

**No. 10-55946**

**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,

vs.

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

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**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**

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**SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLEES IN  
RESPONSE TO GOOGLE INC.'S BRIEF AS *AMICUS CURIAE***

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**SUPPLEMENTAL RULE 26.1 CORPORATE  
DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellees hereby submit the following supplemental corporate disclosure statement reflecting changes since the filing of the Appellees' Brief:

Plaintiff-Appellee Universal City Studios Productions LLLP and Universal City Studios LLC (the successor-in-interest to 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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## INTRODUCTION AND SUMMARY

In *Grokster*, the Supreme Court held that one who distributes a device or operates a service with the unlawful purpose, objective, or intent of fostering infringement is liable for the infringements that actually occur using that device or service. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 940 (2005). That ruling reflects the Supreme Court's recognition that unscrupulous operators can induce or encourage users to infringe by offering a device or service for that very purpose. Particularly in the Internet era, that wrongful objective can be accomplished by catering to a ready market for infringement, even without broadcasting any message that specifically solicits the direct infringement.

Google nonetheless urges this Court to rewrite *Grokster* for the express purpose of creating an immunity from liability for businesses that intentionally facilitate infringement in this way. But *Grokster* expressly rejected Google's twin theories (1) that the only way to induce infringement is by communicating a message encouraging infringement, and (2) that inducement liability attaches only to the relative handful of specific infringements that are committed in response to such messages. Those artificial limitations would immunize the largest offenders that intentionally facilitate infringement on a massive scale. Far from creating such an immunity, *Grokster* made clear that liability attaches to the intentional

facilitation of infringement by any means, and particularly by offering a device or service with the objective of facilitating infringement.

It is equally spurious for Google to claim that Congress immunized this kind of intentional wrongdoing in the DMCA. The preconditions that must be met to qualify for DMCA immunity ensure that it protects only “innocent” service providers. *ALS Scan, Inc. v. RemarQ Cmtys., Inc.*, 239 F.3d 619, 625 (4th Cir. 2001). Thus, the DMCA applies only to liability “by reason of” performing certain passive technological functions – not to liability arising under *Grokster* by reason of intentional wrongdoing. In addition, the DMCA defense applies only if the service provider does not have actual knowledge or awareness of facts and circumstances making infringement apparent – which necessarily excludes those who intentionally facilitate infringement. Google’s importation of a “specific knowledge” limitation finds no basis in the statute. That limitation would serve only to immunize intentional infringers, who can easily avoid knowledge of the specific infringements through which their intent is realized, while continuing to induce infringement on a massive scale.

Google’s “policy” argument that intentional infringers should be shielded from liability in order to protect legitimate innovators is also both meritless and contrary to *Grokster*. As the Supreme Court explained, inducement liability targets the intentional misuse of technology, not the technology itself, and thus creates no

risks of liability for lawful technological innovation. Indeed, immunizing intentional infringement would only harm legitimate innovation. If wrongdoers can intentionally exploit valuable copyrighted content without a license for free, then honest innovators who must pay for that content will not be able to compete on an equal footing. The inevitable result of the rules Google touts would be a race to the bottom in which service providers compete to maximize their intentional facilitation of infringement. Nothing in the law rewards wrongdoing in that way.

Notably, Google is not a disinterested amicus. Google itself is a defendant in suits charging certain of its business units with intentionally promoting infringement.<sup>1</sup> Google's arguments as amicus reflect its litigation interest in obtaining a legal ruling that facilitation of infringement, even if shown to be intentional, may still be immune from copyright liability.

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<sup>1</sup> See, e.g., *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 518 (S.D.N.Y. 2010) (“[A] jury could find that [Google and YouTube] not only were generally aware of, but welcomed, copyright-infringing material being placed on [the YouTube] website. Such material was attractive to users, whose increased usage enhanced defendants’ income from advertisements displayed on certain pages of the website...”); *Authors Guild v. Google Inc.*, \_\_ F. Supp. 2d \_\_, 2011 WL 986049, at \*9 (S.D.N.Y. 2011) (rejecting settlement in class action involving Google Books because it “would grant Google control over the digital commercialization of millions of books ... even though Google engaged in wholesale, blatant copying, without first obtaining copyright permissions”) (footnote omitted).



## ARGUMENT

### **I. *Grokster* Covers All Intentional Facilitation of Infringement Via a Product or Service, and Is Not Limited to Specific Encouraging Messages Causing Specific Acts of Infringement.**

Google seeks to limit *Grokster* to situations in which a defendant disseminates a specific message soliciting infringement, and would further limit liability only to the specific infringements carried out in response to such messages. But these limitations defy what the Supreme Court held. *Grokster* recognized that the Internet allows unscrupulous businesses to offer products or services with the objective that they be used to infringe on a massive scale, not just occasionally in response to an encouraging message to a specific user. Often, no overt advertising or message is necessary to foster mass infringement in this way, particularly in the post-Napster era, when a ready market of would-be direct infringers can be tapped. Thus, as the Supreme Court held, a service provider that offers its product or service with the very objective of exploiting that market for infringement is liable for all the infringement that results, whether or not any particular infringer was induced by a specific message, and even in the absence of any such messages.

Contrary to Google's rhetoric, *Grokster* did not thereby establish a "thought-tort" under which liability could be triggered merely by an inchoate bad purpose or by equivocal conduct." Google Br. 9. Liability under *Grokster*

involves concrete conduct causing concrete harm – operating a service that in fact facilitates infringement, typically on a massive scale. *In addition*, liability under *Grokster* requires an objective, purpose, or intent to facilitate infringement in this way. There is nothing unusual about imposing tort liability (or even criminal liability) for engaging in concrete conduct when carried out with wrongful intent. Battery turns on making physical movements with a certain intent. Inducement is similar. No doubt, in either case tortfeasors will aim their blows (operate their service) in ways that are more likely to achieve their wrongful objective than if they lacked such intent, as Fung did in this case. But the tortiousness of the conduct derives from acting with wrongful intent, not the precise steps taken to accomplish it.

**A. Inducement Does Not Require a Specific Message.**

*Grokster* already has rejected the contention that disseminating a *message* encouraging infringement is a necessary element of the inducement offense.<sup>2</sup> Any such limitation is foreclosed by the Supreme Court’s own enumeration of the *Grokster* 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

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<sup>2</sup> Here, of course, there is undisputed evidence that Defendants disseminated such messages. *See* Appellees’ Br. 7-10, 31. Those messages are powerful and uncontroverted *evidence* of Defendants’ wrongful objective and liability under *Grokster*. Proof of such solicitation is not, however, a necessary element in its own right for inducement liability.

inducement theory ... requires [3] evidence of actual infringement by recipients of the device [or users of the service].” *Grokster*, 545 U.S. at 940.

As this formulation shows, *Grokster* expressly covers cases where the service provider’s wrongful intent extends to the operation of its entire service, not just specific inducing messages. And the Supreme Court drove the point home by rejecting in unequivocal terms the very argument Google makes here:

It is not only that encouraging a particular consumer to infringe a copyright can give rise to secondary liability for the infringement that results. Inducement liability goes beyond that, and the distribution of a product can itself give rise to liability where evidence shows that the distributor intended and encouraged the product to be used to infringe. In such a case, the 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. Infringement can be encouraged or promoted not only by overt solicitation, but also by deliberately offering a service suitable for infringing use to the market for infringement.

Ignoring these clear statements, Google seizes on isolated fragments in *Grokster* referring to advertisements or messages soliciting infringement. But *Grokster* consistently emphasizes that although advertisements or encouraging messages can constitute inducement, they are not necessary elements of inducement liability. Thus, *Grokster* stated that “advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations” may be

the “classic instance” of inducement – but not the only one. *Id.* at 937. The Court went on to explain that where, as here, a service is being run with the purpose of facilitating infringement, encouraging messages are simply one type of evidence showing that wrongful purpose: “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...” *Id.* at 938; *see also id.* (“Proving that a message was sent out ... is the preeminent but not exclusive way of showing that active steps were taken with the purpose of bringing about infringing acts.”). For that reason, the Court emphasized, purely internal communications are just as relevant as advertisements and solicitations. *Id.*

That soliciting messages are not required for liability is also reflected in one of the central quotations relied on by Google: “[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by a clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.” *Id.* at 936-37 (quoted at Google Br. 8). As this quotation makes clear, *Grokster* liability arises from “distribut[ing] a device” (or offering a service) “with the object of promoting its use to infringe copyright.” And that object can be “shown” not only by “clear expression,” but also by “other affirmative steps taken to foster infringement.” *Id.*

As in any case where an unlawful purpose, objective, or intent is an element of an offense, it can be shown by circumstantial evidence. It will be a rare defendant who forthrightly trumpets his illegal objective, as Fung has done here. Thus, *Grokster* made explicit that the “clear expression or other affirmative steps” by which the object to foster infringement can be shown go beyond advertising and solicitation and include, among other possible evidence, internal communications, *id.* at 937; “aiming to satisfy a known source of demand for copyright infringement,” *id.* at 939; refusing to deploy “filtering tools or other mechanisms to diminish the infringing activity,” *id.*; providing technical assistance to users engaged in infringement, *id.* at 938; and evidence that “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 infringement or use access to infringing works to attract users, *id.* at 940; *see also* Appellees’ Br. 39-43.

Against the backdrop of the evidence the Court actually relied on in *Grokster*, Google’s argument that the district court should not have considered any evidence except that Defendants “disseminated an inducing message to users” (Google Br. 16) is frivolous. Google goes so far as to suggest that evidence of designing an indexing program for the purpose of seeking out and categorizing copyrighted works, like Fung’s “spider” program, should not factor into the

inducement analysis. Google Br. 16. But that is highly probative of culpable intent. In addition to being foreclosed by *Grokster* itself, Google's rule would encourage intentional inducers to limit what they say publicly, while forcing courts to ignore evidence like internal communications, investor presentations, and design features that may manifest a clear intent to facilitate infringement.

Despite *Grokster*'s own unequivocal holding, Google suggests that Circuit precedent requires the communication of an inducing message to the users as an element of *Grokster* liability. Google Br. 9-10. But Google selectively quotes out of context from the two cases on which it relies, *Perfect 10, Inc. v. Visa International Service Ass'n*, 494 F.3d 788 (9th Cir. 2007), and *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007). Central to the analysis in both *Visa* and *Amazon.com* was the fact that neither defendant was accused of providing its service with the overarching intent to facilitate copyright infringement, in stark contrast to the present case. *See Visa*, 494 F.3d at 801 (“Perfect 10 does not allege that Defendants created or promote their payment systems as a means to break laws.”); *Amazon.com*, 508 F.3d at 1171 n.11 (limiting discussion of inducement to a single footnote and concluding that the *Grokster* standard was not met “because Google has not promoted the use of its search engine specifically to infringe

copyrights”).<sup>3</sup> Thus, in the absence of wrongful intent animating the services, the inducement claims in those cases focused on whether specific messages were communicated.

**B. Causation Is Not Limited to Infringements in Response to Specific Messages.**

The foregoing also refutes Google’s causation argument. Because inducement is not limited to disseminating a message that solicits infringement, it follows that causation cannot be limited to specific acts of infringement committed in response to such soliciting messages. Thus, as the Supreme Court explained, “[i]t is not only that encouraging a particular consumer to infringe a copyright can give rise to secondary liability for the infringement that results.” *Grokster*, 545 U.S. at 940 n.13.

As shown above, the wrongful conduct in a *Grokster* case is distributing the device or operating the service that facilitates infringement with the purpose of fostering infringement. That wrongdoing causes *all* the infringements that actually result when users of the device or service use it as intended to infringe. The Supreme Court was explicit about this when it listed the elements for *Grokster* liability: “In addition to intent to bring about infringement and distribution of a

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<sup>3</sup> Moreover, this Court’s analysis in *Visa* was not limited to whether inducing messages were communicated, but instead questioned whether there was any evidence of “‘clear expression’ or ‘affirmative acts’ with any specific intent to foster infringement.” *Visa*, 494 F.3d at 801.

device [or offering of a service] suitable for infringing use,” inducement liability requires “evidence of actual infringement by recipients of the device [or users of the service]” – not evidence of infringement directly caused by soliciting messages. *Grokster*, 545 U.S. at 940. The Court went on to explain that because “there is evidence of infringement on a gigantic scale, ... there is no serious issue of the adequacy of MGM’s showing on this point in order to survive the companies’ summary judgment requests.” *Id.* No showing that the “infringement on a gigantic scale” was in response to soliciting messages was necessary, because the causation element was satisfied by showing that – as intended – infringement occurred using the device or service.

*Grokster* rejected Google’s causation argument for good reason: It would impose insurmountable burdens of proof on plaintiffs whose copyrighted works have been infringed using the kinds of decentralized and diffuse technologies typified by the Fung Sites. Via the Fung Sites and BitTorrent technology, copyrighted materials are transferred via “swarms” of users. Appellees’ Br. 4-7. Given that technology, proving that a particular act of infringement was induced by a specific message would be virtually impossible. The same was true in *Grokster* itself, where the peer-to-peer technologies would have prevented proof that a specific message caused a specific infringement. But the *Grokster* Court found



that to be irrelevant, and recognized the obstacles for copyright infringement plaintiffs created by these types of technological advances:

When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.

*Grokster*, 545 U.S. at 929-30. The causation rule Google advances would resurrect the very problem *Grokster* sought to fix: Copyright owners would be forced to identify countless direct infringers and bring each one before the court to attest to the immediate stimuli for their infringement.

**C. Google's Theories Would Reward Intentional Wrongdoing and Harm Legitimate Innovation.**

Google's "policy" arguments are likewise foreclosed by *Grokster*. As the Supreme Court recognized, holding businesses liable for intentionally facilitating infringement, even via services with substantial noninfringing uses, does nothing to hinder legitimate innovation, because innovators using the same technology without the wrongful objective will not face inducement liability. "The inducement rule ... premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise." *Id.* at 937. 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.

In an effort to conjure up a parade of horrors, Google argues that service providers might be held liable under the Supreme Court’s ruling for infringement occurring before any inducing activity begins or after past inducing activity ends. Google Br. 13-14, 18-19. As explained, however, inducement is not premised on linking specific acts of infringement with specific acts of inducement, but rather on the infringement that results from distributing a device or offering a service with culpable intent. If a defendant offers a service that facilitates infringement with the objective that it be used to infringe, and if as a result users infringe, then that defendant is liable for those infringements under *Grokster*. The temporal questions raised by Google are factual matters that can be addressed in each case, just as they are in any tort case where wrongful intent is an element of liability.<sup>4</sup>

Google also argues that innocent service providers could be liable for every infringement using their services merely because of “stray statements.” But

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<sup>4</sup> For example, a service provider that reforms its past wrongful behavior would presumably make efforts to stop future infringements through filtering or other methods. A court would then have to determine whether those efforts severed the causal link to future infringements using the service, or whether (as questioning from the Court suggested in *Grokster*) the defendant is still profiting from its intentional wrongdoing by having used “unlawfully expropriated property ...as part of the startup capital for his product,” Tr. of Oral Argument at 36-37, *Grokster*, 545 U.S. 913 (No. 04-480). Indeed, that is what has occurred in this case. See ER15.

evidence of wrongful intent must always be assessed in the context of an entire factual record. Because wrongdoers will usually try to conceal their unlawful purpose, no brightline rules can be formulated for what evidence is sufficient. Nonetheless, courts are well equipped under the Federal Rules of Civil Procedure to stop a case from going to trial where the evidence as a whole is legally insufficient to establish intentional inducement – or, conversely, as occurred here, where there is no genuine dispute that the defendants did operate their services with an unlawful objective. Google’s hypothetical scenarios certainly cannot justify an artificially constricted causation requirement.

At bottom, Google’s policy arguments are as misguided as Defendants’ arguments about non-infringing uses of BitTorrent technology. *See* Appellees’ Br. 23-24. The *Grokster* rule imposes liability when evidence establishes that the defendant distributed a device or offered a service with culpable intent and infringement results, leaving the lawful use of technology untouched. That rule, and the district court’s application of it here, “does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.” 545 U.S. at 937.

## **II. The DMCA Does Not Immunize the Intentional Facilitation of Infringement.**

Google’s position concerning the DMCA is even more extreme. Google argues that an intentional inducer of infringement under *Grokster* – even on

Google's narrow and erroneous reading of that case – is still immunized from liability by the DMCA, as long as the inducer carefully avoids obtaining “specific” knowledge of the resulting infringement and responds to takedown notices from copyright owners. As previously shown in Appellees' Brief, at 36-52, that argument is foreclosed by the DMCA's language, structure, and purpose.

Further, Google's rule would provide a road map for unscrupulous Internet businesses to profit intentionally from an unending flood of infringing uploads by users – and to actively encourage such uploads by advertisement or otherwise – but avoid liability. Such businesses would only need to blind themselves to the specifics of the infringing copies, and then wait to remove infringements until after copyright owners detect them and send takedown notices – an after-the-fact process that is never sufficient to stem the floodtide of infringement. Google's desired immunity is the equivalent of requiring copyright owners to empty a swimming pool with a teaspoon, while a willful infringer continues to fill the pool with a fire hose, all the while profiting from the operation. The statute enacted by Congress to protect innocent service providers certainly does not immunize operators who intentionally facilitate massive infringement in such a way.

Even Google does not appear to believe its own theory, because it pleads for the Court to sidestep the issue and instead affirm the DMCA ruling on grounds not relied on by the district court or pressed by Plaintiffs here or below. Specifically,

Google argues for affirmance of the DMCA ruling on the grounds that Defendants did not “(1) register[] a DMCA agent; (2) reasonably implement[] a repeat-infringer policy; and (3) respond[] expeditiously to take-down notices.” Google Br. 20. But the first two grounds listed by Google were not raised by Plaintiffs as a basis for summary judgment in their motion. And the district court ruled that the evidence was disputed concerning Google’s third ground, Defendants’ response to takedown notices. ER67.

In contrast, the evidence of Defendants’ wrongful intent and liability under *Grokster* is undisputed and underlies the district court’s legal rulings under the DMCA. Similarly, the evidence concerning Defendants’ direct financial interest and right and ability to control – which Google completely fails to mention – is also undisputed and provides an alternative ground of affirmance. Appellees’ Br. 46-49. Thus, the issues briefed by the parties and ruled on below – not the extraneous issues Google wants to inject into this appeal as a nonparty – present clean legal questions that are ripe and suitable for this Court’s decision.

**A. The “By Reason Of” Requirement Negates the DMCA Defense for *Grokster* Inducement.**

In arguing that the DCMA immunizes *Grokster* inducement, Google fails to mention, much less respond to, Plaintiffs’ first textual argument. *See* Appellees’ Br. 37-38. Namely, each of the four DMCA defenses applies only to liability “by reason of” performing specified functions, such as providing storage or indexing.

17 U.S.C. § 512(a)-(d). In contrast, “[t]he inducement rule ... premises liability on purposeful, culpable expression and conduct.” *Grokster*, 545 U.S. at 937.

In other statutory contexts, the Supreme Court has indicated that the words “by reason of” should be construed narrowly, lest the statute’s reach extend more broadly than Congress intended. See *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 263-64 (1992); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 (1983). Particularly in light of that rule, intent-based liability under *Grokster* is not “by reason of” the technical functions identified by the DMCA. The underlying premise of *Grokster* liability is that, without the wrongful purpose, the same conduct could be perfectly lawful. Liability is therefore “by reason of” the wrongful purpose.

That reflects Congress’s intent for the DMCA to provide a defense only for *innocent* service providers from potential liability based on (“by reason of”) the technical functions of their services. Liability based on technical functions, which the DMCA covers, is distinct from liability based on intentional misuse of technology. The Supreme Court drew a similar distinction in *Grokster* between the scope of the *Sony* defense – which applies to liability based solely on the “characteristics or uses of a distributed product” – and the scope of “fault-based liability” under *Grokster* itself – which is based on “intent.” *Grokster*, 545 U.S. at

934. Hence, *Grokster* liability is never “by reason of” the characteristics and functions identified in the DMCA.

Thus, as the district court correctly recognized, “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 Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 142 (S.D.N.Y. 2009) (“if Defendants ... encouraged or fostered such infringement, they would be ineligible for the DMCA’s safe harbor provisions”).

**B. The Knowledge and Awareness Condition Also Negates the DMCA Defense for *Grokster* Inducement.**

The DMCA’s knowledge and awareness prong is a second, independent basis negating the DMCA defense for *Grokster* inducement. The statutory language – which Google all but ignores – denies the defense to a service provider that has “actual knowledge that the material or activity is infringing” or, “in the absence of such actual knowledge, is ... aware of facts or circumstances from which infringing activity is apparent” (sometimes referred to as a “red flag” test, *e.g.*, S. Rep. No. 105-190, at 43-44 (1998)), but does not “act[] expeditiously to remove, or disable access to, the material.” 17 U.S.C. § 512(d)(1).

Google asserts this provision covers only knowledge of “specific” infringements. But that argument finds no support in the statutory language, which omits the modifier “specific” or any similar limitation; provides that “awareness of facts and circumstances from which infringing activity is apparent” is an alternative basis for negating the defense “in the absence of [actual] knowledge”; and denies the defense when there is actual knowledge or red-flag awareness not only of “material” but also of “infringing *activity*,” which cannot be limited to specific instances of infringement. 17 U.S.C. § 512(d)(1); S. Rep. No. 105-190 at 44. All these features of the actual statutory language establish that Congress intended it to broadly cover a variety of cases in which a service provider has actual knowledge or red-flag awareness of infringement on its site, not the single narrow circumstance identified by Google. *See* Appellees’ Br. 42-43.

Google’s reading is further rebutted, not supported, by the statutory requirement that a service provider who has actual or “red flag” knowledge must “act[] expeditiously to remove, or disable access to, the material.” The natural reading of this language is that “the material” a service provider must expeditiously remove turns on the nature of the infringing activity apparent from the facts and circumstances of which it is aware. If the service provider only knows of scattered instances of specific infringement, then those specific instances are what must be eliminated. But where a service provider actually knows or is



aware of facts and circumstances indicating massive infringement using its service – such as when it *intends* to foster that infringement under *Grokster* – then its duty to remove “the material” sweeps wider. In such a circumstance, the provider cannot avoid liability by blinding itself to the specifics. Rather, if there is actual knowledge or awareness of massive infringement on the site, the duty to “act[] expeditiously to remove ... the material” necessarily encompasses making reasonable efforts to identify specific infringing material, whether manually or by using filtering technology, so that it may be removed. *Cf.* ER4 n.1 (finding that “a filter would appear to be the most efficient way for Defendants to avoid liability”).

Accordingly, the DMCA does not allow a service provider that actually knows or is aware of circumstances indicating widespread infringement on its service to willfully blind itself to the specifics of that infringement. By its terms, the “expeditious removal” requirement forbids such willful blindness. Nor does § 512(m) support Google’s advocacy of willful blindness. Under that subsection, “a service provider need not monitor its service or affirmatively seek facts indicating infringing activity ....However, *if the service provider becomes aware of a ‘red flag’ from which infringing activity is apparent, it will lose the limitation of liability if it takes no action.*” S. Rep. No. 105-190, at 44 (emphasis added). Thus, a service provider that *lacks* actual knowledge of infringement or awareness of red flags indicating infringement may well have no freestanding duty to monitor for

infringement to obtain such knowledge or awareness in the first instance. But once a service provider does in fact *have* relevant knowledge – as a *Grokster* inducer surely does – then it may not turn a blind eye to the specifics, but must take the steps necessary to expeditiously remove such material. *See* Appellees’ Br. 44-45.

Finding no support in the statute itself, Google relies almost exclusively on snippets from a few cases. That effort is unavailing. *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102 (9th Cir. 2007), does not support Google’s specific knowledge argument. Indeed, *CCBill* said nothing at all about whether knowledge or awareness must be general or specific. It simply held that *in the absence of* actual knowledge or “red-flag” awareness of infringing activity, a service provider does not have a freestanding duty to investigate in order to obtain knowledge or awareness in the first instance. But, as just explained, where a service provider already *does* have knowledge or awareness – a scenario *CCBill* did not discuss – then the DMCA’s plain language requires the service to take the steps necessary to expeditiously remove the infringing material. In short, nothing in the DMCA or *CCBill* permits willful blindness once the service provider possesses actual knowledge or awareness of circumstances indicating rampant infringement. *See* Appellees’ Br. 45-46 & n.14; *see also id.* at 41-42 (discussing other cases on which Google relied).

**C. The DMCA Adequately Protects Innocent Service Providers Without Distorting It Into an Immunity for *Grokster* Inducers.**

Because the DMCA's language does not support Google's position, Google hopes to convince this Court that judicially expanding the defense to intentional infringers is necessary to protect innovation by innocent service providers. But as recognized by the Supreme Court in *Grokster*, imposing fault-based liability by reason of a defendant's wrongful intent does nothing to hinder innovation by honest enterprises that lack infringing intent. *Supra* Section I.C. The very same logic necessarily applies under the DMCA. Imposing liability "by reason of" wrongful intent and imposing liability "by reason of" using certain technology are two different things. Denying the DMCA defense to intentional facilitators under *Grokster* provides ample room for innovation by innocent service providers, who are protected from liability "by reason of" performing the technological functions identified in § 512(a)-(d).

Nor is a specific knowledge standard appropriate to foster innovation by innocent service providers. To the contrary, adopting a specific knowledge requirement would just provide a blueprint for intentional wrongdoers to profit from infringement while escaping scot-free. In the Internet era, dishonest enterprises that intend to profit from infringement can always structure their businesses to avoid knowledge of the specifics of the infringements they are fostering. The Supreme Court recognized this in *Grokster* when it rejected a

“specific knowledge of infringement” standard as “error” in inducement cases. *Grokster*, 545 U.S. at 934. Although service providers must also respond to takedown notices to qualify for the DMCA defense, that is not enough to prevent intentional infringement on a massive scale. Businesses that cater to a community of infringers can always count on a flood of infringing uploads, while copyright owners can only send takedown notices on a link-by-link basis after the fact. Thus, a service provider that intends to foster and profit from infringement can easily continue to do so even if it responds to takedown notices. That is why Congress did not make responding to takedown notices the sole precondition for the DMCA defense.

Conversely, innocent service providers do not need a specific knowledge standard. The DMCA requires “actual knowledge” or actual subjective “red-flag” awareness of facts indicating infringing activity to trigger the duty to remove infringing material. *See* S. Rep. 105-190, at 44. Thus, an innocent service provider who does not have the objective of facilitating infringement but merely has constructive knowledge (“should have known”) of possible infringement because its service is the sort that *can* be used to infringe will lack the actual knowledge or subjective “red flag” awareness that triggers a duty to remove

infringing material.<sup>5</sup> If the innocent service provider obtains actual knowledge or subjective red-flag awareness of a few infringements, then it must only expeditiously remove that material.

But where a service provider has actual knowledge or subjective red-flag awareness of circumstances indicating that its service is in fact rife with infringement on a massive scale, then it must act expeditiously to do what is reasonable to remove “the material” that is the subject of the massive infringing activity it knows about. That does not impose an undue burden on innocent service providers. To the contrary, the knowing refusal to act reasonably to stop infringement on a massive scale refutes any claim of innocence. As Congress recognized when it enacted the DMCA, requiring service providers to act in the face of actual knowledge or subjective red-flag awareness provides ample protection for legitimate technological innovation, while preventing Internet businesses from knowingly and intentionally fostering and profiting from infringement.

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<sup>5</sup> Similarly, under the *Sony* rule, liability for distributing a product with substantial noninfringing uses cannot be imposed merely based on “constructive knowledge” that some consumers “would use [the product] to infringe.” *Grokster*, 545 U.S. at 935, 931.

## CONCLUSION

For the foregoing reasons, the Court should reject Google's pleas for immunities for businesses that intentionally facilitate infringement.

Respectfully submitted,

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Dated: April 11, 2011

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B) and 32(a)(7)(C), and the Clerk's Order of March 31, 2011, the undersigned certifies that the foregoing Brief of Plaintiffs-Appellees contains 5,575 words. In preparing this certificate, the undersigned relied on the word count generate by Microsoft Word.

Dated: April 11, 2011

Respectfully submitted,

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## **STATUTORY ADDENDUM**

Pursuant to Fed. R. App. P. 28-2.7, all applicable statutes are contained in the Statutory Addendum bound with Brief of Plaintiffs-Appellees filed on February 1, 2011.



## CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 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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