

**Docket No. 10-55946**

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*In the*  
**United States Court of Appeals**  
*For the*  
**Ninth Circuit**

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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.*

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

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**SUPPLEMENTAL BRIEF OF APPELLANTS IN RESPONSE TO  
AMICUS BRIEF OF GOOGLE, INC.**

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Pursuant to the Court' Order of March 31, 2011, allowing parties to address solely the issues raised in the *amicus brief* of Google, Inc., Defendants Gary Fung and isoHunt Web Technologies, Inc. submit the following Supplemental Brief.

### **SUMMARY OF ARGUMENT**

Google, Inc.'s Brief as *Amicus Curiae* contains two kinds of arguments. The first kind identifies fatal errors and omissions in the District Court's Order Granting Plaintiffs' Motion for Summary Judgment on Liability (hereinafter "MSJ Order"). The second kind declares that the MSJ Order should be affirmed.

Google does not attempt to resolve the conflict between the two kinds of arguments. Instead, Google juxtaposes the two kinds of argument as if they were parts of a single integrated argument.

Google's arguments of the first kind are generally based on authority and policy and generally support Defendants' positions. Defendants adopt such arguments generally without analysis or approval of specific propositions.

Google's arguments of the second kind have no genuine basis. Google treats the evidentiary record as if the Court were reviewing a jury verdict in favor of Plaintiffs instead of the MSJ Order actually on appeal. In matters involving the Digital Millennium Copyright Act ("DMCA"), Google ignores Defendants' DMCA policy and practice, adopts Plaintiffs' evidence uncritically regardless of

genuine disputes and offers new evidence that is both improper and irrelevant.

Google repeats the error made by the District Court in the MSJ Order and by Plaintiffs in their Opposition Brief of using an incorrect legal standard. Google, like the District Court and Plaintiffs, would ignore Defendants' evidence and render judgment solely on Plaintiffs' evidence.

Again repeating Plaintiffs' error, Google fails to address the practical need to define a legal standard for the new *Grokster* rule. (See *MGM v. Grokster, Ltd.*, 545 U.S. 913 (2005).) District courts need a full-fledged legal standard for uniform management of cases based on the *Grokster* rule that challenge the legitimacy of new technologies. Such cases will present both common features and also features specific to only some defendants or to a unique defendant. An effective legal standard, such as Defendants' proposed factors test, applies uniformly to all cases; and its terms enable courts to make principled distinctions.

Google's proposed legal standard does not enable this Court to deal with the needs of this case or with likely future cases. The "three elements" Google proposes have no structure or substantial content. They would guide neither district courts nor technology developers who seek to evaluate potential liability.

Google's proposed legal standard ignores issues raised by case, e.g., the expansion of the *Grokster* rule that is tethered to "distribution of a device" into a rule that makes all of a person's actions subject to findings of liability. Although

Google mentions *Sony*<sup>1</sup> frequently, the *Sony* principle does not appear in Google's proposed legal standard. Google ignores "features" that were prominent in the *Grokster* decision and in applications of the *Grokster* decision by the District Court in subsequent proceedings in *Grokster* and in this case.

Google's illogical approach culminates in arguments that simultaneously seek to affirm summary judgment rulings in both this case and also in the *Veoh*<sup>2</sup> case, scheduled to be argued at the same time as this case. In each of the two cases, evidence against the service provider is presented in the form of a "heap," where a heap is made up of "nuggets" located by copyright owners who search huge volumes of digitalized materials for items that can be made to appear inculpatory. Apparently, the construction is supposed to lead the decider to conclude that the service provider "must have known or should have known" that persons were using the service for infringing purposes.

The two heaps of items of accusatory evidence in the two cases (*Fung* and *Veoh*) are roughly comparable in size and severity. Technical features and incidents of notice in the respective heaps resemble each other and fit into general families. In *Fung*, the district court ruled that the heap was so large and severe that nothing Defendants say could alter the result. In *Veoh*, the district court ruled that

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<sup>1</sup> *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984).

<sup>2</sup> See *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F.Supp.2d 1099 (C.D.Cal., 2009).

the heap was too small and insignificant to alter the result.

There does not appear to be any way to affirm both the summary judgment in favor of *Veoh* and the summary judgment against Defendants in this case.

Google's request for both results has no basis in reason.

Defendants submit that Google's confusing arguments and fallacious reasoning should not obscure the importance of issues presented by this case. Defendants have proposed a practical way to deal with such issues; but Google, like Plaintiffs, propose nothing other than affirmance of a factually flawed and legally ill-founded District Court decision. Google, like Plaintiffs, ignores everything Defendants say and pretends that Defendants have said nothing.

In sum, Defendants welcome any assistance from Google in support of Defendants' attempt to take their case to a jury. Google's *amicus brief* includes arguments that support Defendants' attempt and Defendants adopt such arguments.

The *amicus brief* contains other arguments urging affirmance of District Court rulings. Such arguments are devoid of merit and should be rejected.

## LEGAL ARGUMENT

### I. Defendants Adopt Certain Arguments Stated by Google that Support Defendants' Positions.

Defendants welcome assistance provided by Google in identifying flaws and omissions in the District Court's MSJ Order and in arguing against positions advanced by Plaintiffs. Defendants do not attempt to discuss individual propositions set forth by Google, except as specified below.

Accordingly, Defendants generally adopt the following portions of Google's *amicus brief*:

1. That part of the Introduction dealing with national, commercial, social and technological values protected by the balancing principle stated in *Grokster* and by the *Sony* principle -- up to but not including the bottom of page 4, where Google urges affirmance of the judgment against Defendants but expresses concern over the District Court's reasoning that ignored the foregoing principles.

2. The part of the Summary of Argument dealing with causation beginning in the center of page 6 -- up to but not including Google's declaration that a showing of causation "can readily be made in this case," apparently referencing defective, disputed and non-existent evidence.

3. The paragraph beginning "On the DMCA" on page 7.

4. All of pages 9 through 14 on the error of creating a "thought-tort," on

the need to keep from entrenching on regular commerce or discouraging technological development even of systems with unlawful potential and on the causation problem -- up to but not including point I.B. on page 14 and excluding the isolated sentence on page 11: “As discussed below, there is clear evidence in this case that the defendants directly solicited their users to infringe.”

5. That part of point I.B. criticizing “Some of the evidence cited by the district court,” beginning on page 16 -- up to but not including material on page 18 that begins “In a case like this, that showing should not be difficult” and excluding the isolated sentence on page 17: “This case is not a difficult one, and there is no need for the Court to explore the outer limits of inducement liability.”

6. All of page 19 dealing with causation beginning with the sentence “For example.”

7. All of pages 22-25 dealing with the DMCA, beginning with the paragraph that starts “In addition to being unnecessary” on page 22.

8. All of point II.B on pages 26 through 30.

## II. Google’s Arguments in Favor of Affirming the District Court’s Decision Are Devoid of Merit.

Google urges this Court to reach the same results as those reached by the District Court but, because of errors and omissions in the District’s Court’s reasoning, Google states that the Court “should take a somewhat different path to

reach those results.” (Amicus brief at 5.) Google states that the District Court “complicated a straightforward DMCA case” and that: “There is a better path for this Court to follow.” (Id. at 20.)

Defendants submit that Google does not show a better path or a path that is different from the path followed by Plaintiffs or the District Court. Google, Plaintiffs and the District Court are all on the same erroneous path: a path that ignores the legal standard for summary judgment, a path that ignores Defendants’ evidence, inferences and arguments and a path that ignores Defendants’ Constitutional right to jury trial. Google’s path, like that of Plaintiffs, leads to unprincipled and confused judicial management and to a welter of conflicting rules. Google, like Plaintiffs, ignores Defendants’ proposed path to jury trial that will facilitate uniform and efficient judicial management.

A. Google Confuses the Legal Standard for Affirming a Jury Verdict With the Legal Standard to Be Applied in a Summary Judgment Proceeding.

Google argues that “there is ample evidence to find that defendants are liable under Grokster.” *Amicus brief* at 6; see also 4 (“ample evidence”), page 15 (“clear evidence”), page 16 (list of items of “evidence [that] taken together satisfies the Grokster requirement”) and 18 (“substantial evidence”).

Defendants do not dispute Google’s argument, at least as to “substantial

evidence.” In their Opening Brief at 49, Defendants stated: “it appears that a properly-instructed jury might find defendants liable for inducing infringement.”

This appeal involves a legal standard that is different from the “substantial evidence” (or “ample evidence”) test that is used to review a jury verdict. There must be a jury trial before the substantial evidence test is used. The standard for a summary judgment ruling<sup>3</sup> preserves Defendants’ right to jury trial.

In their Opening Brief, Defendants set forth their evidence and identified disputed facts that the District Court failed to recognize in the MSJ Order. Defendants showed the relevance of evidence presented by Defendants that was disregarded by the District Court and Defendants also showed the relevance of evidence sought by Defendants that was denied in discovery proceedings.

Defendants showed that BitTorrent and the BitTorrent collective ecosystem are very different from the portrayal presented by Plaintiffs and adopted by the District Court, both overall and as to important details. Fung’s testimony about himself showed a person that was very different from the portrayal drawn by Plaintiffs. Contrary to the legal standard for a summary judgment proceeding, the

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<sup>3</sup> “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions ...” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505 (1986). The opposing party’s “version of any disputed issue of fact thus is presumed correct.” *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456, 112 S.Ct. 2072 (1992). See Defendants’ Opening Brief at 36.

District Court acted as if the parties' portrayals and showings were identical and as if Defendants stood dumbfounded and mute at Plaintiffs' accusations of "pirate, pirate, pirate." Plaintiffs and Google seek affirmance of such an approach.

The District Court and Plaintiffs accuse Defendants of being "willfully blind" to facts of infringement but neither they nor Google notice facts that detract from the image Google desires the Court to affirm. Notwithstanding the refusals of the District Court, Plaintiffs and Google to recognize the facts, the facts are that Defendants are devoted to technology, not to infringement. Defendants promote noninfringing uses and provide abundant evidence of noninfringing uses of BitTorrent that refute Plaintiffs' phony statistics of universal piracy. Defendants maintain a robust DMCA enforcement service that other copyright owners employ (but, of course, not Plaintiffs); and Defendants tried filtering methods to protect Microsoft copyrights. It is Plaintiffs who oppose any cooperative methods that copyright owners and technology developers could use to curtail infringement.

Fung is a young computer devotee and innovator, not an infringement profiteer. In contrast to previous adjudicated infringers, he is not a profiteer of any sort, as shown by his early shoestring operations and his adventuresome attitude.

Incidental occurrences — Plaintiffs' nuggets — where Defendants' zeal for technology promotion over-rode mature judgment about copyrighted materials do not prove an intention to promote infringement. What they show is a person who

is vocally disrespectful of constraints that he believes are ill-founded and damaging to his goals. Vocal responses to happenstance events do not add up to an “object” or “aim” or “purpose,” using terms from the *Grokster* opinion.

Defendants contend that they are being scapegoated to warn off independent innovators from fields of technology coveted by large corporations like Google and Plaintiffs. But sacrificing a scapegoat -- or even warning off all independent innovators -- does not solve any real problems. Neither Defendants nor other independent BitTorrent operators “cause” piracy. No causation has been shown generally or as to any specific act of piracy. Piracy will continue even if Defendants and all independent Bittorrent operators are completely closed down. New vehicles of piracy, such as social networking, are already becoming popular.

Instead of acknowledging the significance of Defendants’ evidence and inferences, Google improperly offers heaps of evidence (*amicus brief* at 15-16, 20-21) that appear similar to Plaintiffs’ heap. Often, it is unclear where Google simply repeats what Plaintiffs have said and where Google is saying something new. Is Google suggesting that Plaintiffs’ heap and argument are insufficient and that Google’s new evidence and arguments will put it “over the top?”

Google’s heap at pages 15-16 is irrelevant for the reasons summarized supra and in Defendants’ Reply Brief, chiefly that Defendants’ evidence must be considered before rendering summary judgment. Defendants dispute the evidence

that Google says is undisputed. As the leading example, Defendants dispute facts about “Box Office Movies.” (Reply Brief at 15.)

Defendants object to Google’s supposed new evidence about Defendants’ DMCA agent registration (Google Brief at 20-21). Such purported evidence is hearsay, not the best evidence, lacking foundation and contrary to Rules of Court. Defendants’ agent designation was not disputed by Plaintiffs in proceedings in the District Court. (ER0471(eee).)

Google’s supposed new evidence is also irrelevant to issues presented here. Google misinterprets *Ellison v. Robertson*, 357 F.3d 1072, 1080 (9th Cir.2004). (*Amicus brief* at 22). *Ellison* preserved such questions of fact for determination by “a reasonable jury.”

In *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9<sup>th</sup> Cir. 2007) *cert. den.* 552 U.S. 1062 (2007), the Court stated:

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. *Ellison*, 357 F.3d at 1080 (working notification system required); *Corbis Corp. v. Amazon.com, Inc.*, 351 F.Supp.2d 1090, 1102-03 (W.D.Wash.2004) (must adopt procedure for dealing with notifications)...”

Defendants’ evidence (Opening Brief at 21-22) is sufficient to take the

affirmative defense to the jury.

Other evidence heaped up by Google (*amicus brief* at 21) is disputed at Defendants' Opening Brief 22 and materials referenced therein including whether Defendants had "any pretense of DMCA compliance." Defendants' DMCA system works successfully with copyright owners other than Plaintiffs, including RIAA and Microsoft. Plaintiffs did not try to use the system in a cooperative way. Defendants evidence showed that "Plaintiffs enforcement agent, BayTSP" (Google's Brief at 21) was not interested in curtailing infringement but acted abusively to try to generate "nuggets" for Plaintiffs' lawsuit. Even the District Court found disputes over the sufficiency of Plaintiffs' DMCA Notices. (ER0067:25-27.) Google ignores Defendants' evidence and ignores the disputes.

In the context of this case, Google has ignored the proper standard of review and has presented fallacious issues. Using the proper standard of review, the issue on appeal is not whether Plaintiffs have produced substantial evidence or "ample evidence." Rather, the issue on appeal is whether Defendants have produced evidence that shows a genuine issue of fact. Defendants submit that they have produced such evidence and that they are, therefore, entitled to try to persuade a jury of the merits of their cause. Google has ignored the issue on appeal and its arguments are, therefore, devoid of merit.

B. Google's Proposed Legal Standard for the New Grokster Rule is an Unprincipled Revision of the Supreme Court's Formulation That Ignores Important Elements and Features of a Proper Legal Standard.

Google quotes the Grokster rule on page 8 of the *amicus brief* and then declares that "By its terms this standard requires the plaintiff to show" three elements. Google is apparently proposing a legal standard. What Google offers is a revision of the *Grokster* rule that omits *Grokster*'s focusing language "distributes a device." Google revises and omits other parts of the *Grokster* rule but Google does not attempt to justify any of the revisions or omissions.

1. Element 1 of Google's proposed legal standard.

Element 1 of Google's proposed legal standard is "that the defendants acted with the *specific objective* of promoting the use of its product to infringe."

(*Amicus brief* at 8, emphasis in original.)

Google does not define or limit the phrase "its product." Is Google arguing that Defendants' search engine is the "product?" Is Google arguing that .torrent files obtained by isoHunt through automated processes that spider the Internet are isoHunt's "product?" Google does not explain how its own search engine differs from that of Defendants or how torrent files linked through operations of its own spiders are different from those obtained through use of Defendants'.

Google does not define or limit the meaning of "defendants acted." Judging

by the result Google wants the Court to reach, the definition of wrongful “actions” by Defendants includes providing public access to a search engine, as was emphasized by the District Court in finding Defendants liable. (ER0060:5-6: “Most obviously, Defendants’ websites allow users to locate dot-torrent files.”)

At page 16 of the *amicus brief*, Google criticizes the District Court for basing liability on:

how the defendants’ websites presented information about files in browseable categories, provided additional information about those files, placed them into categories based on commonly searched terms and used an indexing program that automatically matched filenames with specific terms.

Google apparently wants this Court to declare legal protections for the actions it lists. Google does not suggest how the Court is to apply Google’s proposed legal standard to state distinctions between culpable actions and protected actions or how the Court is to use such distinctions to reach the desired result of finding Defendants liable.

Is Google arguing that the “*specific objective* of promoting the use of its product to infringe” (emphasis in original) is shown here as a matter of law -- notwithstanding Fung’s denial, notwithstanding Fung’s testimony of a contrary objective, namely, to promote technological innovation, and notwithstanding Fung’s evidence in support of his testimony?

How does Google distinguish between a “general objective” and a “specific objective?” Is that similar to the distinction between a “general intent crime” and a “specific intent crime?” How does such a distinction apply in this case? Does application of such a distinction disqualify any items of evidence in Plaintiffs’ heap?

Defendants submit that element 1 of Google’s proposed legal standard has no substantial content or practical value.

2. Element 2 of Google’s proposed legal standard.

Element 2 of Google’s proposed legal standard is “that the defendant furthered that objective by *affirmative measures* taken to foster infringement.” (Emphasis in original.)

Google’s language seriously changes language abstracted from the *Grokster* rule. In addition, Google’s element 2 does not engage the facts of this case.

Google does not discuss which items in the heap of items in the District Court MSJ Order or Plaintiffs’ Opposition should be included as “affirmative measures.” For example, Google does not discuss Defendants’ supposed support of “automatic downloading?” (Appellants’ Opening Brief at 9, 13-14, 54-55)

Is Google arguing that the matters identified by Google on page 16 of its *amicus brief* and discussed supra are excluded from the category of “affirmative measures” that support the finding of liability?

What measures count as “affirmative?” How are “measures” different from “actions?” What actions, if any, are excluded from “affirmative measures?” Is Google saying something more than: “defendants did something, anything, at some time, any time, that can be interpreted as having been done to foster infringement?”

What does it mean to “foster infringement?” Does running a website with open-access forums “foster infringement?” Do open-access forums “foster infringement” if posters mention infringing copies of copyrighted works? Does a single such mention amount to “fostering infringement?” How many mentions does it take to prove that Defendants “foster infringement” as a matter of law?

Defendants submit that element 2 of Google’s proposed legal standard has no substantial content or practical value.

3. Element 3 of Google’s proposed legal standard.

Element 3 of Google’s proposed legal standard is “that the infringement at issue *actually resulted* from the defendant’s inducing conduct.” (*Amicus brief* at 8, emphasis in original.) Google does not identify any actual “infringement at issue.” The absence of any actual infringement was a major topic in Defendants’ Opening Brief. (Opening Brief at 43-45.)

Google discusses the need for a plaintiff to show causation and declares that “In a case like this, that showing should not be difficult.” (Google’s Brief at 18.) Defendants “repeatedly and unequivocally communicated that message to their

users.” As near as can be ascertained from Google’s general statement, “that message” was to “use our services for infringement.” Google argues: “And it appears that users of defendants’ websites heeded that message in overwhelming proportion.” (Id., sic.) Google’s general language has no support in facts and its specific language (“overwhelming proportion”) is devoid of meaning.

Unfortunately for Google's arguments, neither Google nor Plaintiffs actually prove any causation, either in their statistical manipulations or in their particularized evidence. What is actually demonstrated, at most, is infringement activity, including activity where Defendants' services are used, and occasions when Defendants cheer on potential infringers.

As a hypothetical, if there is an illegal prize-fight going on and defendant is selling snacks to the audience (or even running illegal bets between gamblers) while cheering the fighters, that does not prove that defendant caused the fight, especially if defendant came to an existing fight and there are lots of other snack vendors (or bet-runners) and cheerers. Defendants’ position is comparable here. Plaintiffs proved certain facts but they did not prove causation.

Causation under the common law, in commonsense terms and as argued in Defendants’ Briefs, requires that Defendants were in some sense necessary for the wrongful acts and that Defendants could have done something to prevent or avoid particular infringements that they are charged with inducing. There is no evidence

whatsoever that Defendants were necessary for any infringements or that Defendants could have done anything to prevent or avoid any infringements at all much less some particular infringement.

Google's proposed legal standard fails to address the causation problem. Defendants submit that element 3 of Google's proposed legal standard has no substantial content or practical value.

4. Google omits important matters from its proposed legal standard.

Google's proposed legal standard also fails to address or refer to matters that were addressed in Defendants' Briefs. Although Google frequently mentions *Sony* in the *amicus brief*, there is nothing in Google's proposed legal standard that refers to the *Sony* principle. Google does not address the conflict between First Amendment jurisprudence and liability based on "messages." Google does not address the problem of expanding liability based in *Grokster* on defendant's purposeful design of a device into liability based on defendant's participation in a technology that was designed by others. Google does not make any attempt to incorporate into its legal standard the "features" the Supreme Court identified in *Grokster*'s operations that justified imposing liability as a matter of law in that case. (See Defendants' Opening Brief at 46-49.)

C. Google Presents an Erroneous Argument That This Court Can Affirm DMCA Rulings in Both This Case and the *Veoh* Case.

Google argues that “the DMCA’s knowledge standards are specific and focus on the particular material that the plaintiff is suing about.” (*Amicus Brief* at 27.) Plaintiffs’ argument for a less specific focus:

was rejected ... in *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1082, 1099, 1111 (C.D. Cal. 2009) (appeal pending), which expressly held that it was not sufficient for a copyright owner to show “a provider’s general awareness of infringement.” *Id.*

Unfortunately, Google juxtaposes the foregoing principle with assertions that “this [Fung case] is such an easy case” and that a broader knowledge standard is “unnecessary to resolve this case.” (*Id.* at 26.)

Google’s position is fallacious. Evidence against Defendants is largely based on “general awareness.” (MSJ Order at ER0066:10-70:12.) Plaintiffs never alleged infringement of specific titles that are identified in the MSJ Order or Google’s evidence. (ER0370 (Exhibit A to Plaintiffs’ First Amended Complaint.)

Even more fundamentally, there is in this case evidence of Defendants’ robust DMCA notice and takedown system (nearly identical to one the provided by Google). Indeed the trial court acknowledged a triable issue of fact on Defendant’s DMCA notice and takedown mechanism. Thus there is logically no specific infringement that was identified in a DMCA Notice sent by a Plaintiff to a

Defendant that is or could be the basis for summary judgment. And even if there were evidence of DMCA Notices sent to Defendants of specific channels of infringement, a few incidents of actual infringement do not suffice to establish liability as a matter of law. In order to lose the defense as a matter of law, defendant's disregard must be wholesale or have been particularly directed in ways that injure plaintiff.

If otherwise disconnected incidents of actual infringement are presented as a basis for a judgment of general inculpatory knowledge or if there are substantial disputes over the validity of DMCA Notices, the conclusion is one that is reserved for the jury. See *Ellison v. Robertson*, supra, 357 F.3d at 1080. See also *Visa*, supra, 494 F.3d at 794 n. 4; *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619 (4<sup>th</sup> Cir. 2001); *Hendrickson v. eBay, Inc.*, 165 F.Supp.2d 1082 (C.D.Cal., 2001); *Brave New Films 501(c)(4) v. Weiner*, 626 F.Supp.2d 1013 (N.D.Cal.2009).

The errors in Google's approach are clearly shown by comparing the "heap"

of facts supposedly showing knowledge in this case and the heap in the *Veoh* case.<sup>4</sup>

In this, the *Fung* case, Plaintiffs generally incorporate “numerous undisputed facts in Part I” into their argument about actual knowledge or awareness. (Page 39 of Plaintiffs’ Opposition Brief.) Such facts are set forth at pages 7-11 of Plaintiffs’ Opposition Brief. Many show only “very general” awareness.

UMG presents corresponding evidence in its Opening Brief in Action No. 09-56777 at page 10-11 and 13-29.

Comparison of items in the respective heaps shows many common items, e.g., evidence of defendants general knowledge that infringers were using the site, supposedly inculpatory names for categories, supposedly inculpatory data added by defendants, supposedly inculpatory terms related to search engines, notices by third parties to defendants of specific infringements, news stories about the popularity of defendants’ services among infringers, disregard by defendants’ employees or agents of indicia of infringement, defendants’ advertising related to infringement and defendants’ profits keyed to traffic that is supposedly infringing.

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<sup>4</sup> UMG’s appeal in *Veoh* and Defendants’ appeal here have been scheduled for a single hearing. Some features of the two cases provide material for comparison, but Defendants find that overall parallels are difficult to draw. *Veoh* is charged with direct infringements while in this case only secondary infringement is alleged. Materials stored on the *Veoh* system are easily examined; Defendants here cannot investigate the copyright status of referenced materials that are accessible elsewhere. The *Veoh* defendants own their system and easily modify it while Defendants here are operating within the collective BitTorrent ecosystem.

In the *Fung* case, the District Court held that the heap of inculpatory items was so overwhelming that no opposition evidence could prevent judgment from being rendered against Defendants. In the *Veoh* case, on the other hand, a rather similar heap of items did not even raise a genuine issue of fact.

Google is making an argument that is contrary to reason when it argues both that summary judgment in favor of the *Veoh* defendants should be affirmed and also that summary judgment against the *Fung* defendants should be affirmed.

## CONCLUSION

Google cannot simultaneously protect its own position and the position of those it favors while offering Defendants as a scapegoat. Developmental technologies present too many factual overlaps and too many unique features.

Accordingly, Defendants ask the Court to reject Google's arguments urging affirmance of District Court rulings. Defendants adopt Google's arguments that demonstrate errors in District Court's rulings and in Plaintiffs' arguments.

Dated: April 11, 2011

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 4,752 words.

**CERTIFICATE OF SERVICE**

I hereby certify that on April 11, 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/ John Hur