

No. 10-55946

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

COLUMBIA PICTURES INDUSTRIES, INC., DISNEY ENTERPRISES, INC.,
PARAMOUNT PICTURES CORPORATION, TRISTAR PICTURES, INC.,
TWENTIETH CENTURY FOX FILM CORPORATION, UNIVERSAL CITY
STUDIOS LLLP, UNIVERSAL CITY STUDIOS PRODUCTIONS LLLP, and
WARNER BROS. ENTERTAINMENT, INC.,
Plaintiffs-Appellees,

vs.

GARY FUNG and ISOHUNT WEB TECHNOLOGIES, INC.
Defendants-Appellants.

**On Appeal from a Permanent Injunction Entered by the United States
District Court for the Central District of California**

No. 06-CV-05578

Hon. Stephen V. Wilson, District Judge

BRIEF OF PLAINTIFFS-APPELLEES

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellees state as follows:

Columbia Pictures Industries, Inc. and Tristar Pictures, Inc. are indirect subsidiaries of Sony Pictures Entertainment Inc., which in turn is an indirect subsidiary of Sony Corporation, a publicly traded company. No publicly held company owns 10% or more of Sony Corporation's stock.

Disney Enterprises, Inc. is a wholly owned subsidiary of The Walt Disney Company, a publicly traded corporation. No publicly held company owns 10% or more of The Walt Disney Company's stock.

Paramount Pictures Corporation is wholly and directly owned by Viacom Inc., a publicly traded corporation. No publicly held company owns 10% or more of Viacom Inc.'s stock.

Twentieth Century Fox Film Corporation is a wholly owned subsidiary of Fox Entertainment Group, Inc. The parent of Fox Entertainment Group, Inc. is News Corporation, a publicly traded corporation. No publicly held company owns 10% or more of News Corporation's stock.

Warner Bros. Entertainment Inc. is a wholly owned subsidiary of Time Warner Inc., a publicly traded company. No publicly held company owns 10% or more of Time Warner Inc.'s stock.

Universal City Studios Productions LLLP and Universal City Studios LLC (formerly known as Universal City Studios LLLP) are wholly and indirectly owned by NBCUniversal Media, LLC (formerly known as NBC Universal, Inc.). NBCUniversal Media, LLC is indirectly owned by Comcast Corporation, a publicly traded U.S. corporation, and General Electric Company, a publicly traded corporation. No publicly held company owns 10% or more of Comcast Corporation's or General Electric Company's stock.

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STATEMENT OF JURISDICTION

Defendants-Appellants' ("Defendants") jurisdictional statement is incomplete; the district court also had jurisdiction over Plaintiffs' copyright claims under 28 U.S.C. § 1331. ER354. The correct citation to the Order Granting Plaintiffs' Motion for Summary Judgment on Liability is ER29-74.

STATEMENT OF ISSUES

1. Whether the district court properly granted summary judgment on the basis of an undisputed factual record showing that Defendants operated websites that enabled massive copyright infringement, and did so to induce infringement under the standard articulated in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).
2. Whether the district court properly rejected Defendants' defenses under the Digital Millennium Copyright Act, where Defendants intended to induce infringement, were fully aware of massive infringement, 17 U.S.C. § 512(d)(1), and also profited from the infringement while failing to exercise their right and ability to control it, *id.* § 512(d)(2).
3. Whether the district court abused its discretion in crafting an injunction in response to Defendants' inducement of infringement.

STATEMENT REGARDING STATUTORY ADDENDUM

Relevant statutory provisions are set forth in the Addendum.

STATEMENT OF THE CASE

Plaintiffs-Appellees ("Plaintiffs") own the copyrights in thousands of popular motion pictures and television programs that have been infringed using websites operated by Defendants Gary Fung and Isohunt Web Technologies, Inc.

Plaintiffs sued and, after discovery, moved for summary judgment on claims for inducement of infringement, contributory infringement, and vicarious infringement. The district court granted Plaintiffs' motion on the inducement claim, and declined to reach the alternative grounds for liability "because Defendants' inducement liability [was] overwhelmingly clear." ER43. The court observed that the "material facts supporting Plaintiffs' claims are almost wholly un rebutted," and that Defendants' case rested on "legal arguments and meritless evidentiary objections," with "little of their own evidence that directly addressed Plaintiffs' factual assertions." ER30. The court concluded that "[t]he undisputed evidence shows that Defendants . . . engaged in 'purposeful, culpable expression and conduct' aimed at promoting infringing uses of the websites," and therefore were liable for inducing infringement. ER63 (quoting *Grokster*, 545 U.S. at 937).

Following the liability finding, the court received substantial briefing, evidentiary submissions, and oral argument on Plaintiffs' request for injunctive relief. After careful consideration, the court entered a permanent injunction to stop Defendants' ongoing facilitation of infringement. ER21-28. Defendants moved to stay the injunction and submitted additional testimony from Fung. The court denied the stay, but modified the injunction. ER5-6, 9. Defendants then filed this interlocutory appeal from the injunction and the underlying summary judgment

order. ER97-99. On June 28, 2010, this Court denied Defendants' emergency motion to stay the injunction.

The district court has placed this case on its inactive calendar, with damages to be determined after this appeal is resolved. Dkt. #450. Plaintiffs have filed two motions for contempt of the injunction in the district court, which remain pending.

STATEMENT OF FACTS

A. Defendants' Websites and Their Operation.

Defendants unabashedly encourage and facilitate copyright infringement, as manifest in fact after fact recited by the district court, none of which is genuinely disputed. Defendants operate websites designed to promote massive amounts of infringement. They actively seek out infringing material and trumpet this fact to users. They have blatantly promoted and encouraged the availability of entire categories of infringing works including "Top Box Office Movies"; they and their agents have personally used their sites to infringe; and they have repeatedly helped other users engage in obvious copyright infringement. They explicitly target infringement-minded users and honored prominent users with the tagline "I pir4te, therefore I am." Defendant Fung even admitted that "stealing" copyrighted content was the basis of his business and that users are drawn to the sites by infringing material. *Infra* at 7-14. These facts are just the tip of the iceberg. The record of inducement of infringement could not be clearer.

1. The Fung Sites and the BitTorrent Network.

Defendants operate the websites www.isohunt.com, www.torrentbox.com, and www.podtropolis.com, and formerly operated the site www.ed2k-it.com (collectively the “Fung Sites”), as well as related online servers known as “trackers.” ER35-36, 508, 510-12. By Defendants’ own count, millions of users have accessed the Fung Sites, ER16, 70; SER98-118, and unrebutted statistical evidence shows that approximately 95% of content downloaded via the Sites is infringing. ER38, 277-78.

Like Napster and Grokster, the Fung Sites facilitate “peer-to-peer” file exchange. “Peer-to-peer” denotes the process of obtaining content from the personal computers of other individual users (called “peers”), rather than from a central server. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1158 (9th Cir. 2004), *vacated on other grounds*, 545 U.S. 913 (2005); ER505-07.¹

The Fung Sites utilize BitTorrent peer-to-peer technology.² Downloading files via BitTorrent involves three functional components: (i) websites, known as “torrent” sites, that enable users to find works to download and initiate that

¹ BitTorrent is a different technology than that used by Napster and Grokster, but as the district court recognized, it likewise facilitates peer-to-peer file exchange. ER31-32.

² The now-defunct www.ed2k-it.com used “eDonkey” technology with functionality similar to BitTorrent. ER34, 511-12.

download; (ii) a software application (“client”) that users install on their computers that facilitates downloading; and (iii) computer servers, known as “trackers,” that manage the file exchange among different users. ER33, 507. Defendants operate three “torrent” sites and two “tracker” servers. ER35-36, 508, 510.

“Torrent” sites play a crucial role in the process of identifying and downloading content, effectively functioning as retail storefronts where users can find and obtain the content they want. They are websites that index specialized “dot-torrent” files that enable users to locate and download content files, such as movies or television programs. ER508-09. Dot-torrent files do not contain the content itself (*e.g.*, the movie). ER508. Rather, a dot-torrent file identifies a unique copy of a content file and includes data necessary for users’ computers to obtain that content file from other users. *Id.* In a sense, dot-torrent files are the “keys” to obtaining content files from other users. Their only purpose is to enable users to identify, locate and initiate the download of the associated content item. ER36; SER95. Torrent sites sometimes rely on user submissions of dot-torrent files, but sites like Defendants’ Isohunt also utilize programs that actively search out and collect dot-torrent files. ER512-15, 517-18.

Torrent sites assemble, host, and organize these dot-torrent files. Indeed, users generally must visit central torrent sites like the Fung Sites to find and obtain content, because the BitTorrent “clients” on users’ own computers generally do not

provide the functionality to search independently for content. ER34, 508.³ On torrent sites like the Fung Sites, a user may search for content either by browsing or by entering a term into a search box. ER36-37, 510. Thus, a user looking for an episode of *The Simpsons* might browse through the list of “Top 20 TV Shows” or search using the term “Simpsons.” Either way, the user will receive a list of dot-torrent files for various *Simpsons* episodes.

The user chooses an episode by clicking on the “download torrent” button at the torrent site. ER36, 510-11. Users’ computers are normally configured so that this click initiates the download of the selected content to the user’s personal computer, without further user input, through an automated process that is invisible to the user. ER510-11. Using instructions provided by the dot-torrent file, the “client” software and “tracker” server operate behind the scenes to identify the Internet addresses of other users with the content file and download the content from those users. ER35, 510-11.

Downloading users also automatically become uploaders of the content. With BitTorrent technology, a content file is broken up into many smaller pieces, which may be downloaded from many other users at once. ER508-09. As a user downloads pieces of the file, that user also begins uploading pieces to other users

³ In this respect, a BitTorrent client differs from the “clients” in *Grokster*, which permitted searching for content.

who are downloading the same content file, both before and after the entire download is complete. ER35, 9-10. This network of users simultaneously downloading and uploading a file is called a BitTorrent “swarm.” *Id.* In this way, popular large files, such as a movie or television show, can be downloaded relatively quickly. *Id.*

2. The Facts Demonstrating Defendants’ Inducement of Infringement.

The district court found that “[t]he undisputed evidence shows that Defendants (both Fung and the websites) engaged in ‘purposeful, culpable expression and conduct’ aimed at promoting infringing uses of the websites.” ER63 (quoting *Grokster*, 545 U.S. at 937). That evidence is overwhelming and demonstrates an unmistakable intent to promote infringement.

a. Defendants Solicit, Gather, and Organize Infringing Content.

Defendants take affirmative steps to solicit and gather dot-torrent files for infringing content, which they organize into categories to help users find and download infringing content. For example, Defendants blatantly solicited Isohunt users to upload dot-torrent files for a list of the most current “Box Office Movies.” Defendants created and updated “a list of the top 20 highest-grossing films then playing in [the] United States, which linked to detailed web-pages concerning each

film. Each of these pages contained ‘upload torrent’ links allowing users to upload dot-torrent files for the films.” ER53; *see also* ER38, 515-16; SER161-67.

Repeated posts by Fung and Defendants’ moderators – whom the district court found were Defendants’ agents – have also encouraged users to upload (and download) infringing content. ER56-58. Fung specifically solicited uploads of dot-torrent files for the copyrighted films *Matrix Reloaded*, *Lord of the Rings: Return of the King*, and *Alien*, in addition to encouraging and providing links for users to download copies. ER40, 55; SER145-48, 169-70. Similarly, when a user posted a list of files including major motion pictures the user offered for upload, Fung moved the post to the “share forum” of one of his sites, where users are invited to “trade” their content files. SER149-50, 152. Defendants’ moderators posted similar lists themselves and encouraged users who did the same. ER58; SER151-52, 154-57.

Fung also created a customized software program known as a spider to locate and gather dot-torrent files for infringing content for the Fung Sites. ER60, 517; SER190-91. Fung directed the spider program to specific web pages on other blatantly infringing torrent sites, including the notorious infringing site Pirate Bay (thepiratebay.org), which has been raided by the Swedish government and whose operators have been convicted of criminal copyright infringement and sentenced to

prison terms. ER60, 518; SER191-92.⁴ Fung further directed his spider to web pages known to contain references to copyrighted content, such as “seinfeld-videos.” *Id.*; *see also* SER192-93 (under seal materials containing additional details about spider’s targeting of infringing materials).

Fung also created a program to categorize dot-torrent files by terms associated with pirated content. ER61, 518-19; SER193-95. For example, the program classified files with the term “PPV” (pay-per-view) in a filename as television shows, ER61, 519; SER195-96, and files with the term “screener” (which refers to an infringing copy of a commercially released movie provided to critics for review) as videos, ER61; SER194-95; *see id.* (additional examples). Instead of using this program to block these blatantly infringing works, Defendants deploy it to facilitate infringement by classifying the pirated content for users.

Defendants further organize their sites to make it easier to find and download infringing content. For example, the Fung Site Podtropolis still displays search categories including “Top 20 Movies” and “Top 20 TV Shows,” ER37; SER136-37, and ed2k-it provided categories of “High Quality DVD Rips” and “TV Show Releases,” ER37; SER137-38, all of which overwhelmingly showed the

⁴ *See* Dan Mitchell, *Pirates Take Sweden*, N.Y. Times, Aug. 16, 2006, available at <http://www.nytimes.com/2006/08/19/business/19online.html>; Associated Press, *Swedish Court Upholds Conviction in File-Sharing Case*, Nov. 26, 2010, available at <http://www.nytimes.com/2010/11/27/technology/27pirate.html>.

availability of infringing content. The Fung Sites Isohunt and Torrentbox provide categories of dot-torrent files for “TV,” “Movies,” “Music Video,” and “Games,” as well as sub-genre classifications such as “Action,” “Comedy,” or “Drama.” ER54; SER157-60. The Fung Sites even provide download statistics and user ratings indicating the best dot-torrent files to download. ER54, 529-31; SER216, 160-61. And for particular works, the Fung Sites provide information that might include a “Plot Summary” cast, director, release year and rating information, and user reviews. *Id.*

b. Defendants Seek Infringing Users and Assist Their Infringing Activities.

Defendants advertise their sites as key locations for infringement and specifically target infringement-minded users. For example, Defendants inserted the term “warez” – computer slang for illegal content – as a “metatag” in the webpage source code for every page of their Isohunt site. ER37, 55, 522; SER143-44. This increased the likelihood that infringers searching a commercial search engine for “warez” would locate Isohunt. *Id.*

Defendants cultivate a culture of piracy in other ways. For example, they rewarded their most active users with honorary ranks that have included titles such as “I pir4te, therefore I am” and “All Day I Dream About W4rez.” ER55; SER142. Defendants also help users infringe. Fung himself has repeatedly provided technical assistance to users openly engaging in copyright infringement.

ER56; SER176-85 (offering assistance to users seeking many copyrighted works including *Pirates of the Caribbean*, *The Lord of the Rings: Return of the King*, *Kill Bill*, and *Star Trek: Enterprise*). Defendants and their moderators also routinely advise their users how to infringe without being caught, such as recommending the use of cloaking software. ER55; SER196-201.

c. Fung Admits Defendants' Infringing Purpose and Downloaded Copyrighted Works Himself.

Fung has explicitly recognized and applauded the fact that the Fung Sites facilitate copyright infringement. In an interview broadcast on Canadian television, Fung admitted that the availability of the then-newly released movie *The Da Vinci Code* was a key attraction for users of his websites. ER40; SER141. Elsewhere, he characterized his actions as “stealing” from copyright holders. In response to an Isohunt user complaining about “big corporations” that own copyrights, Fung stated: “they accuse us for thieves, and they r right. Only we r ‘stealing’ from the leechers (them) and not the originators (artists).” ER40, 462-65.

Fung has made other overt admissions that he knew of and intended to foster copyright infringement, including:

- In response to a user complaint about removal of even legal pornography on the Fung Sites, while permitting “every other form of illegal software and movie piracy” – Fung stated: “legal doesn’t mean right, and *illegal doesn’t*

necessarily mean wrong. But to me porn is wrong.” SER140 (emphasis added).

- Fung further clarified his intent: “Morally, I’m a Christian. ‘Thou shalt not steal.’ But to me, even copyright infringement when it occurs may not necessarily be stealing.” ER40, 460.
- To a user advising Fung to shut down his forums because they are rife with explicit reference to copyright infringement, Fung facetiously responded: “excuse me? this is a search site, nothing more. Certainly not outrageous free downloads 😊.” SER140.

Additionally, Fung admitted that he personally used the Isohunt website to download infringing copies of popular movies and television shows such as *The Simpsons*, *Lost*, and *The Lord of the Rings*. ER48; SER168-70. Likewise, Defendants’ hand-picked site moderators – including *Defendants’ official DMCA copyright compliance officer* – admitted to using the Fung Sites to directly infringe. SER170-76.

d. The Fung Sites Are Predominantly Used for Infringement.

Defendants’ efforts to promote their websites for infringement have been successful. The Fung Sites host and index vast numbers of dot-torrent files for the most popular movies and television shows, and almost all the dot-torrent files downloaded from the Fung Sites are infringing. Plaintiffs’ expert conducted an

unrebutted statistical analysis showing that approximately 95% of the content actually downloaded via the Isohunt and Torrentbox sites is infringing or highly likely infringing material. ER38, 277-78.

e. Defendants' Business Model Is Based on Exploiting the Draw of Infringing Content.

Defendants facilitated this extensive infringement to make money. Their business model essentially relies on advertising as their sole source of revenue. ER62-63; SER206. Defendants earn more ad revenue by attracting more users, *id.*, and they admit that infringing content is popular and a draw to users. ER62; SER207-08; *see also* SER138-39.

Indeed, Defendants touted the draw of copyrighted content on their sites when soliciting advertisers. ER62. Fung wrote to one potential advertiser that Isohunt would “make a great partner, since TV and movies are at the top of the most frequently searched by our visitors.” ER62; SER208. Fung further boasted that Isohunt could connect advertising with searches for specific copyrighted content, citing as an example “selling Matrix sunglasses directly to people searching for ‘matrix reloaded.’” SER209-10; *see also* SER210-11 (forwarding search queries for copyrighted content to advertising partner). In short, Defendants’ own admissions establish that Defendants’ business model was directly based on attracting users through the availability of infringing content, in order to maximize advertising revenue.

f. Defendants Selectively Exercised Their Control Over the Fung Sites Without Filtering Copyrighted Content.

Although Defendants actively sought to prevent the Fung Sites from being used to distribute some files, such as those containing adult-themed content, they do not similarly attempt to prevent infringing uses. Defendants implemented a strict “no pornography” policy on the Fung Sites, by banning users who posted pornographic content, banning trackers associated with pornographic content, filtering out pornographic terms in lists of top searches, and manually deleting dot-torrent files corresponding to pornographic content. ER520, 524-25; SER202-03. Similarly, Defendants deleted so-called “fake” dot-torrent files (*i.e.*, those with names that did not match the associated content) and banned any trackers associated with such “fake” files. SER203-04; *see also* SER171, 186-89. Defendants refused to take similar proactive steps to eliminate obviously infringing content. SER205. To the contrary, as explained, they intentionally facilitated infringement.

B. Procedural History.

1. Liability.

Following discovery, the district court granted Plaintiffs’ motion for summary judgment on their inducement claim and rejected Defendants’ arguments that they were entitled to the affirmative defenses for service providers set forth in

the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512. The court denied Defendants’ request for further discovery because the requested discovery was “utterly irrelevant to the present Order, which relates specifically to Defendants’ efforts directed at inducing third parties’ infringement.” ER72.

2. Permanent Injunction.

After extensive additional briefing, submission of evidence, and oral argument, the district court ruled that Plaintiffs were entitled to injunctive relief. The court observed that Defendants had “etched their niche in the market for infringement” and “were enormously successful in building a user-base of infringers that, by Defendants’ own account, number in the millions.” ER16. The court found that broad remedies against further infringement were justified by “the great extent to which Defendants have actively encouraged copyright infringement in the past”; “the fact that Defendants’ very business model, at its core, depends upon copyright infringement, and Defendants would financially benefit from further infringement”; and the fact that Defendants took no meaningful steps to mitigate infringement *even after* the court’s liability finding. *Id.* The court therefore enjoined Defendants from contributing to the infringement of Plaintiffs’ copyrighted works under U.S. copyright law. ER27.

In crafting the injunction, the court balanced the need to protect Plaintiffs against future infringement while ensuring that Defendants would not be penalized

for unintentional violations. Thus, the injunction bars Defendants from infringing Plaintiffs' works only after Plaintiffs have provided a list of titles of works covered under the injunction. ER24-25. The court further provided that Defendants would be liable only for knowing violations of the injunction. ER22-24.

The district court denied Defendants' subsequent motion to stay the injunction. However, after consideration of additional evidence, the court modified the injunction to require Plaintiffs to supplement their title list with additional details to identify certain copyrighted works, such as those with one-word titles or titles identical to works not owned by Plaintiffs. ER5-6. The court also found that a "properly designed filter" is one feasible means to comply with the injunction, although the injunction does not mandate filtering or any specific means of compliance. ER3-4.

The court also tailored the injunction to target infringement that violates U.S. copyright law. ER27. When this litigation commenced, the servers for the Fung Sites were located in the United States. ER380. During the litigation, they were apparently moved to Canada. However, as the district court noted, millions of U.S. users a month have visited the Fung Sites, and U.S. users made up about 25% of the Fung Sites' user base, almost twice that of any other country. ER14, 68-69; SER98-126.

Even today, Defendants continue to facilitate infringement by U.S. users. Although Defendants established a so-called “Isohunt Lite” website accessible to users with U.S. Internet Protocol (“IP”) addresses, the district court rejected the first proposed version of this “Lite” site because it still induced infringement. ER16-17. Defendants subsequently implemented a different “Lite” version, but they still operate the original Isohunt website (“Main Isohunt”). Br. 29. That “Main” site continues to facilitate infringement by U.S. users actionable under U.S. copyright laws. *Infra* at 60. Plaintiffs have filed two motions for contempt in the district court based on Defendants’ failure to comply with the injunction; both remain pending.

SUMMARY OF ARGUMENT

Defendants are plainly liable for the massive copyright infringement they intentionally facilitated. The Supreme Court’s decision in *Grokster* established a clear inducement standard that does not need or allow the modifications proposed by Defendants. In suggesting a novel alternative test, Defendants seek to relitigate issues the Supreme Court already decided. *Grokster* applies to any conduct inducing infringement, including operation of a service, not just distribution of a product. *Grokster* also squarely held that the noninfringing uses of technology utilized to induce infringement are no defense to inducement liability. And *Grokster* made clear that Defendants are liable for all actual acts of infringement

using the service they intentionally provided for that purpose, without regard to whether users were prompted by a specific encouraging message or had alternative avenues to infringe.

The district court correctly applied *Grokster* and found there were no material disputed facts regarding Defendants' object of fostering infringement. In their brief, Defendants simply ignore almost all of the voluminous evidence of their unlawful activities, including their solicitation, gathering, and organization of dot-torrent files for infringing material, solicitation of a community of infringing users, direct assistance to users to infringe, solicitation of advertising based on availability of infringing works, admissions of their infringing intent, and direct engagement in infringing activities. These and other factors demonstrating intentional wrongdoing are based squarely on *Grokster*. There are no material factual disputes, nor would Defendants' requested discovery alter this conclusion.

The district court also correctly rejected Defendants' DMCA defense. As the court recognized, the DMCA does not immunize service providers who *intend* to foster infringement and are thus liable under *Grokster*. Defendants are also disqualified from the defense for other reasons. Defendants indisputably had either actual knowledge of infringing activity or, at a minimum, awareness of facts or circumstances from which infringing activity was apparent. 17 U.S.C. § 512(d)(1)(B). Defendants also had the right and ability to control infringement

from which they received a financial benefit. 17 U.S.C. § 512(d)(2). Any one of these points alone negates the DMCA defense.

The district court also properly exercised its discretion in crafting the injunction. Defendants are adjudicated intentional inducers, who solicited and built a base of infringing users in the United States over years, continued their infringing operations even after being found liable for massive infringement, and have taken only token remedial steps that are ineffective in halting infringement involving U.S. users. The injunction is properly targeted to address the extensive harm caused by Defendants' operations. Defendants' arguments that its terms are vague and overbroad are cursory and legally unsubstantiated. Moreover, the injunction does not bar conduct that occurs wholly outside the U.S. By its express terms, it is limited to stopping infringement involving U.S. users that is unlawful under the Copyright Act.

STANDARD OF REVIEW

This Court reviews entry of summary judgment *de novo*. *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 652 (9th Cir. 2002). The Court must “determine whether the evidence, viewed in a light most favorable to the nonmoving party, presents any genuine issues of material fact and whether the district court correctly applied the law.” *Id.* at 653 (quotation marks omitted).

With respect to the injunction, the Court reviews legal conclusions *de novo*, factual findings for clear error, and scope for abuse of discretion. *Id.*

ARGUMENT

I. DEFENDANTS ARE LIABLE FOR INDUCEMENT UNDER *GROKSTER*.

As the district court observed, ER30, Defendants' opposition to summary judgment under *Grokster* rests on meritless legal theories and unsupported evidentiary objections. *Grokster* settled the applicable legal standard and forecloses Defendants' bald-faced request for a different standard concocted by them. Under the correct standard, Defendants' liability is indisputable on this record. Defendants refuse even to acknowledge, much less dispute, the lion's share of the evidence demonstrating their intentional wrongdoing, and their limited attempts to create factual disputes are immaterial.

A. Defendants' Plea to Change the *Grokster* Standard Is Meritless.

1. *Grokster* Established a Clear Standard For Inducement Liability.

Grokster held that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." 545 U.S. at 919. Liability for intentionally facilitating (or "inducing") infringement under this theory is established by three

straightforward elements: “In addition to [1] intent to bring about infringement and [2] distribution of a device [or offering of a service] suitable for infringing use, the inducement theory . . . requires [3] evidence of actual infringement by recipients of the device, the software in this case.” *Id.* at 940.

There is no basis for Defendants’ bare assertion that these elements do not “supply a legal standard” or a “method of reasoning [that] applies to all cases that are expected to be brought under it.” Br. 40. These elements are readily understood and mirror other intentional torts where liability requires certain objective conduct carried out with unlawful intent. The Supreme Court’s test is grounded in common-law principles of inducement liability that have been applied for over a century. *Grokster*, 545 U.S. at 935-37. That standard neither requires nor permits any revision.

Defendants’ proposed five-factor test (Br. 58) was not argued below and is therefore forfeited. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). But in any event, it must be rejected as a modification of the *Grokster* standard. Further, the “factors” proposed by Defendants reflect fundamental misapprehensions about the nature of inducement liability, as explained below.

2. Inducement is Not Limited to Distribution of a Device.

Defendants argue that *Grokster* limited inducement liability only to those “who distribute[] a device” or a “product.” Br. 41 (citing *Grokster*, 545 U.S. at

919). That is incorrect. It would be absurd to limit inducement liability only to the one-time distribution of a product, while exempting operation of a service that has ongoing dealings with direct infringers. Not surprisingly, that is not the law.

Grokster grounded its inducement standard in contributory infringement. 545 U.S. at 930 (“One infringes contributorily by intentionally inducing or encouraging direct infringement.”) (citing *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)). And courts have long held service providers contributorily liable for intentionally facilitating direct infringement. For example, *Gershwin*, on which *Grokster* relied, held the defendant contributorily liable for providing services of promoting and sponsoring infringing performances. *Gershwin*, 443 F.2d at 1162-63; *see also, e.g., Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263-64 (9th Cir. 1996) (swap meet operators liable if they provided services to vendors selling counterfeit recordings). *Grokster* itself also identified advertising services as a “classic” case of inducement. 545 U.S. at 935-36; *see also Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62-63 (1911) (defendant liable for advertising and selling films for infringing uses); *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 405 (C.C.S.D.N.Y 1966) (advertising agency liable for placing ads for infringing records).

Defendants' argument is also foreclosed by post-*Grokster* Circuit precedent holding that "the standard for inducement liability is providing a *service* 'with the object of promoting its use to infringe copyright.'" *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 801 (9th Cir. 2007) (quoting *Grokster*, 545 U.S. at 937) (emphasis added); accord *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170 n.11 (9th Cir. 2007) (applying *Grokster*'s inducement standard to search engine services); *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007) (applying *Grokster* to websites' password-hacking services).

3. Any Noninfringing Uses of BitTorrent Are Irrelevant.

Defendants are incorrect in arguing that an *ad hoc* "balancing principle" (Br. 54) must be employed in each inducement case to see if noninfringing uses or technological developments might excuse intentional wrongdoing in the particular case. See Br. 52-55 (citing *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984)). *Grokster* squarely held that *Sony*'s "substantial noninfringing use" defense is inapplicable to inducement claims. 545 U.S. at 927-28, 933-34. In its own earlier decision in *Grokster*, this Court had ruled that the defendants' peer-to-peer services had substantial noninfringing uses and therefore were not liable. *Grokster*, 380 F.3d at 1160-62. In reversing, the Supreme Court assumed the existence of such substantial noninfringing uses, but held that notwithstanding any noninfringing uses, the peer-to-peer services were liable if they intentionally

facilitated infringement: “where evidence goes beyond a product’s characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony*’s staple-article rule will not preclude liability.” *Grokster*, 545 U.S. at 935. Thus, “nothing in *Sony* requires courts to ignore evidence of intent if there is such evidence, and the case was never meant to foreclose rules of fault-based liability derived from the common law.” *Id.* at 934-35.

Holding Defendants liable for their intentional wrongdoing in no way impairs the technological development of BitTorrent technology for legitimate uses. As a general rule, because inducement “premises liability on purposeful, culpable expression and conduct,” imposing liability in such cases “does nothing to compromise legitimate commerce or discourage innovation having a lawful purpose.” *Id.* at 937. In short, case-by-case balancing is inappropriate, because *Grokster* held that the noninfringing uses of a technology never excuse its intentional misuse.

4. Causation Is Established By Proof That the Service Was Actually Used to Infringe.

Defendants also misapprehend the nature of the “causal connection between defendant’s conduct and specific acts of infringement” required for *Grokster* liability. Br. 43. As noted, *Grokster* requires three elements: offering a service or product that can be used for infringement; wrongful intent to facilitate such

infringement; and “evidence of actual infringement” by users of the service or product. *Grokster*, 545 U.S. at 940. Because Defendants operated their sites with the actual intent to bring about infringement, the only causal element required under *Grokster* is proof that users in fact used the sites to infringe. That fact is not genuinely disputed.

Defendants contend that Plaintiffs also must show a direct causal connection between a specific message inducing infringement and a specific act of infringement. Any such requirement is foreclosed by *Grokster*'s statement of the inducement elements, as explained above. *Grokster* also expressly rejected the argument that liability arises only when the defendant disseminates messages that encourage users to infringe. “[T]he culpable act is not merely the encouragement of infringement but also the distribution of the tool intended for infringing use” *Id.* at 940 n.13; *see also* 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.04[A][4], at 12-116 n.315 (rev. ed. 2010) (infringing user need not be recipient of specific message to find liability). Hence, *Grokster* emphasized that liability could be based on *internal* communications manifesting the intent to facilitate infringement, even if those communications were never sent to users, because “the function of the message in the theory of inducement is to prove by a defendant’s own statements that his unlawful purpose disqualifies him from claiming protection (and *incidentally* to point to actual violators likely to be

found among those who hear or read the message).” 545 U.S. at 938 (emphasis added). “Proving that a message was sent out, then, is the preeminent *but not exclusive* way of showing that active steps were taken with the purpose of bringing about infringing acts, and of showing that *infringing acts took place by using the device distributed.*” *Id.* (emphasis added).

Defendants also appear to suggest that they should escape liability if the infringing users of the Fung Sites could have used other BitTorrent services to infringe instead. Br. 44. Again, that is inconsistent with *Grokster*, which only requires “evidence of actual infringement” using Defendants’ services. 545 U.S. at 940. Indeed, *Grokster* itself concerned technology that was not unique. *Grokster* was one of several licensors of the FastTrack technology, and StreamCast utilized open Gnutella technology. *Grokster*, 545 U.S. at 921; ER506-07. The availability of alternative means to infringe did not immunize the *Grokster* defendants from liability for the infringement that they induced. The same is true here.⁵

⁵ Contrary to Defendants’ contentions, *Visa* is inapposite on this point because it did not involve intentional facilitation under *Grokster*. *Visa*, 494 F.3d at 800-01. Defendant’s reliance on the “DES cases” (Br. 45) is also misplaced. In those cases, it was impossible to identify the specific manufacturer of the drug that caused harm. *See Sindell v. Abbott Labs.*, 607 P.2d 924, 936 (Cal. 1980). Here, Defendants are being held liable only for infringements that actually involved use of the Fung Sites. ER72. Even further afield is Defendants’ contention that *Grokster* liability should turn on the “capacities and efforts of . . . copyright owners to prevent or limit infringements.” Br. 58. Inducement liability rests on Defendants’ own culpable conduct and the resulting infringement, not on anything copyright owners may do.

5. The First Amendment Is Not Implicated.

Defendants frivolously claim the First Amendment prohibits consideration of statements made by Defendants and their agents, without citing a single case remotely suggesting that use of a party's statements to demonstrate wrongful intent violates the First Amendment. *See* Br. 42-43, 62-64.⁶ Defendants' "*statements and actions*" are plainly relevant to determine whether defendants acted with the object of promoting infringement. *Grokster*, 545 U.S. at 941 (emphasis added) (explaining also that liability may be based on "evidence of the distributors' words and deeds going beyond distribution"); *id.* at 938 ("The function of the message in the theory of inducement is to prove by a defendant's own statements that his unlawful purpose disqualifies him from claiming protection."). Thus, *Grokster* does not assign liability based on anti-copyright views, but rather on the intentional conduct that facilitates infringement.⁷ The First Amendment plainly permits

⁶ Defendants also cite the Fifth Amendment, but that argument is presented for the first time on appeal and is therefore forfeited. *Smith*, 194 F.3d at 1052. It is also meritless for the reasons explained below.

⁷ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (cited by Defendants at Br. 64) is not to the contrary. The speech in that case was not connected to proscribed conduct, but was proscribed directly. *See id.* at 2723-24; *see also id.* at 2723 n.5 (government had abandoned argument that the speech could be proscribed as incidental to illegal conduct such as conspiracy). Defendants' citation to *In re Anonymous Online Speakers*, 611 F.3d 653 (9th Cir. 2010), *opinion withdrawn and superseded by*, No.09-71265, – F.3d –, 2011 WL 61635 (9th Cir. Jan. 7, 2011), is even farther afield. That case concerns the right of

consideration of statements to show intent, and a novel holding otherwise would upset long-settled rules of evidence providing for consideration of statements as probative of intent. *See, e.g.*, Fed. R. Evid. 801(d)(2); Fed. R. Crim. P. 16(a); *see also United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 n.3 (1965) (statements that cannot be basis of liability can be used to show intent).

Moreover, when statements are part of the course of illegal conduct itself, they can be proscribed directly. The First Amendment affords no protection to speech in furtherance of unlawful acts. *See United States v. Williams*, 553 U.S. 285, 298 (2008) (“Many long established criminal proscriptions – such as laws against conspiracy, incitement, and solicitation – criminalize speech . . . that is intended to induce or commence illegal activities”); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001) (publication of “directory” to facilitate infringement not protected); *see also United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982). The First Amendment plainly does not bar consideration of Defendants’ statements to establish their *Grokster* liability.

B. The Material Facts Establishing *Grokster* Liability Are Undisputed.

Applying the proper legal standard, the district court correctly concluded that there are no material facts in dispute and Defendants are liable under *Grokster*

online speakers to remain anonymous, not whether statements posted online may be used as evidence of unlawful intent.

as a matter of law. Defendants do not meaningfully contest the facts (as opposed to rewriting the law) concerning any of the three elements. They do not dispute their operation of websites suitable for infringing use, or the actual use of those sites to commit infringement on a massive scale – the reproduction and distribution of Plaintiffs’ works by individual users. *See* ER45-50. While they purport to contest the third *Grokster* element – their “intent to bring about infringement,” *Grokster*, 545 U.S. at 940 – they simply ignore almost all of the record evidence unmistakably demonstrating that intent.⁸ And the handful of evidentiary objections they do raise are baseless, irrelevant, or both. Mere assertions of the existence of a factual dispute and conclusory denials of wrongful intent are insufficient to avoid summary judgment. *See, e.g., Head v. Glacier Northwest Inc.*, 413 F.3d 1053, 1059 (9th Cir. 2005).

Summary judgment is therefore proper here, just as the Supreme Court in *Grokster* effectively directed entry of summary judgment for the plaintiffs there because the defendants’ “unlawful objective” was “unmistakable.” 545 U.S. at 940. Indeed, a number of cases, including the decision below, have properly found inducement liability on the basis of summary judgment records pointing to a

⁸ Arguments about the facts relied on by the district court but unmentioned in Defendants’ brief are accordingly waived. *See Christian Legal Soc’y Chapter of Univ. of Cal. v. Wu*, 626 F.3d 483, 487-88 (9th Cir. 2010) (this court will not “consider matters on appeal that are not specifically and distinctly argued in appellant’s opening brief”).

consistent pattern of conduct as in *Grokster*. See *Arista Records LLC v. Lime Group LLC*, 715 F. Supp. 2d 481, 515 (S.D.N.Y. 2010); *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 154 (S.D.N.Y. 2009); *Metro-Goldwyn-Mayer Studios, Inc., v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 992 (C.D. Cal. 2006) (on remand from Supreme Court).

A range of evidence could be used to establish wrongful intent under *Grokster*. *Grokster* itself identified several nonexhaustive categories of probative evidence present in that case. First, the “classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations,” *Grokster*, 545 U.S. at 937, including by “responding affirmatively to requests for help in locating and playing copyrighted materials,” *id.* at 938. Second, internal communications may manifest the intent to facilitate infringement. *Id.* Third, intent may be shown by “aiming to satisfy a known source of demand for copyright infringement.” *Id.* at 939. Fourth, refusing to deploy “filtering tools or other mechanisms to diminish the infringing activity,” combined with other evidence, is probative of such intent. *Id.* Fifth, other evidence of intent may be buttressed where “the commercial sense of [the] enterprise turns on high-volume use, which the record shows is infringing,” as when Defendants use an advertising revenue model driven by infringing use. *Id.* at 940.

All those factors are present here. Defendants intentionally created and continue to maintain an online destination for infringement. They have sought out dot-torrent files for likely infringing material, organized them into easily browsable categories, and solicited users to upload dot-torrent files for infringing movies. *Supra* at 7-10. There is nothing accidental or technology-neutral about the steps Defendants have taken to induce infringement. For example, they created the “Box Office Movies” feature and designed software that recognized blatantly infringement-related terms in files in order to categorize them as video files. Likewise, they targeted and drew users searching for illegal content to the Fung Sites, and bestowed titles on active users like “I pir4te, therefore I am” and “All Day I Dream About W4rez.” *Supra* at 10. And they repeatedly have provided technical assistance to users to help them infringe. *Supra* at 10-11. Thus, Defendants broadcast a message to solicit infringing activity, including by targeting a user base seeking infringing materials. *See Grokster*, 545 U.S. at 937-38; *Grokster*, 454 F. Supp. 2d at 985-86 (purposeful solicitation of and technical assistance to infringing users); *Lime Group*, 715 F. Supp. 2d at 510-12 (same); *Usenet.com*, 633 F. Supp. 2d at 152-53 (same, including use of metatags).

Nor did Defendants take meaningful steps to diminish infringing activity on the Fung Sites. *See Grokster*, 545 U.S. at 939; *see also Grokster*, 454 F. Supp. 2d at 989-92; *Lime Group*, 715 F. Supp. 2d at 513-15; *Usenet.com*, 633 F. Supp. 2d at

153. They implemented various programs that recognized infringement-related terms in video files, but failed to investigate or delete those files. *Supra* at 9. At the same time, they policed and blocked the availability of other kinds of content on their site, such as pornography, including by removing offending users and dot-torrent files. *Supra* at 14. Until enjoined (and even thereafter), they took no analogous steps to mitigate copyright infringement.⁹ *Id.*

Further, Defendants' advertising-based revenue model is predicated on the rampant infringing activity on their sites – 95% of the actual downloads based on undisputed evidence. *See supra* at 12-13; *Grokster*, 545 U.S. at 940-41; *see also Grokster*, 454 F. Supp. 2d at 985 (scale of infringement “provides the backdrop against which all of StreamCast’s actions must be assessed”); *Lime Group*, 715 F. Supp. 2d at 510 (same); *Usenet.com*, 633 F. Supp. 2d at 152 (same). Defendants even went one step further by touting the presence of infringing content on their sites to attract advertisers. *Supra* at 13; *see Grokster*, 545 U.S. at 939-40

⁹ Defendants point to their “attempts to prevent infringement” and to “work[] with” copyright owners, which consist of purporting to respond to some takedown notices. Br. 21-22. But even if Defendants consistently complied with such notices – a disputed question – given the extensive evidence that Defendants themselves encouraged massive amounts of infringement, such after-the-fact removal of copyrighted works in response to a notice would be just a fig leaf for Defendants' inducement. The staggering scale of Defendants' infringing activities and the speed at which dot-torrent files can be uploaded and content files disseminated ensure that copyright owners are only playing catch-up on the massive infringement Defendants intentionally facilitate.

(infringement-based business model is evidence of inducement); *Grokster*, 454 F. Supp. 2d at 988-89 (same); *Lime Group*, 715 F. Supp. 2d at 512-13; *Usenet.com*, 663 F. Supp. 2d at 153 (same).

All of this evidence is unrebutted. Defendants attempt to challenge only a smattering of points. They argue that a few of the specific statements cited by the district court were made when Defendants' sites relied on different technology, not BitTorrent. Br. at 17-18. This argument was not raised below as to any of the statements and is forfeited. ER459-61; *Smith*, 194 F.3d at 1052. In any event, the objection is misguided – the relevant fact is that Fung admitted to “stealing” by indexing infringing files for his Isohunt website, regardless of the underlying technology used to infringe.

Defendants also assert that the Fung Sites' forum “moderators” were not Defendants' agents. Br. 38. However, the district court found that Defendants had raised no factual dispute that the moderators were agents “with respect to their interactions with the online message boards and forums.” ER57-58. On appeal, Defendants simply assert that there is “substantial evidence that supports contrary conclusions,” Br. 38, without making any argument as to why the court's legal analysis was wrong in light of the snippets of facts Defendants quote, Br. 20-21. The unrebutted record shows that Defendants selected moderators and then vested them with the revocable authority and technical ability to police Defendants'

forums, by editing or deleting forum posts, banning users, deleting dot-torrent files, and enforcing Defendants' rules and policies regarding abusive behavior.

SER212-15. As the district court correctly noted, those facts establish an agency relationship. ER57-58 (citing *Restatement (Third) of Agency* § 3.01 (2006)); see also *Holley v. Crank*, 400 F.3d 667, 673 (9th Cir. 2005). Defendants' repeated point that the moderators were not paid, Br. 20-21, is legally irrelevant. *Comm'r v. Bollinger*, 485 U.S. 340, 349 (1988) (law of agency "permits agents to be unpaid family members, friends or associates").

Defendants also criticize the statistical analyses showing the massive amount of infringement the Fung Sites facilitated. Br. 15-16. But Defendants present no actual conflicting evidence showing any greater use of the Fung Sites for non-infringing purposes. And, as the district court recognized, even a somewhat lower number would be beside the point, because even if the Fung Sites had more significant noninfringing uses, that is no defense to *Grokster* liability. *Supra* at 23-24.¹⁰

¹⁰ Defendants argue in passing that the analysis excluded what Defendants erroneously call "high-volume non-infringing activity," citing their evidentiary objections in the district court. Br. 16. But Defendants do not actually show how the study's design biased the infringement figure, even though they were provided the data from which the figure was calculated. ER39. Hence, they have not created any factual dispute about the reliability of the method established by Plaintiffs' experts. ER275-95.

Defendants' assertion that there are factual disputes about the BitTorrent technology and "ecosystem" (Br. 7-16, 38) is similarly trumped up. They argue that their expert had a "large-scale view" of BitTorrent while Plaintiffs' expert had a "narrow" view. Br. 38. But they point to no specific disputes about the fundamental workings of BitTorrent or the Fung Sites that might affect their inducement liability. Equally irrelevant is their contention that Plaintiffs' expert did not sufficiently emphasize the role of the "publisher," *i.e.*, the individual who initially creates a dot-torrent file. Br. 8. That is no more relevant to the inducement analysis than the identity of the direct uploaders of infringing copies in *Grokster*, because Defendants are being held secondarily liable. Defendants do not dispute that, in the usual course, clicking on a dot-torrent file on the Fung Sites automatically initiates the download of the associated infringing content file without any further user input. ER36, 510-11. In fact, they acknowledge it. Br. 14. There are no material disputes about the functioning of BitTorrent technology generally, much less Defendants' inducement using that technology.¹¹

¹¹ Defendants argue that they needed further discovery related to the availability of infringing content through other websites and potential non-infringing uses of BitTorrent technology. Br. 24-27, 69-70. For the reasons stated above, such discovery is not relevant, and the district court's denial of further discovery was an entirely appropriate exercise of discretion. *See Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) (discovery orders reviewed for abuse of discretion). The court also properly denied Defendants' requests to go on a fishing expedition for "evidence about methods for reducing infringement" in the abstract, because

The undisputed evidence overwhelmingly demonstrates Defendants' clear intent that the Fung Sites be used to infringe. They are liable under *Grokster*.

II. DEFENDANTS' INDUCEMENT IS NOT IMMUNIZED BY THE DMCA.

The district court correctly held that the DMCA provides no defense for Defendants' intentional wrongdoing. First, the DMCA provides no immunity for intentional wrongdoing under *Grokster*. The DMCA shields only innocent service providers from liability. Second, Defendants are outside the § 512(d) safe harbor for two additional reasons, either of which alone disqualifies them: they have always had "actual knowledge" of infringement and (*a fortiori*) were "aware of facts or circumstances from which infringing activity is apparent," 17 U.S.C. § 512(d)(1)(A)-(B); and they obtain a "financial benefit directly" from infringement they have the "right and ability to control," 17 U.S.C. § 512(d)(2). Third, Defendants' argument that they are immunized under 17 U.S.C. § 512(a) for operation of their tracker servers is both legally erroneous and irrelevant in light of their inducement liability for operating their torrent websites.

Grokster liability turns on Defendants' own actual and intentional wrongful conduct.

A. The DMCA Protects Only Innocent Service Providers, Not *Grokster* Inducers.

The DMCA shields “innocent” service providers from liability for incidental infringement over their facilities under narrowly tailored circumstances, thereby maintaining balanced protection for copyrighted material online. Congress expressly designed the safe harbor requirements to “preserve[] 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.” S. Rep. No. 105-190, at 20 (1998). Thus, the statute is carefully structured to protect service providers who act responsibly to disable infringing material under certain circumstances where infringement occurs only incidentally to provision of service, while continuing to provide protection for copyrighted materials online.

Granting DMCA immunity to intentional infringers such as Defendants would wholly disrupt the balance struck by the DMCA. It would create incentives for service providers acting in bad faith to foster and profit from as much infringement as possible, while forcing copyright owners to constantly attempt to play catch-up by sending takedown notices to parties acting in bad faith. The balance would be struck entirely in favor of service providers, even when service providers intentionally exploit copyright owners’ valuable works online. This is inconsistent with the DMCA’s framework, as the Fourth Circuit has noted:

The DMCA's protection of an innocent service provider disappears at the moment the service provider loses its innocence, *i.e.*, at the moment it becomes aware that a third party is using its system to infringe. At that point, the Act shifts responsibility to the service provider to disable the infringing matter

ALS Scan, Inc. v. RemarQ Cmtys., Inc., 239 F.3d 619, 625 (4th Cir. 2001).

In particular, the safe harbors under § 512(a)-(d) apply only to liability “by reason of” providing particular Internet service functions specified in each subsection (in addition to meeting numerous other preconditions). But *Grokster* liability arises “by reason of” intentional actions directed to promoting infringing activity, not by reason of performing any specific technical activities. *Supra* at 24-26. Moreover, Defendants’ intentional facilitation of infringement means, *a fortiori*, that Defendants were aware of facts and circumstances pointing to infringement. *Infra* at 39-46. As the district court correctly held,

inducement liability and the [DMCA] safe harbors are inherently contradictory. Inducement liability is based on active bad faith conduct aimed at promoting infringement; the statutory safe harbors are based on passive good faith conduct aimed at operating a legitimate internet business.... Defendants are liable for inducement. There is no safe harbor for such conduct.

ER71; *accord Usenet.com*, 633 F. Supp. 2d at 142.

B. Additional Factors Disqualify Defendants from the DMCA Defense Under § 512(d).

Defendant also fail two other key preconditions of § 512(d), the primary DMCA safe harbor in which they rely.¹²

1. Defendants Had Actual Knowledge and Were Aware of Facts and Circumstances From Which Infringing Activity Was Apparent.

The § 512(d) defense is unavailable to a service provider that has “actual knowledge that the . . . activity [using its service] is infringing” or, in the absence of such knowledge, is “aware of facts or circumstances from which infringing activity is apparent,” yet fails to “act[] expeditiously to remove, or disable access to, the [infringing] material.” § 512(d)(1). The numerous undisputed facts reviewed in Part I, which demonstrate Defendants’ culpable conduct to induce infringement, also indisputably show Defendants’ knowledge and awareness of infringing activity using their websites. Defendants deliberately sought out and organized dot-torrent files for infringing material and assisted users engaging in

¹² Section 512(d) applies to “infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link.” § 512(d). Defendants also assert that they qualify for the defense under § 512(c), which applies to storage of infringing material at the direction of a user on the service provider’s system network. Assuming *arguendo* that Defendants provide such “storage,” § 512(c) contains requirements parallel in relevant part to those in § 512(d)(1)-(2), which Defendants do not meet for reasons explained below. 17 U.S.C. § 512(c)(1)(A)-(B).

infringement, among other manifestations of knowledge and awareness. *Supra* at 7-11. Under § 512(d), a service provider with such knowledge and awareness must expeditiously block infringing material to qualify for the safe harbor. Far from doing so, Defendants intentionally facilitated and promoted that infringement.

Defendants' primary response is to assert in conclusory fashion that they had only "purely constructive knowledge" of infringement, while noting that the district court cited the fact that 90 to 95% of the dot-torrent files on their sites corresponded to infringing content. Br. 68. But the district court did not base its finding of knowledge and awareness solely – or even significantly – on the extremely high proportion of infringing use of the Fung Sites. Rather, the record is replete with evidence, reviewed above, that indisputably shows that Defendants had actual subjective knowledge and awareness of the facts and circumstances from which infringing activity was apparent, and fully intended to encourage that infringement. *Supra* at 7-14. Defendants' knowledge and awareness was not "constructive" in any ordinary sense of that term – *i.e.*, knowledge imputed to them in the absence of actual subjective knowledge or awareness. *See, e.g., Grokster*, 380 F.3d at 1160 ("constructive knowledge" is "imputed"). Defendants were clearly aware of the rampant infringing activity using their sites, including specific works being infringed. That is *actual* not "constructive" knowledge.

Defendants further rely on *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099 (C.D. Cal. 2009), which held that “general awareness of infringement, without more,” does not disqualify a service provider from the DMCA defense, *id.* at 1111, and *Viacom International Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), which held that knowledge or awareness under the DMCA is triggered only by “knowledge of specific and identifiable infringements of particular individual items,” *id.* at 523. The legal analysis of the DMCA in those cases is incorrect, as discussed below. But in any event, that analysis does not help Defendants. For one thing, in many instances Defendants did in fact have “knowledge of specific and identifiable infringements of particular individual items.” *Supra* at 10-11 (Defendants assisting users in infringing downloads).

Further, *UMG* presents a completely different fact pattern. No argument was presented in *UMG* that the service provider intended to induce infringement as in *Grokster*. Indeed, the *UMG* district court concluded that the defendant there took affirmative steps to limit infringement wherever feasible. 665 F. Supp. 2d at 1111-12. Here, Defendants intentionally facilitated the rampant infringement on their sites, and repeatedly took affirmative steps to encourage – not combat – that infringement. The *UMG* district court also found that the service provider was at most constructively aware of infringement on its site, in the sense that it knew only

that users *could* use its site (like many Internet sites) to infringe. *Id.* at 1111. Here, as explained above, Defendants did not merely have such constructive or imputed knowledge. They actually knew, and were aware of, the massive infringement using their sites; constantly referenced that infringement including in messages to users and potential advertisers; and indeed deliberately fostered it. *Supra* at 7-14.

In any event, the specific-knowledge standard is legally erroneous, and Defendants cannot be immunized from liability merely by baldly claiming to remain ignorant of the specifics of infringing acts they *intentionally* facilitated. The statutory language of § 512(d)(1) forecloses an interpretation that knowledge of specific infringing items is required. The word “specific” nowhere appears therein. Far from requiring knowledge of particular infringing “items,” the statute expressly denies the safe harbor whenever the service provider has “actual knowledge that the material *or activity* is infringing” or is “aware of facts or circumstances from which infringing *activity* is apparent.” § 512(d)(1)(A), (B) (emphasis added). “The term ‘activity’ is intended to mean . . . wrongful activity that is occurring at the site on the provider’s system or network” S. Rep. 105-190, at 44. Requiring item-specific knowledge of infringement would also render the “actual knowledge” prong of § 512(d)(1)(A) superfluous, and strip the statutory phrase “in the absence of such actual knowledge” in § 512(d)(1)(B) of any meaning.

Instead, the service provider need only have “subjective awareness of . . . the facts or circumstances” in question, and thereafter, an objective “reasonable person” standard is used to determine “whether infringing activity would have been apparent” from the known facts and circumstances. S. Rep. No. 105-190 at 44. Congress struck a middle position between holding service providers to a purely constructive or imputed knowledge standard, which would provide too little protection to service providers, and an “item-specific” knowledge standard, which would conversely provide too little protection to copyright owners. There is no one set of “facts or circumstances” necessary to raise a “red flag” warning the provider that it is facilitating infringing activity. *See also* H.R. Rep. 105-551(II), at 53 (1998).

Grokster also illustrates why judicially grafting a specific knowledge standard onto the DMCA would unduly protect intentional wrongdoers, not just innocent service providers. This Court’s decision in *Grokster* had held that the peer-to-peer services there were not liable for facilitating infringement because they lacked “knowledge of specific infringement.” 380 F.3d at 1162. In reversing, the Supreme Court held that requiring ““specific knowledge of infringement”” was “error” where the defendant acts with the very purpose of facilitating infringement. *Grokster*, 545 U.S. at 934. As the Supreme Court recognized, a specific knowledge standard can be manipulated by intentional wrongdoers to evade

liability for the very infringement from which they profit. Reading a specific knowledge standard into the DMCA would parallel the “error” reversed in *Grokster*.

The district court also correctly held that to the extent Defendants avoided obtaining knowledge of specific infringement, their willful blindness itself constitutes knowledge and awareness under the DMCA. ER67-70. It is well established that “[w]illful blindness is knowledge in copyright law . . . as it is in the law generally.” *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003).¹³ *Accord Fonovisa*, 76 F. 3d at 265 (holding that plaintiff stated contributory infringement claim where defendant swap meet organizer was “willfully blind to the ongoing violations” of vendors) (internal quotation marks omitted); *UMG Recordings, Inc. v. Sinnott*, 300 F. Supp. 2d 993, 1000 (E.D. Cal. 2004) (defendant “is held to actual knowledge of the information contained in [infringement notification] letters” even if he deliberately avoided reading them); *see also United States v. Real Property at 2659 Roundhill Dr.*, 194 F.3d 1020, 1028 (9th Cir. 1999) (holding, in context of forfeiture statute requiring knowing action, “an owner cannot deliberately avoid knowledge through willful blindness” (internal quotation marks and citations omitted)).

¹³ While the district court cited the Seventh Circuit’s *Aimster* decision in its discussion of why blatant infringers are not eligible for the DMCA safe harbor, it did not, as Defendants suggest, rely on § 512(i). *See* Br. 68; ER70-71.

This longstanding rule applies equally under the DMCA’s red-flag awareness standard. “Under this standard, a service provider would have no obligation to seek out copyright infringement, *but it would not qualify for the safe harbor if it had turned a blind eye to ‘red flags’ of obvious infringement.*” H.R. Rep. 105-551(II) at 57 (emphasis added); *accord Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1177 (C.D. Cal. 2002). Once Defendants were aware of the massive infringement facilitated by their sites (infringement they fully intended, encouraged and fostered), they could not “turn[] a blind eye to [such] ‘red flags’ of obvious infringement” and still claim immunity under the DMCA by deliberately avoiding knowledge of specifics. *See* H.R. Rep. 105-551(II) at 57. Such intentional avoidance of specific knowledge is itself knowledge under the DMCA, as in the law generally.

CCBill is not to the contrary. That case held that service providers have no free-standing “investigative duties” under the DMCA *in the absence of* actual knowledge or awareness of facts and circumstances from which infringing activity is apparent (“red flags”). 488 F.3d at 1114. Having found there were no “red flags” in that case, *CCBill* did not address whether service providers must

investigate when there *are* such red flags, much less rule that service providers may willfully ignore red flags of which they are aware.¹⁴

The district court's ruling that Defendants had knowledge and awareness of infringing activity negating the § 512(d) defense was plainly correct.

2. Defendants Also Derive a Direct Financial Benefit from Infringing Activity They Have the Right and Ability to Control.

Defendants simply ignore the district court's alternative holding that they are outside the DMCA because they receive “a financial benefit directly attributable to the infringing activity” and have “the right and ability to control such activity.” § 512(d)(2); ER67. Defendants have therefore waived any argument that they satisfy this necessary precondition of the DMCA. *Christian Legal Soc’y*, 626 F.3d at 487-88. The district court's rejection of the defense should be affirmed on that basis alone.

That ruling is, moreover, plainly correct. This Court has held that the financial benefit element in the DMCA should be interpreted consistently with the similarly worded financial benefit element of the standard for common law

¹⁴ Appellees note that they respectfully disagree with the holding that there were no “red flags” on the facts of *CCBill*, because it opens the door to service providers tolerating blatant infringement if read broadly. *See, e.g.*, Jane C. Ginsburg, *Separating the Sony Sheep From the Grokster Goats*, 50 *Ariz. L. Rev.* 577, 596-598 (2008). But, as explained above, it is unnecessary to revisit that holding here, where the existence of “red flags” is indisputable.

vicarious copyright liability. *CCBill*, 488 F.3d at 1117 (following the “the well-established rule of construction that where Congress uses terms that have accumulated settled meaning under common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms”) (quotation marks omitted). Under that standard, a direct financial benefit exists when infringing material is a “draw” for customers, *Fonovisa*, 76 F.3d at 263-64, such as when infringing material attracts a user base that correlates to future revenues, *see Napster*, 239 F.3d at 1023. Here, Defendants earned advertising revenue by attracting users with abundant infringing material, plainly deriving a direct financial benefit from infringement. *Supra* at 13.

This Court has not directly addressed the standard for the “right and ability to control [infringing] activity” under the DMCA, and district courts have divided on that issue.¹⁵ It is not necessary to resolve that conflict here, because under any

¹⁵ Some district courts, including the court below, ER67, have followed the rule of construction applied in *CCBill* and held that the control element of the DMCA codifies the common law standard for vicarious copyright liability. *E.g.*, *Costar Group, Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 704 (D. Md. 2001) (“the DMCA provides no safe harbor for vicarious infringement because it codifies both elements of vicarious liability”). Other district courts have held that the control element of the DMCA requires something “more” than the vicarious liability standard, without explaining what. *E.g.*, *UMG*, 665 F. Supp. 2d at 1112-16. Courts adopting the latter position have reasoned that codification of the vicarious liability standard would result in a service provider having control merely because it can remove infringing material in response to takedown notices, which the DMCA requires as a condition of the defense. *See id.* However, even under the common law standard under governing precedent, being able to respond to

possible reading of the statutory language, Defendants have plainly always had the right and ability to control infringement using the Fung Sites. Defendants possess “the ability to locate infringing material listed on [their] search indices, and the right to terminate users’ access to the system” “for any reason whatsoever.”

Napster, 239 F.3d at 1023-24 (addressing vicarious liability); *see also*

Amazon.com, Inc., 508 F.3d at 1173 (for vicarious liability, “a defendant exercises control over a direct infringer when he has both a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so”). But their control goes much further. Defendants themselves have selected and posted many of the dot-torrent files that unlock infringing content, including by searching for and collecting dot-torrent files from other websites. *Supra* at 8-9. And even when users post dot-torrent files, Defendants pick and choose among them, organize them, and otherwise control how users interact with them in order to obtain infringing files. *Supra* at 9-10. Defendants also selectively search for and remove content that they think is undesirable, *supra* at 14, and assist users openly engaging in infringement, *supra* at 10-11.

takedown notices does not – standing alone – appear to constitute control. *See Napster*, 239 F.3d at 1023-24; *Amazon.com*, 508 F.3d at 1173-74.

Indeed, although neither knowledge nor intent are elements of § 512(d)(2),¹⁶ here we are dealing with parties that intentionally sought to profit by *inducing* infringement on sites they controlled entirely. Such parties can hardly claim immunity under § 512(d)(2).

3. Defendants' Asserted Compliance with Takedown Notices Is Not Sufficient to Qualify for the § 512(d) Defense.

Defendants repeatedly argue that they are immune under the DMCA because they (assertedly) complied with takedown notices sent by copyright owners. Br. 66-67.¹⁷ But the DMCA did not create a regime in which service providers can deliberately facilitate and profit from infringement and then claim immunity as long as they comply with after-the-fact takedown notices. Under the plain language and structure of the statute, complying with takedown notices is a necessary *but not sufficient* precondition for the DMCA defense. The statute unambiguously states that in addition to satisfying the takedown notice

¹⁶ This Court has held that knowledge or awareness of infringement is not an element of vicarious liability. *E.g.*, *Fonovisa*, 76 F.3d at 262 (following *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963) (imposing vicarious liability “even in the absence of actual knowledge that the copyright monopoly is being impaired”). And the statutory language of the DMCA precludes importing a knowledge element in this context, both because § 512(d)(2) does not mention knowledge or awareness, and because requiring knowledge or awareness under § 512(d)(2) would make it redundant of § 512(d)(1). Accordingly, *Viacom*, 718 F. Supp. 2d at 525, erred by importing a knowledge requirement into the parallel control element of § 512(c).

¹⁷ The district court found that the evidence concerning Defendants' compliance with takedown notices was disputed. ER67.

requirement in § 512(d)(3), a service provider must *also* satisfy the knowledge or awareness requirement in § 512(d)(1) *and* the financial benefit and control requirement in § 512(d)(2). *See* § 512(d); *see also* H.R. Rep. 105-551(II) at 54 (confirming that “Section 512 does not specifically mandate use of a notice and take-down procedure” and service provider must remove infringing material where “red flag” test is met “even if the copyright owner or its agent does not notify it of a claimed infringement”).

Defendants misleadingly quote a statement of this Court out of context to the effect that “the DMCA . . . grants a safe harbor against liability to certain Internet service providers, even those with actual knowledge of infringement, if they have not received statutorily-compliant notice.” Br. 67 (quoting *Visa* 494 F.3d at 795 n.4 (citing *CCBill* and § 512(c)(3))). But as the authorities cited in the *Visa* footnote make clear, that statement is limited to the context where the only knowledge a service provider allegedly obtains comes *from the copyright owner* via a *defective* notice. *See* § 512(c)(3)(B) (defective “notification from a copyright owner” shall not be considered evidence of knowledge or awareness); *CCBill*, 488 F.3d at 1113 (same). It has no application where, as here, the service provider obtains knowledge from other sources as specified in § 512(d)(1).

C. The § 512(a) Defense Does Not Apply.

Defendants also claim without explanation that they are entitled to the defense under § 512(a) for their separate conduct of operating trackers. Br. 65. But § 512(a) provides a defense merely for intermediaries that act as “conduits” passively transmitting information from one user to another through the Internet. *See CCBill*, 488 F.3d at 1116; *see also* H.R. Rep. 105-551(II) at 51 (subsection applies to providers that “play[] the role of a ‘conduit’ for the communications of others”). Trackers do not do that. They maintain lists of IP addresses of users who have all or part of a content file and respond to user queries by selecting and sending IP address information to each downloading and uploading user. ER510. Thus, a tracker is locating and selecting information, not acting as a passive conduit. *See CCBill*, 488 F.3d at 1116; § 512(a) (subsection does not apply if there is “selection of the material by the service provider”).¹⁸

Moreover, even if § 512(a) applied to Defendants’ tracker-related conduct (which it does not), it would not immunize Defendants’ separate conduct of intentionally providing and indexing dot-torrent files that point to and unlock infringing conduct. That is the basis on which the district court held Defendants

¹⁸ Defendants argue that § 512(a) applies even when the transmitted material is itself noninfringing. Br. 65-66 (citing *CCBill*). That is beside the point. As explained above, trackers do not perform a “conduit” transmission function for any material, infringing or noninfringing.

liable for inducement. *See CCBill*, 488 F.3d at 1117 (defendant immune for some conduct under one subsection of the DMCA “does not receive blanket immunity for its other services”); § 512(n) (“Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section”).

III. THE INJUNCTION IS PROPER.

On the facts here, a strong injunction to disable Defendants’ infringing activities is plainly warranted. Defendants intentionally created a haven for copyright infringement by amassing and organizing millions of dot-torrent files, almost all of which pointed to infringing content, and soliciting a substantial base of users seeking infringing content. ER14, 16, 68-70. The district court found that Defendants created a “niche market for infringement,” that their “very business model, at its core, depends upon copyright infringement,” and that Defendants continued inducing infringement *even after* the liability finding. ER16-17. The court further concluded that Defendants would not cease infringement unless so ordered by the court. ER15, 17; SER12-13. Moreover, as the district court was well aware, Defendants’ obstreperous conduct extended to their litigation tactics: they were sanctioned for discovery abuses five separate times in the litigation. *See* Dkt. #56, 121, 146, 207, 211.

This record would easily support a far more aggressive injunction than that entered by the district court, and the court did not remotely abuse its discretion in

adopting the injunction adopted here. *See, e.g., Creative Computing v. Getloaded.com LLC*, 386 F.3d 930, 937 (9th Cir. 2004); *see also Napster*, 239 F.3d at 1027. The court entered an injunction targeted at the very type of conduct for which Defendants were found liable. It essentially prohibits Defendants from providing access to dot-torrent files corresponding to Plaintiffs' copyrighted works or from otherwise assisting in the reproduction or distribution of those works, and requires Defendants to cease engaging in specified activities found to induce infringement. ER21-27. Consistent with the type of injunction upheld in *Napster*, 239 F.3d at 1027, it imposes obligations on Plaintiffs to provide Defendants with title and other specified information for their copyrighted works, which enables Defendants to engage in title-based filtering. ER5-6, 24-25. The court also made clear that Defendants will not be held in violation of the injunction for unintentional violations. ER20. In short, the injunction permits Defendants to continue to operate legitimate online businesses while preventing them from facilitating infringement of Plaintiffs' copyrighted works.

On appeal, Defendants largely repeat the same objections rejected by the district court: (1) that the injunction's terms are vague and overbroad and thereby infringe First Amendment rights, and (2) that the injunction is improper because Defendants operate from Canada and have non-U.S. users. The district court carefully considered extensive briefing and four separate declarations from Fung

addressing these arguments, and even permitted Defendants the opportunity to provide objections to a tentative injunction issued by the court. Dkt. #403-04, 421-22, 424. The court even modified the injunction in response to certain of Defendants' objections. ER5-6. The district court is in the best position to consider Defendants' arguments and (apart from the modification that Plaintiffs have accepted) properly rejected them. The district court's determinations in that regard are entitled to substantial deference, *Scott*, 306 F.3d at 653, and are plainly correct.

A. The Injunction is Neither Overbroad Nor Vague.

Defendants baselessly object to the injunction's provisions prohibiting three specific types of conduct – soliciting infringing user bases, using infringement-related terms (which are specifically defined in the injunction) in the metadata of their webpages, and providing support for infringing users – as overbroad and vague. Br. 71. Contrary to Defendants' suggestion, each of these provisions prohibits Defendants only from “knowingly engaging” in the proscribed activities. ER22-24.¹⁹ Each provision is squarely aimed at conduct that underlies Defendants' inducement liability. And each is limited by application to “Plaintiffs'

¹⁹ Defendants' brief also does not quote other aspects of these provisions in full and accordingly makes them seem more restrictive than they are. *Compare* Br. 71, *with* ER22-24.

Copyrighted Works,” which includes only those works that Plaintiffs have identified to Defendants in documented title lists. ER24-25.

Further, the injunction’s core requirement that Defendants cease facilitating the infringement of specific works identified by Plaintiffs parallels the injunction approved by this Court in *Napster*. See 239 F. 3d at 1027. The district court did not specifically mandate a title-based filter, but it considered Defendants’ objections below to the potential implementation of a filter, and concluded from the record evidence that Defendants could readily implement such a filter to comply with the injunction without unduly blocking non-infringing content.²⁰ Defendants do not come close to showing any error, much less clear error, in that finding.

Given Defendants’ egregious conduct, including their multiple sanctions for misconduct in the litigation, a much broader injunction could have been issued that also would have prohibited them from engaging in some *lawful* conduct as a

²⁰ *E.g.*, ER3-4 (quoting Fung’s testimony that there are “common mechanisms that could be used to refine the titles that . . . are [being] filter[ed] from going on to [the website]” so that non-infringing media of the same name are not swept in by the filter (quoting SER91)) (alteration in original); ER4 (concluding that Defendants “have overstated the overbreadth problems caused by” the title list, and “Defendants can readily tailor their system to take into account much of the overlap between Plaintiffs’ works and other works”); *id.* (“a properly designed filter can easily distinguish between” certain studio works and public domain works); ER4 (“Fung has admitted that it is possible ‘to set [up] a matching criteria . . . for filter,’ based on variables such as a ‘file size.’” (quoting SER92)).

prophylactic against continuing infringement. *See, e.g., Creative Computing*, 386 F.3d at 937-38 (approving an “especially aggressive prophylactic injunction” in light of defendant’s persistent egregious activity, as the defendant “is in a position analogous to one who has repeatedly shoplifted from a particular store, so the judge prohibits him from entering it again, saving the store’s security guards from the burden of having to follow him around whenever he is there”). That is particularly the case because Defendants intentionally built their business on the foundation of infringement, and continue to profit from their intentional misconduct by operating that business for lawful as well as unlawful purposes in the future. *See* ER16-19; *Grokster*, 545 U.S. at 940 n.13 (noting that effects of past inducing activities carry forward); *Grokster*, 518 F. Supp. 2d 1197, 1233-34 (C.D. Cal. 2007) (discussing same as grounds for granting prospective injunctive relief); Tr. of Oral Argument at 36-37, *Grokster*, 545 U.S. 913 (No. 04-480) (doubting whether “unlawfully expropriated property can be used by the owner of the instrumentality as part of the startup capital for his product” lawfully). Yet the district court took a far more surgical approach, tailoring an injunction analogous to that affirmed in *Napster*, and significantly narrower than the one upheld in *Creative Computing*, by prohibiting Defendants from continuing to engage in the

specific inducing activities for which they had been adjudicated liable. ER21-27, 53-61.²¹

Further, the First Amendment is not implicated by enjoining activities taken to infringe. *See Napster*, 239 F.3d at 1028 (injunction against publishing a “directory” to facilitate infringement raises no First Amendment concerns); *supra* at 27-28. The cases Defendants cite are inapposite. In *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753 (1994), the Supreme Court in fact approved the portion of the injunction necessary to vindicate the rights at issue (access to clinics), but struck down an extraneous provision prohibiting protestors on private property. *Id.* at 769-70. The injunction here is tailored to protecting Plaintiffs’ copyrights, as in *Napster* and in the injunction portion upheld in *Madsen*.²²

Defendants’ conclusory assertion (Br. 71) that certain provisions of the injunction are vague is equally meritless. Injunctions are only set aside under Fed.

²¹ Defendants’ argument (Br. 72) that the injunction is “punitive” is therefore frivolous. The cases cited by Defendants merely suggest that the court must apply the traditional equitable test before entering injunctive relief, which was done here. *See* Br. at 72 (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944); *Amstar Corp. v. Envirotech Corp.*, 823 F.2d 1538, 1548-49 (Fed. Cir. 1987)). In any event, this argument was not raised below, and is therefore forfeited. *Smith*, 194 F.3d at 1052.

²² Neither *Bartnicki v. Vopper*, 532 U.S. 514, 525, 535 (2001), nor *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1086-87 (9th Cir. 1999), concern review of injunctive relief. Each concerns a restriction on protected speech, not speech in aid of unlawful conduct. *Supra* at 28. *Bartnicki* in particular concerned restrictions on the speech of purely innocent parties, the opposite of an injunction entered against an adjudicated intentional wrongdoer. 532 U.S. at 525, 535.

R. Civ. P. 65(d) where “they are so vague that they have no reasonably specific meaning.” *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir. 1992). Defendants make no such showing here. Indeed, their passing mention of the alleged vagueness is so perfunctory that it is not properly presented to the Court. *Brownfield v. City of Yakima*, 612 F.3d 1140, 1149 n.4 (9th Cir. 2010).

B. The Injunction Is Not Impermissibly Extraterritorial.

Defendants also suggest that the injunction is somehow improper because it has extraterritorial effect, in that Defendants now operate in Canada, and the Fung Sites are accessible by users from other countries as well as U.S. users. Br. 73-74. Initially, because Defendants are subject to personal jurisdiction, *see* ER372-73, 393, the district court plainly has jurisdiction to bind them, even if they are located in Canada. *See Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1364 (9th Cir. 1988) (“Because the injunction operates *in personam*, not *in rem*, there is no reason to be concerned about its territorial reach.”). Moreover, the district court carefully limited the injunction to enjoining only activities resulting in “acts of direct infringement, as defined in 17 U.S.C. § 106, that *take place in the United States*.” ER27 (emphasis added). Defendants’ argument is essentially that their interest in continuing their operations internationally outweighs the Plaintiffs’ interest in stopping infringements of their works in the United States.

But the district court was well within its discretion in remedying Defendants' longstanding inducement aimed at U.S. users by preventing future infringements involving U.S. users actionable under U.S. copyright law. The district court considered ample evidence that Defendants intentionally targeted U.S. users and encouraged their infringing activities over years, and continued to do so even *after* being found liable for copyright infringement. ER14, 16-17. The Fung Sites broadly appealed to U.S. users: at one time, 2.5 million unique U.S. users visited the Fung Sites per month, and the Fung Sites were accessed over *50 million times* from the United States in a single month. ER14. And Defendants have not ever stopped soliciting U.S. users. During the course of the injunction briefing, they proposed a version of the Isohunt website fully accessible to U.S. users ("Isohunt Lite") that the Court rejected as inadequate to remedy infringement. ER16-17; SER84-90. And after entry of the injunction, they have continued to make modified forms of the Isohunt website available to U.S. users (an issue in the pending contempt proceedings). Dkt. #465, 495.

At the same time, Defendants to this very day have continued to offer the full range of plaintiffs' copyrighted works on the "Main Isohunt" site in order to continue to profit from infringement. ER17. Defendants claim to block U.S. users from accessing the Main Isohunt site, but in reality they only block users who appear to have U.S. IP addresses. The un rebutted evidence shows that unblocked

portions of the Fung Sites instruct users how to use “proxy” servers that mask a user’s real IP address to circumvent this blocking. SER9, 14-29.²³ Defendants have merely erected a speed bump, not an effective blockade, to prevent access to the Main Isohunt site by the community of tech-savvy U.S. infringers that Defendants intentionally fostered for years. *Supra* at 16, 59-60.

Moreover, the unchallenged evidence shows that even non-U.S. users of the Main Isohunt site distribute infringing content to U.S. users in violation of the U.S. Copyright Act, in the normal course of uploading content to U.S. users in the “swarm.” SER2-7. The process occurs when non-U.S. users obtain dot-torrent files hosted and indexed by the Fung Sites, and begin the process of downloading infringing content files while simultaneously uploading those files to other users in the U.S. *Supra* at 6-7. The district court was well within its discretion to enjoin acts inducing such infringement actionable in the United States. *See L.A. News Serv. v. Conus Commc’n Co. Ltd. P’ship*, 969 F. Supp. 579, 584 (C.D. Cal. 1997) (holding that “an act of infringement was committed within the United States when the Canadian transmission was received and viewed here”); 4 Nimmer § 17.02, at 17-21 (“[R]egardless of how much infringing conduct may or may not occur abroad, when violation of one of the exclusive rights in copyrighted works is

²³ *See also* Dkt. #454 (additional examples filed in contempt proceeding); *How to get past the new isoHunt Lite and get to the old original site*, <http://www.gregledet.net/?p=482> (last visited Jan. 31, 2011).

completed within the United States, the activity becomes actionable under domestic law.”) (footnotes omitted). The district court appropriately tailored the injunction to *effectively* prevent ongoing infringement by U.S. users. *See Scott*, 306 F.3d at 653.

The cases cited by Defendants are not to the contrary. *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982, 987-88 (9th Cir. 2008), *aff'd by equally divided Court*, 131 S. Ct. 565 (2010), and *Subafilms, Ltd. v. MGM-Pathe Commc'ns Co.*, 24 F.3d 1088, 1095 (9th Cir. 1994) (en banc), both concerned the application of the Copyright Act to reproductions made entirely outside of the United States, and without any involvement of U.S. users. In contrast, the injunction here is tied to infringement involving United States users actionable under U.S. copyright law. ER27. Nothing in *Omega* or *Subafilms* suggests that injunctive relief may not reach conduct that directly relates to the very violations under U.S. law for which Defendants were found liable.

CONCLUSION

The orders of the district court should be affirmed.

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Dated: Feb. 1, 2011

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B) and 32(a)(7)(C), the undersigned certifies that the foregoing Brief of Plaintiffs-Appellees contains 13,948 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certificate, the undersigned relied on the word count generate by Microsoft Word.

Dated: February 1, 2011

Respectfully submitted,

/s/ Paul M. Smith
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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

STATUTORY ADDENDUM

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§ 512. Limitations on liability relating to material online

(a) Transitory digital network communications.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if--

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content.

* * * *

(c) Information residing on systems or networks at direction of users.--

(1) In general.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright 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, if the service provider--

(A)(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;

(B) does not receive 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; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

(2) Designated agent.--The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

(3) Elements of notification.--

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

- (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
- (ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
- (iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.
- (iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.
- (v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.
- (vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(B)(i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

- (ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses

(ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

(d) Information location tools.--A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider--

(1)(A) does not have actual knowledge that the material or activity is infringing;

(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive 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; and

(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

* * * *

(i) Conditions for eligibility.--

(1) Accommodation of technology.--The limitations on liability established by this section shall apply to a service provider only if the service provider--

(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, 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; and

(B) accommodates and does not interfere with standard technical measures.

(2) Definition.--As used in this subsection, the term “standard technical measures” means technical measures that are used by copyright owners to identify or protect copyrighted works and--

(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;

(B) are available to any person on reasonable and nondiscriminatory terms; and

(C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

* * * *

(n) Construction.--Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2011, I electronically filed the foregoing with the Clerk of Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have dispatched the foregoing document to a third-party commercial carrier for next-day delivery to the following non-CM/ECF participant:

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