

Docket 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,

v.

GARY FUNG and ISOHUNT WEB TECHNOLOGIES, INC.,

Defendants-Appellants.

*Appeal from a Decision of the United States District Court for the Central District of California,
No. 06-CV-05578 · Honorable Stephen V. Wilson*

REPLY BRIEF OF APPELLANTS

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I. Plaintiffs Ignore the Constitutional Mandate of Jury Trial.

There is no mention of “jury trial” in Plaintiffs’ Opposition Brief. Plaintiffs put on blinders to prevent “jury trial” from being noticed. Defendants submit that errors in proceedings below are clearly seen in the light of possible jury trial. Most important, the District Court exercised powers reserved for the jury when it adopted Plaintiffs’ evidence and inferences and ignored those of Defendants.

There is a correctible reason why the District Court erred in this case: the absence of a defined legal standard for the new *Grokster* rule. [See *MGM v. Grokster, Ltd.*, 545 U.S. 913, 919 and 936-37 (2005).] With a defined legal standard, rulings would have been tethered to fixed principles. Here, principles shifted, first to deprive Defendants of needed evidence and then to impose liability.

In Appellants’ Opening Brief (“AOB”) at 58, Defendants suggest a factors test for the *Grokster* legal standard in the form of a jury instruction that can serve multiple functions and that this Court can modify as it deems appropriate.

Plaintiffs’ proposed legal standard for the new *Grokster* rule (Plaintiffs’ Brief 20-21) cannot be turned into a jury instruction. Plaintiffs’ proposed legal standard amounts to an “I Know It When I See It” legal standard, called herein an “Ikiwisi legal standard.” An Ikiwisi legal standard has no structure or constraint but instead licenses the decider to make a choice according to personal preference or by focusing on happenstance events.

Plaintiffs' proposed legal standard justifies judgment based on a "heap" of otherwise unrelated facts. Facts piled in a heap here include: ubiquitous online features ("automatic downloading"); search engine functions; copyright-neutral technical innovations; category names; statements of unsupervised moderators; technical assistance to visitors; Fung's remarks in various venues; and individuals' direct infringements. Some facts in the heap support a finding of liability; but summary judgment should not be based on a heap of disjointed facts that includes many seriously questionable matters. That power belongs to the jury.¹

The heap approach ignores online cultures of spontaneous utterances and comprehensive memory. As Fung declared in opposition to the motion for summary judgment (ER 490, ¶ 40):

Plaintiffs have clearly examined hundreds of megabytes of information with a fine tooth comb to collect the examples they present to the court. ... [a] collection of examples, obtained by what must be hundreds of hours of sifting."

The judgment of liability in this case, based on a heap of disjointed facts culled from massive digital storage, amounts to a conviction for Aggravated Copyright Delinquency, punished by permanent unemployment in the delinquent's chosen vocation and foretelling a huge damages judgment.

Defendants submit that persons accused of Aggravated Copyright

¹ In the "paradox of the heap" or *sorites*, a heap ceases to exist "at some point" as items are progressively removed. "The paradox affects all vague predicates." A. R. Lacey, *A Dictionary of Philosophy*, "Heap (paradox of)," (3d ed., 1996).

Delinquency, like all defendants sued under the common law, are entitled to trial by jury pursuant to the Seventh Amendment to the United States Constitution.

Google, Inc. in its *Amicus Brief*, stands with Plaintiffs in these matters.

Google evidently prefers an Ikiwisi legal standard administered by judges because it is a large corporation and “looks respectable.” Defendants suggest that Google does not represent the interests of independent Internet developers, some of whom might challenge Google’s dominant position. (*Amicus Brief* at 1, 5.)

Neither Google nor Plaintiffs mention the 95% overlap between torrents available through Defendants’ systems and torrents available through Google and/or Yahoo!. (*AOB* 29-30.) Neither Google nor Plaintiffs mention the 96% of Torrentbox tracker users who get torrents from places other than the Torrentbox torrent site, such as from Google or Yahoo! (*AOB* 11.)

Defendants might argue to the jury that it is unfair to hold Defendants liable if Google, unbothered by Plaintiffs, provides torrents to ten or twenty times the number of users that visit Defendants. Defendants might argue that Defendants are being scapegoated. Defendants might argue that holding Defendants liable while ignoring Google would not curtail infringement. Defendants might argue that Plaintiffs have litigation purposes other than curtailing infringement.

If issues about such evidence or arguments arose during jury trial, Defendants could subpoena witnesses and get a hearing and perhaps have evidence admitted or at least make a record for appeal; but, if Plaintiffs and Google are successful in persuading this Court to affirm the District Court's rulings, such evidence will never be seen much less put into evidence. Any such arguments will be foreclosed from the beginning.

Defendants submit that upholding the right to jury trial will guide judicial management in secondary copyright infringement cases like this one. When jury trial is anticipated, pretrial discovery and summary judgment serve functional purposes. Liberal pretrial discovery leads to fully-considered *in limine* rulings and efficient testimony, avoiding games and unfair surprises. Summary judgment separates genuine issues from sham. Such purposes were not served in this case. The District Court aimed for dispositive rulings.

Defendants submit that upholding the right to jury trial will help to maintain a "sound balance" between copyright protection and technological innovation. *Grokster*, 545 U.S. 928. The sound balance will be declared by the community of citizens and amplified by the Internet. As a practical matter, juries can apply an Ikiwisi legal standard and the law respects their decisions. Unlike judges' opinions, jury verdicts need little interpretation. Therefore, copyright owners with proper aims should pursue jury trials to publicize their capacities to protect their

rights. Anticipations of a public trial, with courtroom testimony and a possible defense verdict will constrain abusive copyright owners such as Plaintiffs.

Defendants submit that upholding the right to jury trial is the best way to deal with rapidly-changing technology. Judicial rulings influence practical decisions for many years but cannot track changes in Internet technology. Juries do not have to track changes. Internet technology adapts to evade legal constraints. Jurors will see through evasions.

II. Plaintiffs' Proposed Legal Standard is Contrary to Common Law Principles.

Plaintiffs' Brief at 20 declares that "*Grokster* Established a Clear Standard for Inducement Liability."

Plaintiffs further declare (*Id.* 21):

The Supreme Court's test is grounded in common-law principles of inducement liability that been applied for over a century. ... That standard neither requires nor permits any revision.

Plaintiffs' proposed legal standard fails to achieve such clarity and certainty. Plaintiffs' proposal, made up of "three straightforward elements" (*Id.* at 20-21), is not based on the *Grokster* rule but on a condensation of the rule stated in connection with another topic. Plaintiffs re-write and expand the part of the opinion they quote to reach the facts of this case. Specific "features" identified by the *Grokster* Court (AOB 47) dissolve into the Third, Fourth and Fifth of

“several nonexhaustive categories of probative evidence.” (Brief at 30.)

Plaintiffs’ proposed legal standard is contrary to common-law principles. First, it disregards “rules of fault-based liability derived from the common law” referenced in *Grokster*, 545 U.S. 934-935.

In *The Common Law* (1881) at 95, Oliver Wendell Holmes, Jr. explained why the common law refuses to impose general liability for a party’s acts that “opened the door for a series of physical sequences ending in damage.”

There is a:

requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability.

Ibid.

Holmes further states:

The true explanation of the reference of liability to a moral standard ... is not that it is for the purpose of improving men’s hearts, but that it is to give a man a fair chance to avoid doing the harm before he is held responsible to for it.

Id. at 144.

Affirming the judgment here tells independent Internet developers that there is no way to avoid being held liable for infringing acts of third persons other than by avoiding BitTorrent altogether, and perhaps other technologies. If developers dare enter such domains, they must expect that everything ever said or done online will be mined to locate “nuggets” that can be piled on a “heap of liability.”

Liability might be based on ubiquitous online features like “automatic downloading.” Providing open-access resources that can be used by infringers is risky. Don’t ever say anything in opposition to copyright enforcers. Can’t mention popular movies or TV shows. Avoid public statements about uses or capacities of the technology. An internal copyright censor must be operating at every moment. E.g., any visitor to the website who might suggest infringement must be banned. The developer must become a copyright policeman. All the developer’s employees or possible “agents” must follow the same rules.

To sum up, Grokster has not clarified the reach of copyright law’s existing secondary liability doctrines, but adopted a new one and presented a 3-3 split, with three abstentions, on the question whether Grokster was capable of substantial noninfringing uses. Consequently, there is no such thing as a bright-line rule for technologists to make reliable *ex ante* determinations as to what it means to be too close to the line of secondary copyright liability in the Post-Grokster World.

U. Gasser & J. G. Palfrey, “Catch-As-Catch-Can: A Case Note on Grokster” (2005) at 14
http://cyber.law.harvard.edu/publications/2005/Catch_As_Catch_Can
(AOB 52)

Second, Plaintiffs’ proposed legal standard is contrary to common law principles that identify distinctions between the instant case and precedents and that harmonize the cases. Distinctions between this case and precedents are implicit in the statement of the Court in *Perfect10 v. Visa*, 494 F.3d 788, 801 (9th Cir. 2007), *cert. den.* 128 S. Ct. 2871 (2008) (hereinafter “*Visa*”):

“The software systems in [*A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001)] and *Grokster* were engineered, disseminated, and promoted explicitly for the purpose of facilitating piracy.”

Prior defendants were infringement profiteers. Defendants here are not infringement profiteers. Defendants here neither “engineered” nor “disseminated” BitTorrent technology but, instead, joined the existing collective BitTorrent ecosystem. Defendants did not promote their websites for purposes of facilitating piracy. Rather, Defendants promote innovation. There are major differences and detailed differences between this case and *Napster* and *Grokster*.

Defendants quoted the foregoing passage from *Visa* at AOB 12 and 48 but Plaintiffs never address any distinction between this case and the precedents.

III. Plaintiffs Ignore the Unified Focus of the *Grokster* Rule and Disregard Rule Elements: “Distributes a Device” with an Improper “Object” and Liability for “Resulting Acts of Infringement.”

Grokster had a tight unity of facts. A specific device had a single distributor and a compact user base. The *Grokster* defendants expressly planned to provide services functionally indistinguishable from those that had been declared unlawful in *Napster*. Defendants’ promotions carried out their plans. The *Grokster* defendants were the sole providers of devices used for infringement and both actual and proximate causation were established without doubt or question.

The tight unity of facts seen in *Grokster* is absent here. Plaintiffs ignore differences and complications.

Plaintiffs' approach is erroneous because the tight unity of facts was expressed in the very terms used by the Supreme Court to define the *Grokster* rule.

A. "Distributes a device"

Before the case against Defendants can proceed to a determination, the *Grokster* rule must be reconstructed to expand the "distributes a device" term to cover more general "services." Previously, in *Visa*, this Court, citing *Grokster*, ruled that Google could not be held contributorily liable for infringement "solely because the design of its search engine facilitates such infringement." 508 F.3d at 1170 (emphasis in original). Here, liability is not based on a "device" used for copying but rather on the design of Defendants' search engine. Liability is also based on conflating such operations with supposedly inducing "messages."

Such reconstruction and conflation implicate multiple issues of fact that require a jury trial. For example, the content of torrent files, like many online materials, is made up of uninformative links, references and/or functional "meta data" rather than identifiable content. The only information accessible to a search engine operator is a filename and such meta data. Copyright determinations by a search engine operator on the basis of meta data may not be feasible, especially when dealing with lawful and unlawful content that cannot be distinguished.

A “totality of the circumstances” approach must be taken and a decision based on such a totality is for the jury.

Ignoring the totality, Plaintiffs also ignore the existence of actual BitTorrent distributors: the publishers or first seeds of content who also distribute torrent files through torrent sites and search engines. At Brief 35, Plaintiffs disparage the weight of the Gribble testimony (“trumped up”) that identifies such distributors and publishers. Like the District Court, Plaintiffs rely entirely on Horowitz testimony that is artfully crafted to avoid mention of such distributors and publishers.

Plaintiffs state that “*Grokster* grounded its inducement standard in contributory infringement” (Brief 22) as a premise for expansive argumentation. The premise is erroneous. *Grokster* grounded the inducement standard in patent law. *Visa*, 494 F.3d 800.

In *MGM v. Grokster*, 259 F. Supp. 2d 1029, 1035 *et. seq.* (C.D. Cal. 2003), the original summary judgment ruling in the *Grokster* case, the District Court fully stated reasons why Grokster could not be liable for contributory infringement. E.g., “Evidence of actual knowledge of *specific acts* of infringement is required for contributory infringement liability.” (Id. at 1035, emphasis in original.) The District Court’s reasoning in the original *Grokster* decision applies here to refute Plaintiffs’ contributory infringement arguments.

Contrary to Plaintiffs' argument (Brief 23), this Court has not previously decided such questions in *Visa*, supra, *Amazon.com* or *CCBill*.² The product in *Visa* was a credit card. ("Defendants induce customers to use their cards..." 494 F.3d at 800.) In *Amazon.com*, "Google argues that its search engine service is such a product" (508 F.3d at 1170) and the Court so assumed while deciding in Google's favor. *CCBill* is inapposite.

Defendants are not seeking a dismissal of the action, as Plaintiffs erroneously argue. (Brief 21.) Defendants seek a jury trial. Expansion of the *Grokster* rule to include Defendants' services implicates issues of fact for jury trial.

B. "Object of promoting its use to infringe copyright."

The *Grokster* rule applies to "one who distributes a device with the object of promoting its use to infringe copyright." 545 U.S. at 919 and 936-937.

At 545 U.S. 939, the court identified the most important feature: defendants' "aiming to satisfy a known source of demand for copyright infringement, the market comprising former Napster users." "The function of the message ... is to prove ... defendant's ... *unlawful purpose*." 545 U.S. at 938 (emphasis added).

Plaintiffs' proposed legal standard does not require an object, aim or purpose but requires only an "intent to bring about infringement." (Brief at 21.) Under

² *Perfect10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102 (9th Cir 2007.), cert. den. 128 S.Ct. 709 (2007).

Plaintiffs' legal standard, a big enough heap of anecdotes imposes liability as a matter of law, no matter how unrelated, insignificant or momentary are the motives behind such incidents or whether actual infringement results.

There is a difference between a person who occasionally visits casinos and a habitué who relocates nearby: both intend to gamble but only one has the aim, purpose or object of gambling. Plaintiffs' standard ignores such differences.

But the difference was highlighted by the Supreme Court. The new rule:

limits liability to instances of *more acute fault* than the mere understanding that some of one's products will be misused. It leaves breathing room for innovation and a vigorous commerce.

545 U.S. at 932-933 (emphasis added).

Under Plaintiffs' legal standard, evidence is admissible only to show wrongful intent. Evidence of other intents, objects, aims or purposes becomes irrelevant, e.g., Defendants' purposeful assistance given to linux developers who employ BitTorrent to distribute their software. (AOB 15, ER0484-485).

C. "Resulting acts of infringements by third parties."

Plaintiffs erroneously quote language from *Grokster* for their attempted disposal of the causation element. In *Grokster*, causal connections were unquestionable and were never seriously discussed.

An inducement rule for secondary copyright infringement requires a causal element, like all other torts, for the reason given by Holmes, *supra*: defendant

should be held liable for third party torts only if defendant has a chance to avoid the harm done to plaintiff.

The simplest form of causation is “but-for” causation. As stated in Wright, R. W., *Causation in Tort Law*, 73 Calif. L. Rev. 1735, 1775 (1985) (see AOB 45), the but-for

test reflects a deeply rooted belief that a condition cannot be a cause of some event unless it is, in some sense, necessary for the occurrence of the event. This view is shared by lawyers, philosophers, scientists, and the general public.

Here, there is scant evidence that Defendants are, in any sense, necessary for the occurrence of online infringement.

Plaintiffs would hold online operators liable even if the operators can do nothing to prevent the use of the system by infringers other than by crippling their operations or going out of business and even if their going out of business would have little effect on copyright infringement. Plaintiffs want to punish Defendants without showing that Defendants did them any harm. It is the existence of independent BitTorrent operators that Plaintiffs are attacking, not purported “inducements” or any actual damage attributable to them.

IV. Plaintiffs Disregard Defendants’ Evidence and Inferences.

Plaintiffs declare (Brief 20) that factual evidence is “undisputed.” Plaintiffs ignore evidentiary conflicts about BitTorrent technology and components. (AOB

7-11.) Defendants challenge Plaintiffs' evidence. (AOB 24-27.) Defendants dispute specific facts including Fung's IRC messages and news interviews (AOB 17-18, 62-63), Defendants' copyright-neutral search engine and technological innovations (AOB 18-19) and unsupervised forum moderators (AOB 20-21).

Citing only their own evidence, Plaintiffs equate downloading a torrent file with downloading the corresponding content "through an automated process that is invisible to the user." (Plaintiffs' Brief 6.) Plaintiffs ignore disputes over "automatic downloading." (AOB at 13-14.)

Plaintiffs fail to recognize the ultimate question of fact. Words, bits, torrents and hyperlinks are only raw data. The ultimate question is not what Defendants said and did but, rather, Defendants' objects, aims and purposes. (See Point III.C, *supra*.) Judgments of objects, aims and purposes are inferred from raw data. Drawing inferences is a jury function unless reasonable person cannot disagree. *Narayan v. EGL, Inc.*, 616 F.3d 895, 901 (9th Cir. 2010).

Fung declares (ER0494-495, ¶ 50):

I am part of a community of BitTorrent technology developers who indeed want to induce use of BitTorrent technology, but I do not want to induce copyright infringement.

Plaintiffs ignore Fung's side in disputes over evidence and inferences that Plaintiffs and the District Court say is undisputed. Many disputes are referenced in record citations at AOB 16-17. Specific matters are discussed *infra*.

- A. Defendant Fung's aim and object is technological innovation.
(*Grokster* Feature 1)

Fung declares (ER0476-477, ¶6):

My intention is to be a leader in development of search technologies surrounding the BitTorrent protocol ... Continual development requires operating online systems that have large resources and that attract large volumes of traffic to serve as a test-bed for innovation.

Both Plaintiffs and the District Court put "Box Office Movies" at the top of the list of Defendants' alleged wrongful acts. (Brief at 3, 7; ER0053:13-54:5)

Fung declares (ER0498, ¶ 58):

"Box Office Movies," the short term experiment that plaintiffs object to in Facts 50-55, provided a list of popular movies, the kind of list that can be found in thousands of sites on the Internet. This module was an attempt at a mash-up of information gathered from various sources in a style that is commonly deployed by Internet developers... Like many such mashups, this one was insightful for the view but did not lead anywhere. I deny that it was intended to induce or foster copyright infringement.

Fung states his side in disputes involving Fung's "customized software program known as a spider" at *Ibid.*, ¶ 59. (Plaintiffs' Brief 8-9.) Improper references in Plaintiffs' Brief to matters outside the record suggest new evidence arising since the summary judgment motion was briefed in the Summer of 2007.

Fung states his side in disputes involving torrent classification (ER0496, ¶ 54), "Top 20 Movies, Top 20 TV Shows, Top Searches..." (¶ 57), selection of trackers (¶ 59), commented code (¶ 59) and other categories and processes (¶ 60).

B. Defendants' adherence to the DMCA and Defendants' failed attempts to filter Microsoft content and pornography. (*Grokster* Feature 2.)

Plaintiffs' falsely state that Defendants took no meaningful steps to diminish infringing activity. (Brief 31.) Plaintiffs usurp the jury's role when they dismiss Defendants' DMCA system as "just a fig leaf." (*Id.*, fn. 9.) Plaintiffs ignore Fung's attempt to filter Microsoft content by means of keywords, which failed, and his success with "more effective and accurate filtering" using the "unique info_hash string." (ER0493-494, ¶49.) See *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F.Supp.2d 1099, 1103, fn. 6 (C.D. Cal. 2009). Fung's attempts to curtail pornography also failed even though he has a personal dislike for such content and endeavored to block it. (*Ibid.*)

Plaintiffs also ignore the admonition of the *Grokster* Supreme Court (545 U.S. 939, n.12), that invoked *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984) and cautioned against basing liability on:

failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses. Such a holding would tread too close to the *Sony* safe harbor.

Here, substantial noninfringing uses are being ignored. Plaintiffs want to take the *Sony* safe harbor off the map.

C. The absence of any profit-driven “business plan,” much less one aiming at infringement. (*Grokster* Feature 3.)

In *Grokster*, the Supreme Court ascertained the “commercial sense” of Defendants’ business by reviewing “evidence of express promotion, marketing, and intent to promote further, the business models employed by Grokster and StreamCast.” (545 U.S. at 940, 926.)

Fung declares (ER0477, ¶7):

I welcome the momentary profits my websites earn, but profiting from copyright infringement is not important to me and has never entered my goals. I have never sought or needed financial backers. My “business plan” is to establish myself as a developer on the strength of my own efforts.

isoHunt started in January 2003, but the record shows that Defendants’ income was small prior to about May, 2005. (AOB 16, SER0889-890.)

Plaintiffs’ evidence of “Defendants’ business model” (Brief 13) amounts to the inflated “95%” infringing traffic figure where the District Court also held that “it doesn’t matter whether 75% (to pick a number) ... or 95%” is traffic from infringers, plus a 2006 advertising deal. (ER0038:18-27, SER0881.)

A jury might find that Plaintiffs’ arguments about “Defendants’ business model” are less persuasive than Defendants’ evidence and testimony.

D. Damaging practical consequences of Plaintiffs' approach.

The *Grokster* Supreme Court saw value in “promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement” and recognized “the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential.” (545 U.S. 919, 937; AOB 54-56.)

Plaintiffs' approach would nullify the value of innovation and expose dual-use technology to liability standards that take no notice of lawful potential.

Thus, Plaintiffs argue that “Noninfringing Uses of BitTorrent are Irrelevant,” claiming to base their argument on *Grokster*. (Brief 23.) But *Grokster* held only that *Sony* “was never meant to foreclose rules of fault-based liability derived from the common law” and that it was going to “leave further consideration of the *Sony* rule for a day when that may be required.” 545 U.S. at 934-935.

Defendants are not asking this Court to foreclose liability. Defendants are asking for a jury trial in which noninfringing uses are part of a factors test.

The District Court's rulings and Plaintiffs' arguments leave classes of Internet operators and publishers in highly exposed positions, regardless of copyright-neutrality and regardless of inability of operators to control infringement. A clear example is the class of operators of BitTorrent trackers. According to Plaintiffs, simply operating a BitTorrent tracker that is heavily used

for infringing purposes is a cause of those infringements and the filenames give actual notice of infringements. (Brief 24-26, 42-46, 51.) The DMCA provides no protection for a tracker. (Brief 51.) Distinctions between torrent sites and trackers are deemed irrelevant despite Defendants' conflicting evidence. (Compare Plaintiffs' Brief at 35 with AOB 10-11.)

V. Plaintiffs Ignore Free Speech Principles.

Plaintiffs' short dismissive argument (Brief 27-28) declines to recognize First Amendment jurisprudence. Contrary to Plaintiffs' accusations, Defendants do not suggest that "the First Amendment prohibits consideration of statements made by Defendants and their agents." (Brief 27.) Defendants are appealing because "The District Court Erroneously Refused to Weigh or Consider Defendants' First Amendment Rights." (AOB 62, point IV.)

Plaintiffs ask for "a single case remotely suggesting that use of a party's statements to demonstrate wrongful intent violates the First Amendment." (Brief 27.) In *McCoy v. Stewart*, 282 F.3d 626, 629 fn. 1 (9th Cir. 2002) *cert. den.* 537 U.S. 993 (2002), the Court reversed the conviction of a former gang member under an Arizona statute that criminalized "[f]urnishing advice or direction" to others "with the intent to promote or further ... criminal objectives" and/or "with the intent to promote, further or assist ... criminal conduct."

Defendants here are charged with furnishing advice to website visitors with the intent to promote, further and assist copyright infringement.

Among other evidence, it was shown at trial that McCoy “advised [younger gang] members to continue their initiation practices, albeit on a more moderate level, and to increase their ‘tagging,’ or graffiti activities, both criminal offenses.”

Id. at 630.

The Court stated:

McCoy's Opening Brief avers that:

No witness at McCoy's trial testified that McCoy ever told him or her to go out and commit a crime. No witness testified that he or she was incited by hearing McCoy's words. No evidence adduced at the trial suggested that McCoy was offering anything more than his own belief or blueprint on how a successful gang should be run.

The record bears out his assertions.

Far from demonstrating a specific intent to further illegal goals, McCoy's speech appears to fit more closely the profile of mere abstract advocacy of lawlessness.

Id. at 631.

Here, Defendants' Opening Brief makes closely similar averments at page 63. The record submitted to the Court by Plaintiffs bears out Defendants' assertions. Such record also supports Defendants' argument that their chief intent is technological innovation.

The *McCoy* Court applied the “seminal advocacy case” of *Brandenburg v. Ohio*, 395 U.S. 444 (1969) and further noted (*Id.*, 631, n.5):

Other decisions confirm that speech that advocates, teaches, or justifies lawlessness in an abstract way is fully protected, so long as it is not directed to inciting imminent lawless action. The protection afforded an individual's abstract advocacy of lawlessness endures even if the individual hopes that someday such lawlessness may occur.

VI. Plaintiffs Ask the Court to Change or Push Aside the DMCA.

A. Plaintiffs ignore the role of jury trial.

Plaintiffs present the Court with a false dilemma between affirming erroneous rulings and “immunizing” Defendants. Jury trial offers a third choice.

The authorities uphold the right of jury trial for online service providers. There is only one prior case of a dispositive ruling in favor of a copyright owner when, as here, defendants have satisfied the prima facie requirements for the affirmative defense that were stated in *CCBill* at 488 F.3d 1109:

We hold that a service provider “implements” a policy if it has a working notification system, a procedure for dealing with DMCA-compliant notifications, and if it does not actively prevent copyright owners from collecting information needed to issue such notifications.

Defendants satisfy the foregoing requirements. (AOB 22.)

The single dispositive ruling in favor of a copyright owner, *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619 (4th Cir. 2001) involved disputes over specific notices. Cf. *In re Aimster*, 334 F.3d 643, 655 (7th Cir. 2003) (“disabled

itself from doing anything to prevent infringement”). See also *Ellison v. Robertson*, 357 F.3d 1072, 1080 (9th Cir. 2004).³

The best time to deal with DMCA questions raised by Plaintiffs is during trial, after all the evidence is in, while the trial judge is ruling on dispositive motions and formulating instructions. Evidence relevant to the DMCA is relevant to general issues involving Defendants’ operations, objects and purposes. Trial evidence may obviate any need for new DMCA rules.

B. *Grokster* did not push aside the DMCA.

No authority or reason supports Plaintiffs’ argument (Brief 37-38) that *Grokster* defendants have no DMCA affirmative defenses. Plaintiffs’ references to *ALS Scan*, *supra*, and *Arista Records LLC v. Usenet.com, Inc.*, 633 F.Supp.2d 124 (S.D.N.Y. 2009) are devoid of meaning. The specter of “immunity” for “service providers acting in bad faith” (Brief 37) evaporates in front of a jury.

Plaintiffs’ argument would nullify the DMCA. A copyright owner planning a *Grokster* inducement claim would refrain from sending DMCA notices because: the more infringing traffic at the site, the better for the case. Online service providers would have less incentive to respond to DMCA notices.

³ Defendants object to the attempt by Google in its *Amicus Brief* at 20-22 to argue facts to this Court in ways that are inflammatory, extraneous to the record and contrary to undisputed facts. See, e.g., ER0471:13-17 (undisputed status of Allan Parker as Defendants’ DMCA agent).

As stated in *CCBill*, 488 F.3d 1109:

“nothing in the language of § 512 indicates that the limitation on liability described therein is exclusive.” *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 552 (4th Cir.2004).

C. Trackers are not disqualified from DMCA protections.

Trackers qualify for DMCA protection under 17 U.S.C. § 512(a) for services of “transmitting, routing, or providing connections for, material through a system.”

A tracker performs the functions of a router. (ER0209:19-22.) Third parties initiate transmissions, which are carried out through technical processes without selection of materials by Defendants and without modification of materials.

Recipients are selected automatically. No copies pass through or stay on Defendants’ system. (ER0208:22-209:22.) See § 512(a)(1), (2), (3), (4) and (5).

Plaintiffs’ vague “conduit” argument is contrary to clear statutory language. A tracker does not lose DMCA protections by brokering IP addresses. (Brief 51.) “Section 512(a) provides a broad grant of immunity to service providers whose connection with the material is transient.” *CCBill* at 488 F.3d 1101.

D. Plaintiffs’ arguments about knowledge elements are not grounded in precedential decisions or in the facts of the case.

Plaintiffs’ arguments about various kinds of “knowledge” (Brief 39-45) refer only vaguely to facts. Plaintiffs ignore major legal precedents that require specific

knowledge and that reject the general constructive knowledge that Plaintiffs espouse. There is no “incorrect” legal analysis in *Veoh*, supra, or *Viacom Intern. Inc. v. YouTube, Inc.*, 718 F.Supp.2d 514 (S.D.N.Y., 2010). (Brief 41.)

In *Veoh*, supra, at 665 F.Supp.2d 1107, the court stated: “In [*CCBill*] the Ninth Circuit provided clear guidance on how to apply the knowledge elements of the section 512(c) safe harbor.”

CCBill teaches that if investigation of “facts and circumstances” is required to identify material as infringing, then those facts and circumstances are not “red flags.”

Id. at 1108.

[T]he Ninth Circuit has concluded that even providing services to websites named “illegal.net” and “stolencelebritypics.com” is not enough to raise a “red flag” from which infringing activity is apparent. *CCBill*, 488 F.3d at 1114. ... This high bar for finding “red flag” knowledge is yet another illustration of the principle underlying the DMCA safe harbors, that the burden is on the copyright holder, not the service provider, to identify copyright violations.

Id. at 1111.

Measuring evidence cited by the District Court against the foregoing standards shows that some items might qualify as “red flags.” (ER0068:7-70:19.) Others ought not to be considered, including general “awareness,” spider and search engine functions and general categories such as “movies” or “TV shows.” Even the strongest candidates for red flag status require deliberation individually and more so in the aggregate. Defendants submit that such legal and factual

determinations require more consideration than the present conflicted record allows. Such factual determinations can and should be deferred until trial.

Plaintiffs' argument that "the specific-knowledge standard is legally erroneous" (Brief 42) neglects judicial history. The specific knowledge requirement originated in *Religious Technology Center. v. Netcom On-Line Communication Services*, 923 F.Supp. 1231 (1995) ("*Netcom*").

In *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001), the district court had erroneously "concluded that the law does not require knowledge of 'specific acts of infringement.'" The Court held (239 F.3d 1021):

We agree that if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement. See *Netcom*, 907 F.Supp. at 1374. Conversely, absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material. See *Sony*...

See also *CoStar*, supra, 373 F.3d at 548-555 (the DMCA codified *Netcom*).

E. There are genuine issues of triable fact about profiting from infringement and control over infringement.

Plaintiffs' arguments about "direct financial benefit" and "right and ability to control" infringement ignore conflicting evidence and inferences. No other court has found judgment as a matter of law on such skimpy and conflicted evidence. In *YouTube*, supra, 718 F.Supp.2d 527, the Court impliedly adopted the

common law principles discussed supra (point II) and stated:

There may be arguments whether revenues from advertising, applied equally to space regardless of whether its contents are or are not infringing, are “directly attributable to” infringements, but in any event the provider must know of the particular case before he can control it.

As discussed supra, Fung has little concern for “direct financial benefit” and has no profit-based “business model.” isoHunt earned substantial “revenues from advertising” only after two years of operations. (Point IV.C)

Defendants are not able to control infringement on their site except through specific identifications in DMCA notices. (Point IV.B.) Defendants’ voluntary attempts at filtering failed with Microsoft content and with pornography. When the District Court ordered Defendants to filter according to Plaintiffs’ “list of titles,” the results were disastrous, compelling Defendants to spend many hours dealing with defects in the list and leading to pending Motions for Contempt. (AOB 31-32; Plaintiffs’ Brief 17.)

The District Court’s rulings have serious implications. Automated link aggregation and income earned from online advertising are ubiquitous aspects of Internet operations. Holding that such aspects deprive a provider of DMCA protections as a matter of law would contravene Congressional intentions.

Defendants have put into place and operate a valid and legitimate DMCA system to mitigate copyright infringement. Many copyright enforcers make use of Defendants’ DMCA procedures, including Microsoft and RIAA. Plaintiffs refuse

to recognize the proper use of DMCA notices but abuse the system. To deprive Defendants of their DMCA defense as a matter of law on the basis of conflicted, inadequate evidence will tell Internet operators that the DMCA has no purpose, except for abusive copyright owners who want nuggets to pile in a heap.

F. Plaintiffs erroneously invoke waiver doctrines against defendants but ignore such doctrines themselves.

Plaintiffs assert that Defendants have “waived” or “forfeited” positions because of insufficient presentation below or in the AOB. [Brief at 21 (proposed factors test); 27, n.’s 6-7 (Fifth Amendment); 29 (facts in District Court orders); 33 (First Amendment); 46 (elements of Plaintiffs’ case) and 57 (punitive injunction)].

Plaintiffs’ assertions neglect the purpose behind the waiver rule, stated in *Dream Palace v. County of Maricopa*, 384 F3d 990, 1005 (9th Cir. 2004):

This rule serves to ensure that legal arguments are considered with the benefit of a fully developed factual record, offers appellate courts the benefit of the district court's prior analysis, and prevents parties from sandbagging their opponents with new arguments on appeal.

The purpose behind the waiver rule is not served by declaring forfeits against Defendants in this difficult litigation. Defendants developed a factual record. Perfect statements by Defendants in the District Court would not have changed analysis used in rulings. Defendants are not “sand-bagging” Plaintiffs.

The purpose behind the waiver rule forecloses Plaintiffs' argument about the "specific-knowledge standard" for the DMCA. (Brief 43-46, point V.D, supra.) The argument seeks major changes in DMCA duties but does not analyze facts. No such argument was suggested prior to Plaintiffs' Opposition Brief herein.

VII. The Permanent Injunction is Improper

A. The Permanent Injunction is punitive, overbroad and vague.

Plaintiffs portray Defendants as so "egregious" (Brief 55) that total incapacitation is appropriate, like that seen in *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002) (failed filtering efforts) and *In re Napster, Inc. Copyright Litigation*, 2005 WL 289977 (N.D.Cal. 2005) (bankruptcy).

The chief charge is that Defendants are "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." (Plaintiffs' Brief, 52.)

Plaintiffs' arguments, made in isolation, ignore contexts that reveal fallacies. Plaintiffs' accusations of "egregious" ignore comparisons with YouTube and Google, who aggregate similar information and who solicit similar user bases. The Permanent Injunction would prohibit Fung from seeking employment with YouTube or Google, as well as prohibiting employment with any other large online service provider. YouTube has "a user base generally understood, in substantial part, to be ... seeking to infringe Plaintiffs' Copyrighted Works." (ER0023:24-

26.) Google carries out “hosting, indexing, linking to, or otherwise providing access to ... Dot-torrent ... files that ... lead to ... Copyrighted Works.”

(ER0022:8-14.) The prohibition will be for the rest of Fung’s life, while the Internet undergoes continual development. See *Federal Election Commission v. Furgatch*, 869 F.2d 1256, 1262 (9th Cir. 1989).

The First and Fifth Amendments to the United States Constitution limit injunctions. Rule 65(d) is a practical tool for imposing limits. Defendant must “receive fair and precisely drawn notice of what the injunction actually prohibits.” *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 444 (1974).

Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253 (2002) held that "virtual" child pornography could not be outlawed on grounds that it "whets the appetites of pedophiles and encourages them to engage in illegal conduct."

The government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.' [Citation.] The government may suppress speech for advocating ... a violation of law only if 'such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.' [Citation.]"

Defendants submit that Fung’s speech may not be prohibited because it whets the appetites of infringers.

Defendants submit that this Court should adopt a wider view than that urged by Plaintiffs. See *Reno Air Racing Association., Inc. v. McCord*, 452 F.3d 1126,

1133 (9th Cir. 2006): “Ultimately, there are no magic words that automatically run afoul of Rule 65(d), and the inquiry is context-specific.”

The context in this case includes the changing legal environment in which Internet service providers must now operate. Changes include those implicit in this Courts’ s affirmance of the District Court’s Order Granting Plaintiffs’ Motion for Summary Judgment on Liability.

In April, 2003, while isoHunt was starting with IRC, the District Court granted summary judgment in favor of Grokster and StreamCast, as discussed supra. Therefore, while Defendants were setting up operations, no legal cloud threatened development of BitTorrent, especially when this Court affirmed the *Grokster* decision on the basis of *Sony*. Defendants promoted noninfringing uses and set up a DMCA notice-and-take-down system: these facts alone would seem to have entitled them to jury trial, if not to summary judgment.

The legal environment has now changed because of the *Grokster* decision and even more so as a result of this case. National policy in favor of technological innovation is no longer recognized. The DMCA is being cast aside or changed to impose heavier burdens on service providers. *Sony* safe harbors have closed. Online service providers who appear to “encourage” or “foster” infringement are researched to locate nuggets to heap up liability. Such defendants have no Free Speech protections. They have no right to jury trial.

In light of the changing legal environment, the language used in the Permanent Injunction is overbroad and vague because it paralyzes Fung for life while the world around him is re-built. He is being punished for not having foreseen and for having resisted changes that wiped out former supportive policies and protections and the former innovative environment. There is no deterrent value in such punishment. *Hecht Co. v. Bowles*, 321 U.S. 321 (1944).

B. The Permanent Injunction is improperly extra-territorial.

Plaintiffs' argument (Brief 58-61) confuses "Plaintiffs' interest in stopping infringements" (Brief 58) and judicial "discretion" (Brief 59) with jurisdictional power. Simply put, the courts of the United States do not have the power to prohibit Fung, a Canadian resident, from communicating with another Canadian resident using facilities located in Canada. An attempt to exercise such power would contravene basic principles of international comity. (AOB 94.) The fact that the other Canadian citizen may thereafter share infringing files with United States citizens does not give United States courts such power.

To reach the question presented here, this Court must have decided that copyright protection outweighs previous national commitments to technological innovation. The changes in the legal landscape are, however, limited to the jurisdiction of the United States. Other countries will make their own determinations about copyright protection and technological innovation.

CONCLUSION

For the foregoing reasons, this Court should reverse the Permanent Injunction and Summary Judgment Order and remand the action for further discovery and jury trial.

Dated: March 1, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed.R.App.Proc. 32(a)(7)(C) and Local Rules 32-1, the undersigned certifies that the foregoing Appellants' Reply Brief (excluding the Table of Contents, Table of Authorities and Certificates, and including footnotes) contains 6,959 words. In preparing this certificate, the undersigned relied on the word count generated by Microsoft Word.

Dated: March 1, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen Moore