”).

This Court recognized as much in *ALS Scan, Inc. v. RemarQ Cmtys., Inc.*, 239 F.3d 619 (4th Cir. 2001), noting that in the intersection of copyright law and the Internet, the DMCA supplants prior judicial decisions either creating “safe harbors,” as in *Netcom*, or denying them, as in *Playboy*. *ALS Scan* involved a claim by a copyright owner against an electronic bulletin board operator that declined ALS Scan’s demand for removal of photographs posted by customers. In response to arguments over the comparative wisdom of *Playboy* versus *Netcom*, the Court demurred on the ground that “the ultimate conclusion on this point is controlled” by Title II of the DMCA.⁶ *ALS Scan*, 239 F.3d at 622. The Court then analyzed the liability issue under the DMCA, and finding a failure by the defendant to afford itself of the “safe harbor” protections of § 512(c), remanded the case for further proceedings. *Id.* at 622-26. To the extent the District Court based its ruling on *ALS Scan*, see *CoStar*, 164 F. Supp. 2d at 696, it misapprehended the holding of that case.

⁶ The panel in *ALS Scan* observed in passing that Congress ““essentially codifie[d] the result in”” *Netcom*. *Id.* at 622. In doing so, the panel quoted a House Judiciary Committee report prepared in May 1998. *Id.* (quoting H.R. Rep. No. 105-551, pt. 1, at 11). However, the draft legislation on which the Committee was commenting at that time bears very little resemblance to Title II of DMCA as it was enacted a number of months later. In particular, this draft bill did not include the “notice-and-takedown” provision ultimately enacted in 17 U.S.C. § 512(c), or the requirement of a “repeat infringer” policy enacted in § 512(i).

To breathe new life into the judge-made *Netcom* “safe harbor” that Congress modified would effectively topple the compromise between content owners and Internet operators that § 512 embodies. The protections Congress granted to copyright owners as the trade-off for “service provider” immunity—including the right to have infringing material removed from websites and “bulletin boards” upon service of a § 512(c)(3) notice—would be meaningless if those operating such sites were free to ignore these requirements and nevertheless maintain a *Netcom*-based “passive conduit” defense wholly independent of the DMCA. No longer would Internet businesses have the “*strong* incentives to work with copyright holders” that Congress created by holding out “[t]he possible loss of the safe harbor” and to further its “regulatory scheme in which courts are meant to play a secondary role to self-regulation.” *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1178 (C.D. Cal. 2002). Indeed, if Congress intended *Netcom* to survive the DMCA, there would have been no need to enact the statute in the first place.

Nor, it bears noting, is there any risk that, in confining LoopNet’s immunity defense to the DMCA, courts would effectively “hold the entire Internet liable for activities that cannot reasonably be deterred.” *Netcom*, 907 F. Supp. at 1372. To the contrary, because website publishers serve as the final link in the

chain of the distribution of works over the Internet, they are in the best position to prevent, and bear the attendant risks of, the public display of copyrighted works.

The foregoing makes it plain that the District Court erred in granting LoopNet summary judgment. The District Court found disputed facts as to whether LoopNet had forfeited the § 512(c) “safe harbor” by failing to disable access to infringing photographs and failing to design an adequate termination policy for repeat infringers. 164 F. Supp. 2d at 703-04. That should have ended the analysis of whether LoopNet was entitled to assert immunity from a copyright infringement claim on the basis of its asserted “passive” conduct. There was no occasion for the district court to analyze whether the broader, judge-made “safe harbor” articulated in *Netcom* supplied an additional basis for immunity.⁷

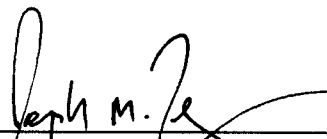
CONCLUSION

For the foregoing reasons and the reasons set forth in CoStar’s brief, this Court should reverse the District Court’s ruling granting summary judgment to LoopNet on the claim of direct infringement.

⁷ Appellant CoStar makes an alternative argument for reversal in the event that the Court finds that *Netcom* survives the DMCA and states the law of this Circuit. *Amici* agree once an entity like LoopNet has notice that its website is hosting infringing material, it is obligated to police the website for further infringements. Under these circumstances, it can be no defense for LoopNet to assert that it was unaware that the photographs it reviewed and posted infringed the copyrights of a third party.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of *Amici Curiae* BMG Entertainment, EMI Music North America, Sony Music Entertainment, Inc., Universal Music Group, Univision Music LLC, Columbia Pictures Industries, Inc., Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corporation, Twentieth Century Fox Film Corporation, and Universal City Studios LLLP in Support of Appellant and Reversal complies with the type-volume limitations prescribed by Fed. R. App. P. 32(a)(7)(B)(i). The brief contains 3,672 words.




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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2003, I caused two copies of the foregoing Brief of *Amici Curiae* to be filed with the Clerk by U.S. Postal Service Express Mail and delivered, by the same method, to the following counsel:

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