No. 14-56596

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAVRIX PHOTOGRAPHS LLC,

Plaintiff-Appellant,

v.

LIVEJOURNAL, INC,

Defendant-Appellee.

On Appeal from the United States District Court for the Central District of California, Case No 8:13-cv-00517-CJC-JPR, Hon. Cormac J. Carney

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BRIEF AMICI CURIAE OF AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF COLLEGE AND RESEARCH LIBRARIES, ASSOCIATION OF RESEARCH LIBRARIES, ELECTRONIC FRONTIER FOUNDATION, PUBLIC KNOWLEDGE, AND WIKIMEDIA FOUNDATION IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici curiae American Library Association, Association of College and Research Libraries, Association of Research Libraries, Electronic Frontier Foundation, Public Knowledge, and Wikimedia Foundation state that they do not have a parent corporation and that no publicly held corporation has an ownership stake of 10% or more in them.

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INTEREST OF AMICI[1]

The American Library Association ("ALA") is a nonprofit professional organization of more than 60,000 librarians dedicated to providing library services and promoting the public interest in a free and open information society. The Association of College and Research Libraries, the largest division of the ALA, is a professional association of academic and research librarians. The Association of Research Libraries ("ARL") is a nonprofit organization of 125 research libraries in North America, including university, public, government and national libraries. Collectively, these three associations represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel.

The safe harbors of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512 have been extremely helpful to the library amici in fulfilling their mission of providing their users with access to information. Libraries act as "service providers" within the meaning of 17 U.S.C. § 512(k)(1)(A). Libraries are the only source for free Internet connectivity and Internet-ready computer terminals for many Americans. The Section 512(a) safe harbor for "mere conduits" has enabled libraries to provide Internet access without the specter of liability for onerous copyright damages because of infringing user activity. Libraries also

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

operate websites that host user-generated content and prepare directories that link users to other websites. The safe harbors in Sections 512(c) and (d) shelter libraries from liability for infringing activity by third parties. Any new restrictions on the availability of the DMCA safe harbors could have an adverse effect on the ability of libraries to deliver a critical service to underserved and other user communities.

Amicus Electronic Frontier Foundation ("EFF") is a nonprofit civil liberties organization that has worked for 26 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 36,000 dues-paying members have a strong interest in assisting the courts and policymakers to help ensure that copyright law serves the interests of creators, innovators, and the general public.

Amicus Public Knowledge is a non-profit organization that is dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. Public Knowledge advocates on behalf of the public interest for a balanced copyright system, particularly with respect to new and emerging technologies.

Amicus Wikimedia Foundation is a non-profit organization based in San Francisco, California, which operates twelve free-knowledge projects on the Internet, including Wikipedia. Wikimedia's mission is to develop and maintain

educational content created and moderated by volunteer contributors, and to provide this content to people around the world free of charge. In August 2016, the Wikimedia projects received 15.69 billion page views, including 7.81 billion page views on English Wikipedia. That month, users submitted nearly 13.5 million edits to Wikipedia. Since its creation, users have created over 40 million articles on Wikipedia.

Many Internet platforms that host user-uploaded content review that content for illegal or objectionable material. These efforts should not endanger their eligibility for the DMCA's safe harbors. Unfortunately, the panel's decision would have exactly that result. The panel found that if an online platform moderates its service, the speech of users could be considered speech by the online platform. This would force providers of Internet platforms to choose between remaining within the DMCA's safe harbor and taking measures to make their services potentially more welcoming platforms for free expression. Website operators should not be forced to make this choice. For this reason, amici support LiveJournal's petition for rehearing or rehearing en banc.

SUMMARY OF ARGUMENT

Congress did not condition eligibility for the DMCA's safe harbors on a provider of online services "monitoring its service or affirmatively seeking out facts indicating infringing activity." 17 U.S.C. § 512(m). As the legislative history

makes clear, however, neither did it wish to discourage such activity; rather, it chose to leave that decision to the providers themselves.

The panel's decision runs directly contrary to that clear expression of intent by penalizing service providers who use moderators. The web-hosting safe harbor, 17 U.S.C. § 512(c), shelters a service provider from liability only with respect to infringing content stored "at the direction of a user." The panel found because LiveJournal engaged volunteer moderators to review the content submitted by users before it went online, the storage in an accessible online location could possibly be considered storage at the direction of the moderators, not the users. And if the postings were not at the direction of users, then LiveJournal could lose its safe harbor.[2]

The possibility that an online platform might lose its DMCA safe harbor by virtue of moderating its service obviously would strongly discourage the platform from doing so. That, in turn, would upend the actual practices of scores of platforms and services who have responded to Congress's clear signal that they would not be penalized for using moderators. Online platforms of all sizes review content posted by third parties for unlawful and inappropriate material, including material that infringes copyright. Copyright holders have benefitted greatly from

[2] This brief does not address whether the volunteer moderators should be considered LiveJournal's agents.

these proactive measures that exceed the DMCA's requirements. The panel's decision would undo these significant public benefits.

The Court should grant Appellee LiveJournal's petition for rehearing or rehearing *en banc*.

ARGUMENT

I. Moderation Is a Valuable Tool for Online Platforms and Services, Which Congress Sought to Encourage.

Online platforms and services vary widely in their operations, including in how they address third party-posted content. In many cases, the volume of content available is incomprehensibly vast; today YouTube users upload 300 hours of video *per minute* and Twitter users generate 500 million tweets per day.[3] These services nevertheless comply with the Digital Millennium Copyright Act safe harbor, expeditiously taking down content upon claims of infringement.

Some platforms and services, however, may operate at a scale where it remains possible for the intermediary's editors or moderators to attempt to filter irrelevant or inappropriate content, or materials that would otherwise make for a less desirable user experience. In enacting the DMCA, Congress did not intend to

[3] *See* Internet Live Stats, *Twitter Usage Statistics*, http://www.internetlivestats.com/twitter-statistics/(last accessed May 10, 2017); Luke Dormehl, *300 Hours of Footage Per Minute: Google Explains Why Policing YouTube Is So Tough*, Fast Company (Jan. 28, 2015), *available at* https://www.fastcompany.com/3041622/300-hours-of-footage-per-minute-google-explains-why-policing-youtube-is-so-tough.

discourage these activities. Rather, it explicitly sheltered them. The panel's decision runs directly contrary to this clear Congressional direction by penalizing platforms that moderate their online fora for inappropriate content.

II. Congress Did Not Intend for the Use of Moderators to Disqualify a Service Provider from Eligibility for a DMCA Safe Harbor.

While Section 512(m) of the DMCA makes clear that service providers have no obligation to look through user-submitted content for possible infringements, the Conference Report for the DMCA explained that the DMCA was "not intended to discourage the service provider from monitoring its service." H.R. Rep. No. 105-796, at 73 (1998).

Yet, the panel found that LiveJournal's use of moderators might disqualify it from the DMCA's protection. Under 17 U.S.C. § 512(c), a service provider is not liable for damages for infringement of copyright "by reason of the storage at the direction of a user of material that resides" on a website controlled by the service operator. The panel held that moderators' substantive, manual review could possibly transform user-directed storage into moderator-directed storage.

The possibility that an Internet service could lose its DMCA protection by virtue of using a moderator not only contradicts the Conference Report quoted above, it also conflicts with clear articulations of both the House and Senate Judiciary Committees concerning the appropriate role of Internet intermediaries. The DMCA's safe harbor for information location tools, section 512(d), provides

protection for a service provider that links to an online location containing infringing material. When the DMCA was pending before Congress in 1998, the Internet portal Yahoo expressed concern about its eligibility for this safe harbor because its employees actually visited websites to determine whether to include them in its directory.

In response, the House and Senate Judiciary committees adopted reports clarifying that a directory such as Yahoo did not lose its safe harbor by virtue of its employees visiting and then linking to websites that turn out to contain infringing content. The Reports stated, "directories are particularly helpful in conducting effective searches by filtering out irrelevant and offensive material," S. Rep 105-190 (1998), at 49; *see also* H.R. Comm. on the Judiciary, 105th Cong., Section-By-Section Analysis of H.R. 2281, at 33-34 (Comm. Print 1998). The reports then specifically referenced Yahoo's directory, noting that it was created by people visiting websites to categorize them. The reports add, "it is precisely the human judgment and editorial discretion exercised by these cataloguers that make directories valuable." S. Rep 105-190, at 49. The reports explain that section 512(d) "is intended to promote the development of information location tools generally, and Internet directories such as Yahoo's in particular, by establishing a safe harbor from copyright infringement liability…." *Id.* For this reason, "the knowledge or awareness standard should not be applied in a manner which would

create a disincentive to the development of directories which involve human intervention." Section-By-Section Analysis of H.R. 2281, at 33.

Given Congress's interest in promoting directories that reflect "human judgment and editorial discretion" under the section 512(d) information location safe harbor, Congress surely would oppose applying the section 512(c) hosting safe harbor in a manner that discouraged that judgment and discretion. Yet that is exactly what the panel decision does.

III. The Panel's Discouragement of Moderators Also Runs Contrary to the Policy Expressed in the Communications Decency Act.

The panel's decision also contradicts the policy reflected in section 230 of the Communications Decency Act ("CDA"), adopted in 1996, two years before adoption of the DMCA. In 1995, a New York court held that the Prodigy bulletin board service was strictly liable for allegedly defamatory material posted by a user about a financial services company. *Stratton-Oakmont Inc. v. Prodigy Services Co.*, No. 310063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 26, 1995). The court based its decision in part on the fact that Prodigy monitored the content of its bulletin board for conformity with standards set forth in its content guidelines. Congress quickly realized that the *Stratton Oakmont* decision led to an anomalous result: an Internet service provider could be penalized for its efforts to rid the Internet of inappropriate content. Accordingly, to eliminate this perverse incentive, Congress adopted 47 U.S.C. § 230(c)(1), which provides that "no

provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[4]

Another provision of the CDA, part of a section ultimately found unconstitutional by the Supreme Court on First Amendment grounds, *see Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), provided that no online service "shall be held liable" on account of "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2).

In sum, both Congress and the courts have repeatedly affirmed the right and ability of Internet intermediaries to use human moderators. The panel's holding cannot be squared with that unambiguous choice.

IV. The Panel's Decision Will Eliminate the Public Benefits Resulting from Moderated Services.

The panel's decision not only contravenes Congress's clear intent, it will undermine the public interest by discouraging platforms from providing moderated options. Many online services have employees review content posted on their services for illegal material such as child pornography, and for material that the

[4] While section 230 states that it shall not be "construed to limit or expand any law pertaining to intellectual property," 47 U.S.C. § 230(e)(2), it is still instructive in this case, showing consistent Congressional policy to eliminate disincentives for online moderation.

operator deems objectionable, such as sexually explicit content, sexual harassment, bullying, graphic violence, threats, and spam. These efforts result in service providers examining user-submitted content—frequently based upon notices by other users—in order to determine whether the content violates a service's policies. Algorithms and automated technologies can assist, but in many cases there's no substitute for manual review.

The Fourth Circuit recognized this in *Costar Group v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004). LoopNet's manual review process enabled it to "identify any obvious evidence, such as a text message or copyright notice, that the photograph may have been copyrighted by another." *Id*. at 547. The Fourth Circuit declined to penalize the service provider for this "gatekeeping function," since "copyright holders benefit significantly from this type of response." *Id.* at 556. Online services that take more aggressive steps in attempting to moderate online content should not be penalized for these efforts, since "[i]t is clear that Congress intended the DMCA's safe harbor for ISPs to be a floor, not a ceiling, of protection." *Id.* at 555.

While platforms should never be *required* to inspect user-generated content, especially prior to posting, voluntary efforts to remove offensive, objectionable, and illegal material can benefit services, their users, and the broader public. Indeed, the need for moderators may be greater now than ever before, amidst rising

concerns over the effect of false or misleading news stories on the democratic process, and the harmful consequences of online harassment. Services that have the capability to moderate user content should be empowered to do so, with the recognition that across the diverse Internet, different sites and services have different capabilities and priorities. Certain services are technically constrained, many lack the resources to affirmatively monitor the nearly incomprehensible volume of communication online, and others may simply choose to not to moderate because they believe such moderation could inhibit free speech and innovation.

There should be no legal distinction between service providers that inspect incoming content before it is posted, and those who remove objectionable or infringing content after it is posted. The latter type of provider clearly qualifies for a safe harbor if it promptly removes infringing material upon receipt of a DMCA-compliant notice. The former type acts at least as responsibly, attempting to prevent improper content from being posted at all. The panel's interpretation of the law would perversely discourage such responsible behavior.

Thus, as a matter of law and sound policy, the DMCA allows services to continue valuable content-review efforts without risking losing the safe harbor because they do not remove material that may be infringing. Congress never intended to force services to choose between preserving their DMCA protections

and taking steps to eliminate harmful and even unlawful uses of their services. Unfortunately, the panel's decision would do just that.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing or rehearing en banc of the panel's decision.

Respectfully submitted,

Dated: May 12, 2017

/s/ Mitchell L. Stoltz

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 2,522 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.

May 12, 2017 /s/ Mitchell L. Stoltz

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2017, I electronically filed the foregoing Brief Amici Curiae of the American Library Association, Association of College and Research Libraries, Association of Research Libraries, Electronic Frontier Foundation, Public Knowledge, and Wikimedia Foundation in Support of Appellee's Petition for 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. 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.

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