

No. _____

**In The
Supreme Court of the United States**

—◆—
VENTURA CONTENT, LTD.,

Petitioner-Appellant,

v.

MOTHERLESS, INC. and JOSHUA LANGE,

Respondents-Appellees.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

—◆—
PETITION FOR A WRIT OF CERTIORARI

—◆—
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QUESTIONS PRESENTED

Under the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512, where an Online Service Provider's (OSP) user uploads over 300,000 pieces of content in one year and had been the subject of numerous copyright complaints, yet whose access was still never terminated, whether the OSP can be held, as matter of law, to have adopted a reasonable termination policy for repeat copyright infringers where the OSP asserts its unwritten policy is to somehow assess, via an undefined "I Know It When I See It" type analysis, the subjective intent of the unknown, anonymous uploader.

Whether the DMCA permits an OSP to itself review and then publish hundreds of thousands of pieces of user-offered content—where undisputed expert testimony showed 66% had watermarks/indicia of ownership and where another 20% had clear indicia of professional production/ownership—yet escape liability, at summary judgment, on the theory that there was neither actual nor apparent knowledge of the infringing activity on the site.

Ultimately, whether OSP's should receive immunity for copyright infringement liability where the same real-world counterpart businesses face copyright liability for the same volitional conduct—that is, whether the United States has two different bodies of copyright law, a free-pass standard for online businesses and a traditional copyright standard for brick and mortar businesses.

CORPORATE DISCLOSURE STATEMENT

Ventura Content, Ltd. is a privately held Anguilla company. None of its shares are held by a publicly traded company.

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OPINION BELOW

The Ninth Circuit’s opinion, the subject of this petition, is published at 885 F.3d 597 (9th Cir. 2018). The District Court’s unpublished opinion is attached hereto.

**JURISDICTIONAL BASIS**

The Ninth Circuit denied panel rehearing and en banc rehearing review of the published opinion on May 22, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Ninth Circuit’s published decision.

**STATUTE AT ISSUE: THE DMCA**

Because copyright is a strict liability tort, Congress in 1998 enacted the DMCA to create safety for OSP’s whose users, while rummaging across an online site, tripped the copyright wire. *See* S. Rep. No. 105-190, at 8-9 (“In the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability . . . service providers must make . . . electronic copies . . . in order to host World Wide Web sites.”). These OSP’s were envisioned to be the neutral informational conduits, the backbone of the internet, people and businesses who rightly should not be held liable because Joe Q. Public transmits another’s copyrighted work across the OSP’s wires; thus, they were envisioned to

entitlement to immunity because they would work hand-in-hand with content owners to keep the internet clean of infringement. *Id.* at 20 (“service providers and copyright owners to cooperate to detect and deal with copyright infringement . . . ”). But OSP’s were never envisioned to be online publishing businesses immune for their content publication decisions, unlike their off-line publishing counterparts. *See* H.R. Rep. No. 105-551(II), at 61 (“those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property of others should know that there is a realistic threat of losing that access”), S. Rep. 105-190 at 8 (“It will also encourage the continued growth of the existing off-line global marketplace for copyrighted works in digital format by setting strong international copyright standards.”).

The DMCA as enacted thus balanced the scope of liability by providing that, relevant here, an OSP is not liable “for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system. . . .” 17 U.S.C. § 512(c), where the OSP:

(1) “adopted and reasonably implemented . . . a policy that provides for the termination in appropriate circumstances of repeat infringers,” 17 U.S.C. § 512(i);

(2) does not “receive[] a financial benefit directly attributable to the infringing activity” where the OSP “has the right and ability to control such activity,” *id.* § 512(c)(1)(B);

(3) “(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material,” § 512(c)(1)(A)(i)-(iii).

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**STATEMENT OF THE CASE AND
THE NINTH CIRCUIT’S BLESSING
OF “I KNOW IT WHEN I SEE IT”¹**

The DMCA has been warped to now allow this fact-pattern to be blessed at summary judgment: Motherless.com is formed and the site puts one million stolen files on its site to have seed content. ER1930#38-39. It licenses no content and offers anonymous uploading ability with batch uploading technology that allows users to upload tens of thousands of files at once. ER1900¶74-75. It then incents people to upload others’ copyrighted content—by offering financial and virtual rewards for high-volume uploads. ER921:18-922:1, 1901-03¶77-82, 1591:11-1592:12. It then looks at thumbnail screenshots of all user submissions, decides which ones to accept or reject. Over 66% of the user submissions contain watermarks or other denoters of ownership. ER1904-06¶92-101. After review, it then chooses to publish that content to the world.

¹ ER refers to Excerpts of Record filed below.

ER1908¶107, 784:5-15, 800:6-802:19. It makes its money almost entirely from ad revenue because of the number of viewers viewing content over its tube site. ER1969#230, 1897¶56-57.

And, undisputed expert testimony shows, 86% of the content on the site is known infringing content. ER1904-05¶93-96.

It has no written policy to terminate repeat infringers. Instead, the policy turns on a discretionary calculus in the OSP's mind as to what the subjective intent of the user was vis-a-vis the rightsholder: An I-Know-It-When-I-See-It Policy. 6ER1159-60.

Six of the eight users who uploaded Ventura's adult content files had been the subject of prior takedowns. They were not terminated and continued to infringe again by uploading Ventura's content. 10ER1982#284-91. One user it fails to terminate uploads 300,000 pieces of content in a year—that is not a typo, it was over 300,000 actually—receives numerous take down notices from rightsholders, and then proceeds to infringe Ventura's content. Even after suit here, that user is allowed to continue uploading for one year. 10ER1776, 1877-81, 1901¶76, 4ER765¶10, 5ER927:8-928:16, 7ER1323:11-13, 9ER1587:2-24, 9ER1590:11-14, 10ER1961#182, 7ER1323:11-13, 10ER1983#290.

Against that record, the Ninth Circuit rules that as a matter of law nothing exists for the jury because: (1) Motherless's "I know it when I see it"-type policy sufficed—in other words, no jury could possible look at

the facts and think Motherless had anything other than a good policy to terminate known repeat infringers; and (2) no jury could possibly think Motherless was aware of facts that gave it actual or apparent knowledge that its service was a bastion of infringement.

Thus, a divided Ninth Circuit panel affirmed, where the District Court had granted a defense summary judgment on the defendant's DMCA affirmative defense.



REASONS WHY CERTIORARI IS WARRANTED

For 20 years since the very advent of the internet, the DMCA has mediated the internet's development and copyright infringement liability standards as between content creators and the new species of businesses, the Online Service Providers, that the internet birthed. But in the last two decades this Court has never taken a single DMCA case. Now is the time.

Plain and simple, the lower courts are in a state of DMCA disarray. At the heart of this disarray exists a new technology business that emerged after 1998, the "tube" site publishing model (akin to YouTube) that the Defendants here operate, one that reproduces and publicly publishes content uploaded by users, including myriad adult content films of Plaintiff-Petitioner Ventura Content. The dissent and majority below amply

demonstrate the collision on the law, which exists across the nation.

Twenty years of sophisticated business development now demonstrates that publishing businesses like Motherless here, which make all their revenue from offering others' content to viewers, have shoe-horned themselves into the DMCA in a manner that has now made online copyright law and offline copyright law exist on two different wavelengths. The result of the DMCA disarray is that abject bootlegging in the offline, brick-and-mortar world remains unlawful, but the same conduct online by an OSP-turned-publisher garners absolute summary judgment immunity. This case demonstrates a brazen business model that makes Grokster's conduct, brutally condemned by this Court (*MGM v. Grokster*, 545 U.S. 913 (2005)), look decidedly trite.

Twenty years is enough, a well-developed internet exists, the courts are broken on the metes and bounds of the statutory language, and this Court now can bring some common sense and clarity to online copyright law.

I. REVIEW IS WARRANTED BECAUSE A CIRCUIT SPLIT EXISTS ON THE MEANING OF A REASONABLE TERMINATION POLICY FOR REPEAT INFRINGERS UNDER § 512(I)

The following cases cannot be reconciled as courts simply collide on whether to look at OSPs for what

they are, or, instead, to turn a blind eye when the very *raison d'être* for the OSP is to facilitate mass infringement:

- *Ventura* (this case): no written policy needed, “I Know It When I See It”-type policy used, multiple known repeat infringements even of content that was watermarked, infringing user uploaded hundreds of thousands of content anonymously by OSP-offered batch upload technology, *held* does not matter that the user is not terminated and OSP gets a summary judgment blessing of a proper termination policy.
- *EMI Christian Music Grp, Inc. v. MP3tunes, LLC*, 844 F.3d 79, 90-91 (2d Cir. 2016): plain meaning, failure to monitor users who uploaded from infringing site; *held* OSP does not get summary judgment because facts showed a conscious disregard.

There is a square conflict. This Court needs to put a marker down for the lower courts to define this statutory language in a basic common-sense manner: a policy must exist; it must be in fact implemented; OSP's can't use their own interpretation of what they think the user was intending to decide and whether the user should be terminated for repeat infringement; abject failure to implement means the DMCA safe harbor is lost. There is a reason, after all, Judge Rawlinson wrote such a stinging dissent in the case below.

At the same time, the Ninth Circuit here has also created a split with the Seventh Circuit on the ability of OSP's to duck their heads in the sand to avoid knowledge of their users:

- *Ventura*: The majority held that “the absence of any significant number of repeat infringers who escaped termination compels the conclusion that a trier of fact could not conclude . . . that Motherless failed to meet the repeat infringer eligibility requirement for safe harbor.” *Id.* at 619. But as the dissent noted, the existence of anonymous users undermined the majority’s characterization of Motherless’ infringement prevention success rate because the majority could not “have confidence in the number of infringers who purportedly escaped termination if there is no way of knowing the actual number of infringers.” *Id.* at 622. Judge Rawlinson logically concluded that Motherless’ refusal to identify and terminate potential, anonymous copyright infringers created a triable issue of fact as to whether Motherless’ § 512(i) policy was reasonably implemented.
- But *In re Aimster Copyright Litig.*, 334 F.3d 643, 656 (7th Cir. 2003), in *affirming* 252 F. Supp. 2d 638 (E.D. Ill. 2002), is at odds with the Ninth Circuit and properly analyzed the issue as Dissenting Judge Rawlinson would: Section 512(i) pertains to a more general inquiry, whether “the service provider implement[s] a policy

that provides for the termination of access to repeat infringers in ‘appropriate circumstances.’” 252 F. Supp. 2d at 659. In answering this question, the district court found that Aimster’s file-encryption system made it impossible for Aimster to ascertain which users were repeat infringers, and thus “purposely eviscerat[ed] any hope” that Aimster could reasonably implement a § 512(i) policy. *Id.*

At root, the Second and Seventh Circuits have disallowed formulaic policies that allow OSPs to run brazen infringement machines and to purposefully engage in conduct to avoid knowledge—that is, behave like ostriches; in stark contrast, the Ninth Circuit in *Ventura* permitted a brazen infringement machine that is more actively involved in curating infringing content than even the business model this Court outright—***and unanimously!***—condemned in *Grokster*.

The split should be resolved and this Court needs to offer guidance on the DMCA after two decades of lower court gestation of online copyright standards.

II. REVIEW IS WARRANTED ON § 512(C) BECAUSE THE NINTH CIRCUIT HAS EVISCERATED THE PRINCIPLE THAT ACTUAL AND APPARENT KNOWLEDGE OF MASS INFRINGING ACTIVITY USING ONE'S WARES SERVES AS A BASIS FOR COPYRIGHT LIABILITY, IN CONTRAVENTION OF *GROKSTER*

This Court's common-sense approach to copyright law in *Grokster* put an end to the Ninth Circuit's struggles at the turn of the century with new software technologies being shared across networked computers. Under *Grokster*, in secondary liability standards for copyright law, companies cannot stick their heads in the sand and avoid knowledge of infringement. A record store, for example, cannot knowingly accept boxes of bootleg records that just appear on its doorstep. And as *Grokster* showed, conduct that demonstrates an awareness that the product serves primarily infringement purposes, even though lawful uses may exist, is enough to face liability. 545 U.S. at 930-37.

Grokster is remarkable in that (1) it was unanimous in condemning (and reversing the Ninth Circuit in its errors then) the Grokster business model as a piratical one that knowingly encouraged and facilitated infringement; and (2) its words about secondary infringement have meant nothing in the online, internet world to the Ninth Circuit here.

Instead, nearly two decades later, the Ninth Circuit has again got copyright liability principles wrong, this time in the DMCA context of the modern internet

era. Section 512(c)(i)&(ii) disallows the safe-harbor where there is actual or red flag knowledge of infringement. Section 512(c) is supposed to codify that basic standard for businesses operating online so that offline and online businesses are treated comparably.

But the Ninth Circuit's decision has ignored these precepts in defining the DMCA knowledge prongs of § 512(c) and has allowed an OSP, with comparable knowledge to offline entities, to simply secure outright immunity (at summary judgment no less). Here, a company allows users who upload hundreds of thousands of files anonymously to continue to do so, even though watermarks show indicia of proprietary content and even when myriad complaints were levied by rights-holders against that user. Here, a company rewards with actual and virtual consideration high-volume uploaders. Here, a company actually reviews all content before it chooses to publish the user submission. Here, undisputed expert testimony showed that 86% of the content was known infringing content to any reasonable person. If ever a fact-pattern existed that should cause a company to at least face a jury on whether it had actual or red-flag knowledge, this was it.

There is no doubt that in the Ninth Circuit, under this *Ventura* decision, Grokster, Inc. could reform its business as Grokster.com and rather than offer software to millions of users—which software dissemination does not trigger a DMCA safe harbor—it could instead offer a .com Tube website to users to upload their music to a music Tube platform, billions of users can share music through a tube site, and Grokster.com

monetizes the user-uploaded and Grokster-published content through ad revenue. It would be fully entitled to a DMCA copyright immunity blessing under *Ventura*. It's absurd, given that Grokster, Inc.'s conduct was less culpable than this immune version of Grokster.com. But it's the state of the law in the Ninth Circuit.

This Court's unanimous basic words on copyright liability for those who knowingly facilitate and encourage mass piracy, even if their platform theoretically has non-infringing uses, has been abandoned by the Ninth Circuit in application of DMCA copyright law on the internet. By finding Motherless's conduct entitled to the safe harbor, the Ninth Circuit has now finally and fully created a senseless schism between offline copyright standards (ala *Grokster*) and online standards. This, notwithstanding the fact that as a matter of law the standards should be the same and internet immunities were not meant to punish traditional businesses vis-à-vis their internet competitors. *Cf. Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 n.15 (9th Cir. 2008) (en banc) (Congress's proviso of immunities for OSP's demands courts "be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability.").



CONCLUSION

The lower courts, acting out of a fear of derailing the internet's development have instead given birth to a new monster: the OSP publisher that is brazenly rich only from others' content, never pays for any content it publishes, knows the content is infringing, has full control over what is published on its platform, does not have to terminate known repeat infringers because unwritten "I Know Repeat Infringement When I See It" policies suffice, and thus enjoys full immunity from copyright law.

Meanwhile, the brick-and-mortar publisher faces copyright exposure for its similar intentional publishing decisions.

It is time for this Court to bring balance to the DMCA, which never intended, nor facially permits, such staggering dissonance between online and offline liability standards.

Dated: August 20, 2018 Respectfully submitted,

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