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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COLUMBIA PICTURES)	Case No. CV 06-5578-SVW (JCx)
INDUSTRIES, INC., et al.,)	
	)	DEFENDANTS' OPPOSITION TO
Plaintiffs,	)	PLAINTIFFS' MOTION FOR A
	)	PERMANENT INJUNCTION
vs.	)	AGAINST DEFENDANTS
)	
GARY FUNG, et al.,)	Hearing Date: March 22, 2010
)	Time: 1:30 p.m.
Defendants.)	Ctrm: 6
)	Judge: Hon. Stephen V. Wilson

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1 Defendants Gary Fung and Isohunt Web Technologies, Inc. (“defendants”)
2 oppose plaintiffs’ Motion for a Permanent Injunction. The Motion should be denied
3 on the grounds of an insufficient factual showing. In the alternative, the Court should
4 order further proceedings to obtain information needed to ascertain whether a
5 permanent injunction should issue and, if so, the appropriate terms, conditions and
6 devices for such a permanent injunction.

7 I. INTRODUCTION

8 Plaintiffs seek a broad-brush black-and-white solution for a problem that will
9 require a spectrum of colors and attention to detail. The proposed Permanent
10 Injunction disregards or belittles unique features of the case – the collective
11 BitTorrent ecology, legitimate BitTorrent uses, international implications – as well as
12 the carefully-crafted findings in the Order Granting Plaintiffs’ Motion for Summary
13 Judgment (“MSJ Order”). As a practical matter, the proposed Permanent Injunction
14 acts like a forfeiture order and life sentence without parole, shutting down
15 defendants’ websites and rendering Fung permanently unemployable in any Internet-
16 related capacity.

17 Plaintiffs neglect to show that such a draconian injunction will prevent even a
18 single infringement. Rather, the excessive proposed Permanent Injunction would
19 likely turn into a weapon aimed at independent BitTorrent developers, who compete
20 with plaintiffs and plaintiffs’ affiliates for creative employees, development resources
21 and market shares.

22 In their moving papers, plaintiffs cite *Metro-Goldwyn-Mayer Studios, Inc. v.*
23 *Grokster, Ltd.*, 518 F.Supp.2d 1197 (C. D. Cal. 2007) (“*Grokster V*”) as their guide
24 and declare that their proposed injunction “is tailored to the harm caused by
25 defendants.” (Motion at 2:25-3:3.) Defendants also take *Grokster V* as the guide;
26 but the detailed approach of the *Grokster V* decision reveals the crudity in plaintiffs’
27 Proposed Injunction. Defendants suggest that plaintiffs’ Proposed Injunction is
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1 designed not so much to reach defendants' wrongful conduct as to require defendants
2 to install an unworkable and unconstitutional "title filter" that has little to do with the
3 present case. Defendants suggest that plaintiffs are more concerned with their
4 broader anti-piracy campaign and their BitTorrent control strategy than with future
5 threatened copyright infringement induced by defendants.

6 Plaintiffs' strategic campaign collides with principles that injunctive relief should
7 avoid prohibiting legitimate conduct and that an injunction against inducement cannot
8 extend to establishing plaintiffs' exclusive control over a staple commodity, in this
9 case, over dot-torrent files. Plaintiffs' proposed "title filter" would give them such
10 exclusive control over dot-torrent files, at least as those files are accessible through
11 defendants' websites.

12 If it were actually to be mandated and put into operation, plaintiffs' proposed
13 filter would make Swiss cheese out of the dictionary, its overbreadth would leave few
14 if any words left over for search, and block authorized distributions, distributions
15 protected by Digital Rights Management ("DRM"), distributions of materials in the
16 public domain ("Phantom of the Opera") and distributions of materials protected by
17 doctrines of fair use and transformation. If a new TV show title is based on a popular
18 phrase that is already in the name of an amateur film or linux program, distribution of
19 the film or program will be blocked.

20 As discussed further below Google and Isohunt use the same core technology of
21 spidering, indexing, and searching and such core technology ought not be enjoined.
22 Indeed, given the identical core technology it should come as little surprise that 95%
23 of the torrent file hashes found on Isohunt are found on other major search engines
24 such as Google. Given that the Court found a triable issue on defendants' DMCA
25 (actual notice and takedown) processes, such DMCA procedures are still squarely in
26 place, and the defendants' removal of the various items related to inducement, it is
27 respectfully argued that little if any injunction is needed.

28

1 In sum, Plaintiffs' proposed Permanent Injunction is poorly suited to its task.
 2 Actual harm caused by defendants – the factual predicate for an injunction and the
 3 measure of its scope – has not been shown. A proper injunction will prohibit
 4 inducement and solely inducement, while avoiding prohibitions of protected conduct.
 5 If such an injunction is to issue, its terms, conditions and devices must address the
 6 facts of the case. Plaintiffs' proposed Permanent Injunction is filled with excesses and
 7 misfits and the Motion should be denied or continued.

8 II. FACTS

9 Plaintiffs declare:

10 “Moreover, in a recent interview in Forbes online magazine, defendant Fung
 11 candidly acknowledged that defendants would not do anything to stop
 12 infringement on defendants' sites ‘without a court order.’ Servodidio Exhibit
 13 F.” (Motion at 2:19-21.)

14 Plaintiffs' quotation is erroneous. The transcript of the interview in Exhibit F
 15 contains the following exchange:

16 **“Given all of your legal troubles, have you considered trying to proactively
 17 remove all of your infringing content, as Mininova is doing?**

18 We won't do that without a court order.”

19 It is impossible to remove “all [materials that lead to] infringing content” while
 20 maintaining operations as an open and independent torrent site.¹

21 _____
 22 ¹ On its website, in a posting dated November 26, 2009, Mininova states:
 23 “Unfortunately the court ruling leaves us no other option than to take our platform
 24 offline, except for the Content Distribution service. According to the verdict (Dutch
 25 link) we have to prevent uploads of torrents to Mininova that refer to certain titles or to
 26 similar-looking titles. We've been testing some filtering systems the last couple of
 27 months, but we found that it's neither technically nor operationally possible to
 28 implement a 100% working filter system. Therefore, we decided that the only option is
 to limit Mininova to Content Distribution torrents from now on. We are still
 considering an appeal at this moment.” <http://mnstat.com/images/blog/index.html>

1 Contrary to plaintiffs' charges, changes in the isoHunt website "to stop
2 infringement" are readily apparent. Long ago, defendants modified metatags to omit
3 words and phrases the Court found improper and the "Movie Box Office" feature
4 discussed in the MSJ Order. Defendants disconnected automated processes that
5 reported statistics on downloads and BitTorrent swarms. Declaration of Gary Fung in
6 Opposition to Motion for Permanent Injunction ("Fung Dec."), paragraph 3.

7 Defendants are mindful of what this Court stated in *Grokster V*, namely, that
8 "...it is entirely too easy for an adjudicated infringer to claim a reformation once the
9 specter of a permanent injunction looms near." 518 F. Supp. at 1221. Instead of
10 claiming reformation and trying to evade a looming specter, Fung has prepared another
11 version of the isohunt website that can be viewed at <http://www.isohunt.com/lite/> (the
12 "primal" website). The primal website contains only an accessible search engine.
13 Please see the accompanying Fung Declaration and Exhibits A-H attached thereto for
14 factual support, including screen shots and data discussed herein.

15 Defendants will make the primal website available for operations under the
16 Court's direction to test the efficacy, burdens and excess of any proposed terms of
17 injunction. As shown in the accompanying Fung declaration, at all material times,
18 defendants have maintained a robust and effective DMCA policy and practice.

19 There is only one basic technical design for all search engine systems which
20 consists of the ever changing dynamic process called "SIS" namely **spidering** the
21 public facing Internet worldwide and as broadly as feasible for URLs (uniform
22 resource locators or links) and files, **indexing** and caching the same with related
23 metadata in a database, and allowing for user **search** of the index on the search site,
24 and that Google, Yahoo and isoHunt all have the same goal: to organize and help users
25 locate information worldwide. isoHunt and the major search engines all use, at its basic
26 core, the SIS approach. Fung Dec., paragraph 11.

27 Given the isoHunt and the major search engines all use the same core technology
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1 one would expect a significant overlap in availability of torrent files via such search
2 engines. In January, 2010, Mr. Fung performed a factual examination of 5000 random
3 hashes of torrent files indexed on Isohunt.com and compared these to results with the
4 hashes and torrent files available from search results in the main internet search
5 engines, including Google and Yahoo!. This test shows that 95% of the torrent files
6 indexed on isoHunt are equally available through the main search engines (4721
7 hashes out of 5000 obtained a hit from Google or Yahoo!, which is 95% coverage.)
8 Fung Dec., paragraphs 13-14.

9 This indicates that the isoHunt search engine does not operate differently than
10 other search engines in any significant degree, it does not discriminate what is indexed
11 and what is not, nor does it make available links to possibly copyright infringing
12 content any more than what is already available on the internet in aggregate as a whole
13 (of course after actual notice under the DMCA filtering hashes). In essence, isoHunt
14 search results reflect the state of the Internet as a whole regarding dot torrent files
15 much the same way as Google and other search sites. Fung Dec., paragraph 15.

16 Indeed, the Court in ruling on the Motion for Summary Judgment in this case
17 found a triable issue regarding actual notice and takedown mechanisms under the
18 DMCA. Defendants submit that, with the current robust DMCA policy and practice,
19 and the rest of the site distilled down to the core SIS technology, the primal website
20 does not infringe upon copyright under the law.

21 As one should not read the Order on the Motion for Summary Judgment finding
22 that the SIS search engine technologies above as it relates to dot torrent files were in
23 violation of US law defendants would respectfully request that any potential injunction
24 not enjoin the SIS functionality.

25 As a matter of public policy, defendants suggest that the Court should consider
26 that legitimate authors need independent BitTorrent resources such as isoHunt. In their
27 Statement of Genuine Issues in Opposition to Motion for Summary Judgment (“SGI”),
28

1 Opposition Facts nn-qq, defendants showed that independent video producers
2 represented on defendants' websites use BitTorrent technology to distribute their
3 works and that the continued existence of these producers may be threatened if open
4 BitTorrent resources and trackers that aggregate and track any and all torrent files are
5 potentially liable simply because of the services they offer. Some software and
6 videogame developers and distributors of technical manuals and free religious teaching
7 materials might be similarly impacted.

8 As a second, related but distinct matter of public policy, defendants submit that
9 the Court should consider the status of competition and recent developments in
10 BitTorrent commerce, commerce that is increasingly controlled by plaintiffs and other
11 copyright owners in the Entertainment Industry. Dot-torrent files resemble staples of
12 commerce in patent law, as extended by *Sony*. The Entertainment Industry should not
13 be enabled to exercise exclusive and monopolistic control over dot-torrent files and the
14 BitTorrent network that depends on dot-torrent files. Such control would be
15 detrimental to independent and creative developers of new technologies and new art
16 forms, especially technologies that maximize user control, precisely the persons
17 identified by Congress and the Supreme Court as worthy of special consideration. 47
18 U.S.C. § 230(b); *Grokster III* at 125 S.Ct. 2776, n. 8.

19 Because of these matters of public policy, defendants request that the Court
20 obtain further facts about the present status of BitTorrent use and traffic and about
21 anticipated future trends before issuing any injunction. Plaintiffs and MPAA have the
22 facts and nobody else has the facts.

23 It is respectfully argued that Grokster's copyright inducement theory only applies
24 to distribution of devices such as peer to peer copying software - The Torrent file
25 search engines and Torrent Files are not a device in the Grokster context and thus there
26 is no technological aspect of the Isohunt site or services to enjoin under an Inducement
27 Theory.

1 In Grokster Justice Souter clarifies what is required for inducement, namely
2 "intent", a "device", and "actual infringement by recipients of the device" and states:
3 "In addition to intent to bring about infringement and distribution of a device suitable
4 for infringing use, the inducement theory of course requires evidence of actual
5 infringement by recipients of the device, the software in this case."

6 The Grokster case turned on the Supreme Court calling peer to peer copying
7 software a device and finding defendants responsible for the copying arising out of
8 "use" of the "device." In the instant case there is no copying on the site or via its
9 services, there is no device, and there is nothing about the sites or services that
10 provided a software mechanism for copying. Once the torrent file was downloaded the
11 connection with the site was lost. There is no precedent for calling a data file, void of
12 any protectable content, a device or one that has any resemblance to the peer to peer
13 copying software distributed in Grokster just like there is no rational basis to say that a
14 book that lists URLs that may lead to infringing web sites is a "device" under Grokster.
15 Thus, it is respectfully submitted that at a minimum, until this "device" issue can be
16 clarified by an appellate Court, that any injunction that issues be narrowly tailored.

17 As to the particulars of the case, the Court has noted that defendants operate three
18 websites in addition to the isohunt website, namely, the tracker torrentbox.com; the
19 eDonkey site, www.ed2k-it.com; and another torrent site, podtropolis.com.
20 Defendants suggest that the terms, conditions and devices ordered for isohunt.com will
21 also guide the other websites. However, differences will also have to be addressed.

22 Once the primal website is operating within the copyright laws, defendants want
23 to add allowable modules and features, e.g., enabling visitors to upload files and/or
24 providing visitors reports on torrent activity. Defendants desire to establish a website
25 that operates within the copyright laws but that also provides defendants and the file-
26 sharing community with as much freedom as possible -- that is, with minimal
27 injunctive restrictions . see Fung Dec., paragraph 4-5.

28

1 Defendants need guidance about whether terms such as “television” and “cam”
2 can be included on the website. (See plaintiffs’ Proposed Injunction at 7:23-25 where
3 these words are exemplary of “terms that signal the availability of Plaintiffs’
4 Copyrighted Works.”) The online website currently uses categories named as
5 “Videos/Movies” and “TV.” Defendants submit that, because such terms are in
6 common speech, they cannot be enjoined consistent with the First Amendment. If use
7 of such common terms is enjoined, defendants need a clear set of rules.

8 Advertising on the website that is currently online at isohunt.com (different from
9 the primal site) includes a manufacturer of consumer BitTorrent systems. Defendants
10 want to solicit and display such advertising as freely as possible.

11 Defendant Fung is a dedicated developer of P2P systems and promotes the widest
12 possible use of file-sharing. He is opposed to the paralyzing constraints sought by
13 MPAA and plaintiffs in general and in this case. Defendants submit that plaintiffs’
14 proposed Permanent Injunction unconstitutionally curtails his right to earn a living and
15 to express his convictions. Fung Dec., paragraph 22.

16 17 **III. LEGAL ARGUMENT**

18 **A. Standard for Issuance of a Permanent Injunction.**

19 **1. General Standard: Discretion within Constraints**

20 The four-element standard for issuance of a permanent injunction was stated in
21 *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d
22 641 (2006) (“*eBay*”) as follows:

23 According to well-established principles of equity, a plaintiff seeking a
24 permanent injunction must satisfy a four-factor test before a court may grant
25 such relief. A plaintiff must demonstrate: (1) that it has suffered an
26 irreparable injury; (2) that remedies available at law, such as monetary
27 damages, are inadequate to compensate for that injury; (3) that, considering
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1 the balance of hardships between the plaintiff and defendant, a remedy in
2 equity is warranted; and (4) that the public interest would not be disserved
3 by a permanent injunction.

4 As this Court reiterated in *Grokster V* at 518 F.Supp.2d 1226 (inner quotation
5 marks and citations omitted):

6 "A permanent injunction must be carefully crafted. The scope of the
7 injunction should be coterminous with the infringement. This is perhaps
8 partly why blanket injunctions to obey the law are disfavored. Rule 65(d)
9 also requires that injunctions be specific."

10 "Injunctive relief should be narrowly tailored to fit specific legal violations.
11 The devil is in the details."

12 In *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 444, 39
13 L. Ed. 2d 435, 94 S. Ct. 1113 (1974) the Supreme Court stated:

14 "one basic principle built into Rule 65 is that those against whom an
15 injunction is issued should receive fair and precisely drawn notice of what
16 the injunction actually prohibits."

17 Injunctions that lacked sufficiently specific terms include those reviewed in
18 *Union Pac. R.R. v. Mower*, 219 F.3d 1069, 1077 (9th Cir. 2000); *E. & J. Gallo Winery*
19 *v Gallo Cattle Co.*, 967 F2d 1280 (9th Cir. 1992); *Test Masters Educ. Servs. v Singh*
20 (5th Cir. 2005) 428 F3d 559, 76 USPQ2d 1865, *cert den* (2006) 547 US 1055, 126 S
21 Ct 1662, 164 L Ed 2d 397.

22 2. The Court is Constrained by Free Speech Provisions of the First
23 Amendment to the United States Constitution.

24 "[P]ermanent injunctions--i.e., court orders that actually forbid speech activities--
25 are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550,
26 113 S. Ct. 2766, 125 L. Ed. 2d 441 (1993)

27 Any system of prior restraints on communication bears a heavy presumption
28

1 against its constitutional validity. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 9 L.
2 Ed. 2d 584, 83 S. Ct. 631 (1963). Prior restraints are unconstitutional limitations on
3 free speech except in exceptional circumstances. *Near v. Minnesota*, 283 U.S. 697,
4 716, 75 L. Ed. 1357, 51 S. Ct. 625 (1931). An “injunction, so far as it imposes prior
5 restraint on speech and publication, constitutes an impermissible restraint on First
6 Amendment rights.” *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418, 91
7 S. Ct. 1575, 29 L. Ed. 2d 1 (1971). See also *New.net, Inc. v. Lavasoft*, 356 F. Supp. 2d
8 1071, 1084 (C.D. Cal. 2003); *Consolidation Coal Co. v Disabled Miners of Southern*
9 *West Virginia*, 442 F2d 1261, 1267 (4th Cir.) *cert den* 404 US 911 (1971) (injunction
10 improperly used terms ““any other manner” and “or otherwise inducing”).

11 Plaintiffs are asking the Court to enjoin defendants' speech that allegedly
12 "encourages" copyright infringement and to prohibit defendants' use of “terms that are
13 widely associated with copyright infringement.” (Proposed Injunction at 7:26-28;
14 8:22-9:2.) Of course, terms such as “P2P” and “BitTorrent” are probably “widely
15 associated with copyright infringement” in the minds of some persons.

16 "The mere tendency of speech to encourage unlawful acts is not a
17 sufficient reason for banning it. The government 'cannot constitutionally
18 premise legislation on the desirability of controlling a person's private
19 thoughts.' [Citation.] First Amendment freedoms are most in danger when
20 the government seeks to control thought or to justify its laws for that
21 impermissible end. The right to think is the beginning of freedom, and
22 speech must be protected from the government because speech is the
23 beginning of thought.

24 “To preserve these freedoms, and to protect speech for its own sake,
25 the Court's First Amendment cases draw vital distinctions between words
26 and deeds, between ideas and conduct. [Citation]; see also *Bartnicki v.*
27 *Vopper*, 532 U.S. 514, 529, 149 L. Ed. 2d 787, 121 S. Ct. 1753 (2001) (“The
28

1 normal method of deterring unlawful conduct is to impose an appropriate
2 punishment on the person who engages in it'). The government may not
3 prohibit speech because it increases the chance an unlawful act will be
4 committed 'at some indefinite future time.' [Citation.] The government may
5 suppress speech for advocating the use of force or a violation of law only if
6 'such advocacy is directed to inciting or producing imminent lawless action
7 and is likely to incite or produce such action.' [Citation.]"

8 *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253, 122 S.Ct. 1389, 152
9 L.Ed.2d 403 (2002) ("virtual" child pornography could not be outlawed from the
10 Internet on the grounds that it "whets the appetites of pedophiles and encourages them
11 to engage in illegal conduct." Id.) See also. *Entertainment Software Association v.*
12 *Blagojevich*, 469 F.3d 641(7th Cir. Ill. 2006).

13 In *Madsen v. Womens' Health Center, Inc.*, 512 U.S. 753, 765-766, 14 S. Ct.
14 2516, 129 L. Ed. 2d 593 (1994), the Court modified an injunction restraining
15 demonstrations at an abortion clinic. holding that free speech rights required it to
16 "ensure that the injunction was no broader than necessary to achieve its desired goals,"
17 and that "the injunction [should] burden no more speech than necessary to serve a
18 significant government interest."

19 Here too, if any injunctive remedy is to be imposed, it must be specific and
20 limited to narrow prohibitions of language.

21 B. Plaintiffs Have Failed to Establish the Factual Predicates Needed for Issuance of
22 a Permanent Injunction.

23 1. Plaintiffs Bear the Burden of Proof as to Each Element of the *eBay*
24 Standard.

25 As this Court ruled in *Grokster V*, plaintiffs have the burden of proof as to each
26 element of the *eBay* standard set forth supra in point A.1, including the element of
27 irreparable harm. 518 F.Supp.2d at 1208, 1211.

1 2. Plaintiffs Have Failed to Show Actual Irreparable Harm but Have
2 Presented Nothing More Than Statistical Speculations.

3 Suppose a hilly terrain is subjected for many years to extremely heavy rainfalls,
4 amounting to a natural disaster. Allegorically, the rain stands for copyright infringers
5 falling on plaintiffs' intellectual property and damaging its value. Specifically,
6 plaintiffs are in the position of a landowner at the bottom of the valley whose
7 previously valuable property has become subject to flooding. The landowner blames
8 defendant, who recently bought a large estate on the ridge overlooking landowner's
9 property. Defendant loves rain and holds weekly parties celebrating rain, selling
10 tickets at a profit. Defendant fires a cannon during the parties, believing that this will
11 cause clouds to drop rain right on top of him. A creek runs from defendant's estate,
12 often carrying rainwater in full spate into a network of creeks that contributes to the
13 flooding of landowner's property. During rain parties, defendant pours cups of water
14 into the creek as a libation and to "drown Satan," referring to the landowner.

15 Landowner sues defendant and asks the Court to enjoin defendant's activities and
16 to compel defendant to keep water out of the creeks.

17 The Court rules that landowner's flooding problems are the result of many years
18 of extremely heavy rainfalls and that defendant did not cause the flooding. It is not
19 possible for defendant on the ridge to prevent water from flowing out of his estate into
20 the valley. Even if defendant's creek were to be dammed, the flooding would be
21 unchanged because water finds other channels to landowner's property.

22 The Court notes that most of the runoff comes from high hills on the side of the
23 valley opposite defendant's estate. The whole high hills property is owned by a single
24 person, a friend of the landowner who has not been sued.

25 The Court enjoins defendant's cannon-firing because it violates an anti-noise
26 ordinance. The Court appoints a referee to draft time, space and manner restrictions
27 for defendant's rain parties.

1 One chief point of the allegory, of course, is to emphasize that, in this case,
2 defendants did not cause plaintiffs' damages. The damages were caused by advances
3 in technology, namely, P2P networking and BitTorrent. Regardless of defendants'
4 public promotions and regardless of any involvement of defendants' in infringers'
5 activities and any profiting by defendants from such involvement, the chief online
6 presence of defendants is a search engine that visitors to defendants' websites use
7 according to their own intentions, infringing or not. Those with infringing intentions
8 can use Google just as easily, which stands like the high hills property in the allegory
9 as the greater channel of plaintiffs' damages, if damage is to be attributed to an upland
10 property.

11 A second point of the allegory is to emphasize that the finding of liability in this
12 case is detached from any actual harm to plaintiffs just like firing the cannon is
13 detached from any rain that falls thereafter. Causing rain is not part of the finding
14 against defendant for firing the cannon; he is liable for violation of an anti-noise
15 ordinance. Here, causing copyright infringement is not part of inducement. Rather,
16 inducement is based on defendant's "purposeful, culpable expression and conduct" and
17 "liability may attach even if the defendant does not induce specific acts of
18 infringement." *Grokster III* quoted in *Grokster V* at 22:26-23:8.

19 Findings of liability for inducement against defendants does not establish harm,
20 much less irreparable harm. Rather, defendants' liability under *Grokster* is liability that
21 can occur without causing harm. Here, defendants' liability is based on nothing more
22 than online speaking and operating online programs which qualify as speech on the
23 Internet, speech which contains no copyrighted materials whatsoever. The collision of
24 such speech liability with Free Speech rights is a matter of fundamental importance.

25 As this Court noted in the MSJ Order at 32:21-24: "Anything that would impose
26 strict liability on a web site operator for the entire contents of any web site to which the
27 operator linked . . . would raise grave constitutional concerns" (emphasis added), citing
28

1 *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 339-41 (S.D.N.Y. 2000)
2 aff'd on other grounds sub nom. *Universal City Studios v. Corley*, 273 F.3d 429 (2d
3 Cir. 2002). There are also grave constitutional concerns raised when an entire web site
4 is condemned because of liability for speech.

5 In the MSJ Order at 20:2-4, the Court relied on “broad statistical evidence” that
6 was “corroborated by specific instances of downloads or transfers of copyrighted
7 works through Defendants’ websites.” Without disputing the Court’s MSJ findings,
8 defendants submit that such a showing is insufficient to constitute “irreparable injury”
9 or to justify a permanent injunction. Statistics cannot substitute for facts. The isolated
10 specific instances are unlikely to recur. There is no demonstrated quantum of
11 infringement that will be prevented by an injunction. See *Kelly Servs. v. Greene*, 535
12 F Supp 2d 180, 188 (D.Ct. Me 2008); *ANSYS, Inc. v. Computational Dynamics N. Am.,*
13 *Ltd.*, 2009 DNH 177, 2009 U.S. Dist. LEXIS 111021 (D. N.H. 2009) (different
14 “architectures” in systems obviated any irreparable harm); *The Deal v Korangy Publ.*,
15 309 F Supp 2d 512, 69 USPQ2d 1775 (S.D.N.Y 2004) ; *KV Pharm. Co. v Medecor*
16 *Pharma, L.L.C.*, 354 F Supp 2d 682 (E. D. La. 2003) (no consumer confusion shown).

17 For the foregoing reasons and for reasons set forth supra in point A.2, supra, no
18 injunction can issue in this case because any injunction would curtail or chill Free
19 Speech rights and because no showing of harm to plaintiffs has been made that would
20 justify such restraints.

21 3. Plaintiffs Fail to Show Inadequate Remedies at Law.

22 As this Court ruled in *Grokster V* at 518 F.Supp.2d 1219, discussion of
23 inadequate remedies at law overlaps and parallels that of irreparable harm. Plaintiffs’
24 failure to demonstrate actual irreparable harm is also a failure to demonstrate
25 inadequacy of legal remedies.

26 4. No Balancing of Hardships is Possible.

27 In *Grokster V*, this Court balanced “substantial costs exacted by StreamCast’s
28

1 inducement” against StreamCast’s “own claims of hardship.” (518 F.Supp.2d 1220.)
2 The balance here is different from that found in *Grokster V*. isoHunt is part of the
3 collective BitTorrent ecosystem. The interests of independent developers are also at
4 stake. See defendants’ SGI, part B, Facts i-ee.

5 The way to test for balancing hardships is to consider two scenarios, one where an
6 injunction is granted and one where it is not, and to compare the two situations that
7 result. A factual question is thus presented as to the likely changes in the collective
8 BitTorrent ecosystem should a major resource like isoHunt disappear. As a matter of
9 practical fact, this question has been answered as to another torrent site, mininova,
10 which ceased operations as an independent torrent site because it could not comply
11 with an injunction. (See footnote 1, supra). Plaintiffs likely have data that shows what
12 happened when mininova ceased operations as an independent torrent site. Until such
13 data is made available, no balancing of the hardships is possible. The likely disruption
14 of legitimate commerce outweighs any speculative benefit from the injunction.
15 *National Football League Properties, Inc. v. Coniglio*, 554 F. Supp. 1224
16 (D.C.Dist.Ct. 1987).

17 As this Court stated in *Grokster V*, 518 F.Supp.2d at 1220, in weighing the
18 hardships, an “injunction will be limited to restraining future infringement resulting
19 from [defendants’] inducement...” Defendants submit, however, that plaintiffs have
20 failed to show any future infringement resulting from defendants’ inducement and that,
21 therefore, no injunction should be issued until after further proceedings.

22 5. The Public Interest in Maintaining a Free and Competitive Internet and in
23 Fostering Development of BitTorrent Resources Independently of
24 Plaintiffs’ Control Weighs Against the Issuance of an Injunction That is
25 Supported by Nothing More Than Statistical Speculations.

26 In *Grokster III*, at 545 U.S. 928, the Supreme Court identified the importance of
27 maintaining:

1 “a sound balance between the respective values of supporting creative
2 pursuits through copyright protection and promoting innovation in new
3 communication technologies ... The more artistic protection is favored, the
4 more technological innovation may be discouraged; the administration of
5 copyright law is an exercise in managing the tradeoff.”

6 See also *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146, 103
7 L. Ed. 2d 118, 109 S. Ct. 971 (1989); *Perfect10 v. Visa*, 494 F.3d 788, 801 (9th Cir.
8 2007), *cert. den.* 128 S. Ct. 2871 (2008).

9 The *Grokster III* Court further stated that “improved technologies may enable the
10 synthesis of new works or generate audiences for emerging artists.” *Grokster*, 545
11 U.S. at 929, n. 8. In enacting the Communications Decency Act, Congress stated
12 national policy to: “promote the continued development of the Internet,” “preserve
13 [its] vibrant and competitive free market” and “encourage the development of
14 technologies which maximize user control.” 47 U.S.C. § 230(b), some elements of
15 which were cited and quoted in *Visa*, *supra*, 494 F.3d at 794.

16 Plaintiffs’ proposed Permanent Injunction ignores national policy and ignores
17 important matters weighing against the broad-brush and elastically expansive
18 injunction plaintiffs are seeking. The Court needs to obtain evidence to put into the
19 balance, evidence that is in the exclusive possession of plaintiffs and MPAA.

20 In *Grokster V*, this Court stated: “Plaintiffs’ copyrights generally do not afford
21 them the right to decide whether a staple should or should not be distributed.” 518
22 F.Supp.2d at 1236. In footnote 32, however, the Court left open the possibility that “a
23 complete ban on further distribution” could be ordered.

24 Defendants do not have information to state the extent to which complete ban on
25 further distribution of torrent files through isoHunt or a ban on its essential functions,
26 would afford plaintiffs – and the Entertainment Industry in general – the right to decide
27 whether, and how, torrents can be distributed. As shown in defendants’ SGI, Facts nn-
28

1 qq, many independent creators need Internet resources like isoHunt to distribute their
2 creations. When the MSJ papers were filed, plaintiffs and their affiliates were
3 launching their own BitTorrent distribution systems; but the present status of
4 competition among BitTorrent providers on the Internet is not known. Unless this
5 Court inquires further and reaches a contrary conclusion, it appears that an injunction
6 preventing distribution of independent torrent files through isoHunt might be contrary
7 to both the national policy set by Congress and the policy of protecting substantial
8 noninfringing uses established in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S.
9 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984).

10 The findings on inducement in the MSJ Order were narrowly targeted to
11 defendants' conduct. However, wider implications are involved in the issuance of a
12 Permanent Injunction, especially in this case and by this Court.

13 The proof that was sufficient to show inducement for MSJ is not sufficient to
14 justify the issuance of a Permanent Injunction. Plaintiffs have failed to come forward
15 with sufficient evidence to justify the issuance of a Permanent Injunction.

16 For the foregoing reasons, plaintiffs' Motion for a Permanent Injunction should
17 be denied or continued for further proceedings.

18 C. Plaintiffs' Proposed Injunction Includes Provisions That Are Extra-Territorial and
19 Beyond the Court's Jurisdiction.

20 "The classic enunciation of the act of state doctrine is found in *Underhill v.*
21 *Hernandez*, 168 U.S. 250, 252, 18 S. Ct. 83, 84, 42 L. Ed. 456 (1897):

22 'Every sovereign State is bound to respect the independence of every
23 other sovereign State, and the courts of one county will not sit in
24 judgment on the acts of the government of another done within its
25 own territory.'"

26 *Timberlane Lumber. Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 605 (9th Cir.
27 1977) *cert. den.* 472 U.S. 1032, 105 S. Ct. 3514, 87 L. Ed. 2d 643 (1985).

28

1 See also *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 427 *et.*
2 *seq.* (9th Cir. 1977), discussing *Steele v. Bulova Watch Co.*, 344 U.S. 280, 73 S. Ct.
3 252, 97 L. Ed. 319 (1952) and *Ramirez & Feraud Chili Co. v. Las Palmas Food Co.,*
4 *Inc.*, 146 F. Supp. 594 (S.D.Cal.1956), *aff'd per curiam*, 245 F.2d 874 (9th Cir. 1957),
5 *cert. denied*, 355 U.S. 927 (1958), on which plaintiffs rely.

6 Plaintiffs' proposed Permanent Injunction purports to govern defendant Fung, a
7 Canadian citizen residing in Vancouver, British Columbia, who is subject to the laws
8 of Canada. For example, plaintiffs seek to enjoin Fung from "providing technical
9 assistance ... to users engaged in infringement, or seeking to infringe" regardless of his
10 knowledge of users' activities or intentions. (Permanent Inj. at 9:3-5.) Plaintiffs want
11 to enjoin Fung, a Canadian citizen, from working on a government-sponsored Internet
12 system in Vancouver if there is a tiny possibility that a user may try to download a
13 copyrighted file with it. The Court should not issue such an injunction.

14 D. Paragraph 2 of the Proposed Injunction Improperly Enjoins Defendants From
15 Elastically Expansive Classes of Activities Without Any Knowledge Element.

16 In its lead-in language, paragraph 2 of plaintiffs' proposed Permanent Injunction
17 extends to "the Isohunt System or any Comparable System." A "Comparable System"
18 includes any "system or software that provides users access to Plaintiffs' Copyrighted
19 Works, using BitTorrent or any peer-to-peer or other file-sharing or content delivery
20 system." (Proposed Permanent Injunction at 7:5-8.) Under plaintiffs' definitions,
21 every computer is a "Comparable System" and all systems infringe copyrights.

22 Paragraph 2 of plaintiffs' proposed Permanent Injunction consists of 3
23 enumerated lists of strings of prohibitions. Prohibitions incorporate expansive and
24 elastic terms such as "otherwise providing access," "Dot-torrent or similar files,"
25 "point or lead to any of the Copyrighted Works," "any other server." Defendants are
26 to be enjoined from activities that "assist" or "lead to" infringement even if defendants
27 are entirely ignorant of such infringement.

1 Plaintiffs' proposed paragraph 2 is improper for reasons discussed above in points
2 A and B: the prohibitions are non-specific and invade Free Speech rights; they are not
3 tailored to wrongful conduct but are crudely punitive; they would improperly extend to
4 extra-territorial mandates. The Court should decline to issue such an injunction.

5 E. Paragraph 3 of Plaintiffs' Proposed Injunction Imposes a Jungle of Excessive and
6 Vaguely-Stated Prohibitions.

7 The *Grokster* rule prohibiting inducement speaks of "one who distributes a device
8 with the object of promoting its use to infringe copyright, as shown by clear expression
9 or other affirmative steps to foster infringement." (125 S.Ct. at 2770). In contrast, the
10 general prohibition in paragraph 2 of plaintiffs proposed Permanent Injunction
11 restrains defendants from engaging in "**activities** having the object **or effect of**
12 **fostering** infringement." (Proposed Permanent Injunction at 8:16, emphasis added.)

13 In other words, the Supreme Court's rule implies two steps, first, fact-finding
14 about the distribution of a device, based on objective facts, and, second, fact-finding
15 about the defendant's object in carrying out such distribution, based on a process of
16 inference. A clearly-expressed object of promoting infringement justifies an injunction
17 against distribution of the device. In contrast, the proposed prohibitions here use the
18 broadest possible category, "activities," with a defining set of characteristics that
19 extend indefinitely in subject matter and time.

20 But "defining characteristics ... that extend indefinitely" are not definitional at all.
21 Plaintiffs' proposed lead-in prohibition and indefinitely elastic terms would exclude
22 defendants in broad-brushed fashion from large areas of ordinary commercial activity,
23 especially in the Internet realm. It is a prohibition *in terroram* that is excessive and
24 punitive.

25 The substance of paragraph 3 consists of 13 enumerated items, each of which has
26 concatenated terms and phrases. Whatever the justification for isolated elements, the
27 aggregate is incomprehensible and all-inclusive.

28

1 In the context of this proceeding, defendants do not dispute the propriety of an
2 injunction against advertising, promoting or soliciting infringement, which is the
3 proper core of items (a), (b), (c), (d) and (m). Defendants do dispute language
4 prohibiting defendants from “encouraging...users” to infringe. “Encouragement” is
5 subjectively felt by the users and defendants should not be responsible for the users’
6 subjective feelings. Defendants do not object to a prohibition against “exhortation,”
7 which refers to objective acts. Defendants object to the term “similar files.”

8 Prohibition (e) enjoins defendants from “providing technical assistance or support
9 services to users engaged in infringement of, or seeking to infringe, Plaintiffs’
10 Copyrighted Works.” The prohibition attaches even if defendants have no knowledge
11 or notice that the users are infringing or “seeking to infringe;” and the prohibition
12 attaches even to assistance or support that has nothing to do with infringement. The
13 Court should not issue such an injunction.

14 Prohibition (f) prohibit defendants from “providing access” to lists of “search
15 terms for Dot-torrent files or similar files that include, refer to or signal the availability
16 of Plaintiffs’ Copyrighted Works.” (Proposed Permanent Injunction at 9:8.) The
17 terms are so broad and all-inclusive as to exclude defendants from engaging in Internet
18 commerce. A “Google search” box on a web page provides access to lists of links that
19 lead to pirated copies of Plaintiffs’ Copyrighted Works.

20 Prohibitions (g), (h), (i) prohibit activity with respect to “Infringement-Related
21 Terms.” Such terms include the “common name of a television series,” words like
22 “Television” and “Cam” and “terms that are widely associated with copyright
23 infringement.” Depending on which associations are widespread, the prohibited words
24 likely include “Cheers,” “Happy Days,” “BitTorrent,” “P2P,” “Facebook” and even
25 “Internet.” Prohibitions target “Dot-torrent or similar files.”

26 Such prohibitions against words are overbroad, vague, unconstitutional and
27 impractical. They are intended to maintain a threat over defendants that a careless
28

1 phrase or something written online will subject them to contempt. This Court should
2 not issue such an injunction.

3 Expansively elastic terms are used again in prohibitions (j), (k) and (l) (“user base
4 generally understood, in substantial part, to be engaging in infringement...or seeking to
5 infringe;” “service that, directly or indirectly, provides access to unauthorized copies;”
6 “well-known infringing source sites.”) Plaintiffs ignore the fact that “freeware games”
7 appearing to be authorized distributions are available through torrents found at The
8 Pirate Bay as well as at other torrent sites. Plaintiffs ignore the fact that torrents that
9 lead to their Copyrighted Works are as accessible through Google as through The
10 Pirate Bay. The base of Google users is generally understood, in substantial part, to be
11 engaging in infringement or seeking to infringe. Google is a service that, directly or
12 indirectly, provides access to unauthorized copies. Google is a well-known infringing
13 source site. Under terms of plaintiffs’ proposed Permanent Injunction, defendant
14 Fung may not advertise on Google, may not redirect users to Google and may not
15 collect Dot-torrent “or similar files” from Google for indexing purposes. The Court
16 should not issue such an injunction.

17 F. Paragraph 5 of Plaintiffs’ Proposed Injunction Mandates a Filter That is
18 Unworkable and Unconstitutional.

19 In paragraph 5 of their proposed Permanent Injunction, plaintiffs ask the Court to
20 give them *carte blanche* to impose a filter requirement on defendants. There is no
21 prototype of plaintiffs’ “list of titles” and no constraint on the demands they can
22 impose. There is no showing that filtration can be efficient and avoid blocking
23 distribution of works promulgated by independent authors. The issue of efficient
24 filtration was disputed during the Motion for Summary Judgment. See MSJ Order at
25 33-34, n. 24. The Court’s finding in *Grokster V* was that keyword filtering was
26 “ineffective in itself.” 518 F.Supp.2d at 1206. Plaintiffs have offered nothing to
27 change such determinations.

28

1 Instead of providing pertinent evidence, plaintiffs misrepresent the facts. They
2 rest their argument on “a centralized index of infringing dot-torrent files on computer
3 servers defendants control.” (Motion at 16:16-18.) Of course, the undisputed facts are
4 that dot-torrent files are non-copyrightable and there are no infringing materials on
5 servers defendants control. Defendants’ SGI a-h.

6 The control defendants have over their servers is different from a control that can
7 distinguish dot-torrent files that lead to plaintiffs’ Copyrighted Works and those that
8 do not. Defendants do not have the capacity to filter Dot-torrent files in a way that
9 protects the rights of independent authors.

10 The use of “titles” would lead to paralysis of search engines such as isoHunt. For
11 example, using the keyword “Columbus” may remove torrent files that point to
12 downstream unauthorized copyrighted works but would also be overbroad and remove
13 works that are fair use or are otherwise authorized. Words have multiple spellings and
14 a single set of symbols has different meanings in different languages and dialects, not
15 to speak of different cultures using a single language like English. Keyword lists
16 cannot avoid overbreadth and underbreadth and a mandate would appear to be either
17 an insurmountable barrier or an endless cause of dispute.

18 Suppose one were to take all copyrighted works ever made and filter out their
19 titles along with misspellings and shortened titles; it is likely that the English language
20 would be denuded of words available to other Internet publishers.

21 Since it is not possible in general to categorize Internet materials according to
22 their copyright or authorization status or to distinguish promotional or fair use
23 materials, a filtering mandate based on title words would cripple isoHunt (or Google).
24 Authors would be “warned off” of words appropriated by the Entertainment Industry.
25 Free speech would be chilled.

26 In addition, there is no practical way to ascertain whether content is an
27 authorized distribution that is protected by digital rights management (“DRM”).
28

1 In *Grokster V* at 518 F.Supp.2d 1237 *et. seq.*, this Court emphasized Notice of
2 Copyrighted Works before an obligation arose to remove links to the Works. The
3 DMCA is proper means of providing such Notice and defines the appropriate
4 requirements, including specificity of Notice. A list of titles is not proper Notice for
5 the reasons set forth supra. Defendants respectfully request that any potential
6 injunction require plaintiffs to provide actual notice of specific copyright unauthorized
7 hashes to defendants before any URL or hash/file is removed or filtered in the US from
8 the search engines's index and/or search results.

9 If plaintiffs' have a genuine solution for the problem of distinguishing between
10 authorized and pirated content on the Internet, they should reveal such solution. Until
11 then, the Court should not issue an injunction such as paragraph 5 of plaintiffs'
12 proposed Permanent Injunction.

13 G. Paragraph 6 of Plaintiffs' Proposed Injunction Would Render Defendants'
14 Personal Property Valueless Without Good Reason.

15 Defendants oppose Paragraph 6 of plaintiffs' proposed Permanent Injunction that
16 would impose additional restraints on any sale, lease, give away, pledge or other
17 transfer of Defendants' business assets. Plaintiffs propose that any transferee of such
18 assets must sign various legal documents that make the transferee a party to this action
19 and that apparently expose the transferee to all sorts of expense and inconvenience,
20 and perhaps some sort of liability or sanction.

21 The effect of such an injunction is to destroy the value of the assets altogether.
22 The assets become unmarketable even if they are fungible technological commodities.
23 Defendants cannot even "hypothecate" business assets by giving a bank a security
24 interest in all such assets as part of a loan package for an entirely different business.

25 The effect is to punish Defendants without any connection between the
26 devaluation of any particular business asset and the claim of copyright infringement
27 against Defendants.

28

1 It is well settled that injunctive relief looks to the future; it is "designed to deter,
2 not to punish." *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 62, 45 L. Ed. 2d 12, 95
3 S. Ct. 2069 (1975) (internal quotations omitted). See also *Cummings v. Connell*, 316
4 F.3d 886, 897 (9th Cir. 2003) 316 F.3d 886, 897 (9th Cir. 2003).

5 The restraints on business assets set forth in Paragraph 6 are improperly punitive.
6 *Federal Election Com. v Furgatch*, 869 F.2d 1256 (9th Cir. 1989). They do not guard
7 against "some cognizable danger of recurrent violation," (*United States v W. T. Grant*
8 *Co.*, 345 US 629, 633, 97 L Ed 1303, 73 S Ct 894 (1953)) but are designed simply to
9 strike at defendants' property and assets. The Court should not issue such an
10 injunction.

11 H. The Terms of the Proposed Injunction as to Gary Fung Individually are Punitive
12 and Would Render Fung Permanently Unemployable in His Field of Commerce
13 Without Good Reason.

14 The reasons for the Court to refrain from issuing the proposed injunction as to
15 "defendants" in general apply with additional force to defendant Gary Fung as an
16 individual. Paragraph 7 of the proposed Permanent Injunction requires Fung to
17 provide a copy of it to each of his "principals" as well as to any employer who is
18 running a Comparable System, i.e., any computer connected to the Internet as
19 discussed above in point D, as well as to the registrar responsible for any domain name
20 used by a Comparable System. See proposed Permanent Injunction at 12:13-19.

21 The proposed Permanent Injunction has no time limit. BitTorrent and P2P can
22 become as obsolete as VisiCalc but Fung and defendants will still be enjoined from
23 assisting in the support of any "Comparable System."

24 The effect of the provisions of the proposed Permanent Injunction, separately and
25 in combination, are to render Fung permanently unemployable. Any injunction issued
26 in this case should be limited in time because Internet technology evolves quickly;
27 there are multiple competing search engines on the internet for users to find Dot-

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1 torrent files; and any actual attraction felt by infringers with respect to defendants
2 resulting from any past history of inducement (the evidence of which is absent from
3 the record) will dissipate quickly in the fickle Internet environment.² Hence, any
4 permanent injunction should have a limit of two years or less.

5 In any event, the Court should not issue a punitive lifelong injunction such as that
6 requested by plaintiffs. *Federal Election Commission v. Furgatch*, 869 F.2d 1256,
7 1262, (9th Cir. 1989.) (injunction against “similar violations” was insufficiently
8 specific and injunction was unlimited in time); *U.S. v. Holtzman*, 762 F.2d 720, 725-
9 726 (9th Cir. 1985); *ES Development, Inc., et al. v. RWM Enterprises, Inc.*, 939 F.2d
10 547, 558-559 (8th Cir. 1991). There is nothing in evidence tying defendants to a
11 specific infringement, so any injunction should be of short duration.

12
13 **IV. CONCLUSION**

14 For the foregoing reasons, plaintiffs’ Motion for a Permanent Injunction should
15 be denied or continued.

16 Dated: February 19, 2010

Respectfully submitted,

18 ROTHKEN LAW FIRM

19
20 By: _____/s/Ira P. Rothken_____
21 Ira P. Rothken, Esq.
22 Attorney for Defendants

23
24 _____
25 ² The record arguably does not show any cause and effect relationship between the
26 findings of inducement and effect on or benefit to the sites at issue or defendants and
27 given the continued presence of a robust DMCA notice and takedown procedure the
28 circumstances ought to counsel against an injunction of an extended time period or
broad scope.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COLUMBIA PICTURES)	Case No. CV 06-5578-SVW (JCx)
INDUSTRIES, INC., et al.,)	
	)	DECLARATION OF GARY FUNG IN
Plaintiffs,	)	OPPOSITION TO PLAINTIFFS'
	)	MOTION FOR A PERMANENT
vs.	)	INJUNCTION AGAINST
	)	DEFENDANTS
GARY FUNG, et al.,)	
	)	Hearing Date: March 22, 2010
Defendants.	)	Time: 1:30 p.m.
	)	Ctrl: 6
<hr/>	)	Judge: Hon. Stephen V. Wilson

DECLARATION OF GARY FUNG OPPOSITION TO PLAINTIFFS' MOTION FOR A PERMANENT INJUNCTION

Columbia Pictures, *et al.* v. Fung, et al.
Case No. CV 06-5578-SVW (JCx)

1 I, Gary Fung, declare:

2 1. I am a defendant in this action and the owner of defendant isoHunt Web
3 Technologies, Inc. I make this declaration in opposition to Plaintiffs' Motion for
4 Permanent Injunction. All statements made herein are on my personal knowledge, unless
5 otherwise stated. If called as a witness, I could competently testify to the following
6 matters.

7 2. I have read the Court's Order Granting Plaintiffs' Motion for Summary
8 Judgment on Liability. I respect the authority of the Court and declare my desire to
9 comply with the Injunction if and when issued as to the operations of defendants'
10 websites with respect to visitors located in the United States, if such operations can be
11 continued consistent with practical constraints and ethical principles. Otherwise, I must
12 anticipate closing the sites.

13 3. In efforts to limit potentially copyright inducing aspects of the isoHunt site,
14 defendants have modified the meta-tags on the isoHunt site, including removal of the
15 term "warez" in or around 2005. The current meta-tags are: "torrent, torrents, bittorrent,
16 irc, creative commons, public domain, files, search, engine, video, audio, music,
17 software, games." Other corrective action we have already taken in or around 2005
18 included disabling the "box office movies" list feature.

19 4. For the purpose of providing a means for the Court to evaluate terms,
20 conditions and devices of any Injunction, defendants have prepared a "primal" website at
21 www.isohunt.com/lite/ (the "primal website"). Attached hereto as Exhibit A are true and
22 correct copies of a screen shot of the main screen and of a screen shot of search results as
23 they would be displayed by this primal website.

24 5. Defendants will make the primal website available for testing, etc. at the
25 Court's direction. The primal website has a basic search functionality along with a robust
26 DMCA type notice and takedown system. The primal site has none of the social modules
27 and technological assist features that have been in use at the isoHunt website, e.g.,
28

1 browsable categories, top search lists, forums or tutorials. Torrentbox and Podtropolis
2 will be redirecting to isoHunt Lite for US users.

3 6. Although the Court has not ruled on the propriety of our DMCA Notice and
4 Takedown system, I affirm that Defendants posted a copyright policy webpage on their
5 website as early as February, 2005, a true and correct copy of which is attached hereto as
6 Exhibit B, and which may also be located on the Internet at www.archive.org
7 (http://web.archive.org/web/*/http://isohunt.com/dmca-copyright.php) This policy page
8 has remained largely unchanged. The current copyright policy webpage is attached
9 hereto as Exhibit C. Allen Parker became the DMCA copyright agent for Defendants in
10 or around October, 2006.

11 7. At all times material hereto, defendants have implemented a takedown
12 procedure in response to notices by copyright owners in compliance with the DMCA.
13 Over the course of the DMCA take down program Defendants have processed 5416
14 notices in its ticketing system, 520 in its pre-ticketing system, and have taken down over
15 200,000 dot torrent files – please see as Exhibit D a true and correct copy of take down
16 notices processed by month. To the best of my knowledge each time a proper DMCA
17 request came in we took down the given link and as such the search results were filtered
18 to no longer provide such link.

19 8. Over the course of Defendants’ website operation, Defendants have complied
20 with the DMCA notice and takedown requirements with respect to MPAA members,
21 including, but not limited to the Plaintiffs in this action. The first such notice was
22 received in or around January 2005. Attached hereto as Exhibit E are select tickets from
23 Defendants’ notice and takedown system from MPAA members or 3rd parties acting on
24 their behalf requesting the takedown of their copyrighted materials and showing
25 Defendants’ compliance with every such requests.

26 9. Commencing in March 9, 2007, Defendants implemented a system enabling
27 the banning of torrent files by hash. This system enhances Defendants’ ability to perform
28

1 takedowns after receiving notice from copyright holders pursuant to the DMCA, by
2 permanently banning future indexing of Dot torrent files, regardless of URL, of the same
3 hash as contained in the torrent links requested for takedown. Attached hereto as part of
4 Exhibit D is a true and correct copy of a spreadsheet and graph illustrating that 192,924
5 torrents have been banned by hash.

6 10. The “primal website” at <http://isohunt.com/lite> is free of the inducement “red
7 flag” items identified in the Court’s Order Granting Summary Judgment on Liability,
8 including:

- 9
- 10 a. Top lists – e.g. Top 20 Movies, Top 20 TV Shows, Box Office Movies, Top
11 Searches, High Quality DVD Rips, TV Show Releases, etc. are eliminated;
 - 12 b. Metatags – metatags associated with copyright infringement, e.g. warez, are
13 eliminated;
 - 14 c. Site Interface Design – No suggestive categories or honorary ranking systems, just
15 basic search engine design similar to Google or Yahoo!
 - 16 d. No connection to online forums;
 - 17 e. Filtering tools – filters implemented by hash value in response to DMCA type
18 takedown notices.
 - 19 f. Comments – No additional information or comments posted by users provided
20 about the works associated with torrent files retrieved by search;

21 11. My understanding is that there is only one basic technical design for all
22 search engine systems which consists of the ever changing dynamic process I will call
23 “SIS” namely **spidering** the public facing Internet worldwide and as broadly as feasible
24 for URLs (uniform resource locators or links) and files, **indexing** and caching the same
25 with related metadata in a database, and allowing for user **search** of the index on the
26 search site, and that Google, Yahoo and isoHunt all have the same goal: to organize and
27 help users locate information worldwide.

28 12. My understanding is that Google, Yahoo and isoHunt all use the same basic
process and that all have the same goal: to organize and help users locate information
worldwide.

13. In January, 2010, I performed a factual examination of 5000 random hashes

1 of torrent files indexed on Isohunt.com and compared these to hashes of torrent files
2 indexed on major internet search engines, including Google and Yahoo!. The results are
3 organized into a database and a CD-Rom with the Excel file is being lodged with the
4 Court and served on the parties for examination purposes. True and correct copies of the
5 opening page and a page showing the totals are attached hereto as Exhibit F.

6 14. This test shows that 95% of the torrent files indexed on isoHunt are equally
7 available through searches on the main search engines. That is, out of the 5000 torrents
8 on isoHunt (identified by hashes) 4721 were also indexed on Google or Yahoo!, which is
9 95% coverage.

10 15. This indicates that the isoHunt search engine does not operate differently
11 than other search engines in any significant degree, it does not discriminate what is
12 indexed and what is not, nor does it make available links to possibly copyright infringing
13 content any more than what is already available on the internet in aggregate as a whole.
14 In essence, isoHunt search results reflect the state of the Internet as a whole regarding dot
15 torrent files much the same way as Google and other search sites. As I did not read the
16 Order on the Motion for Summary Judgment finding that the SIS technologies above as it
17 relates to dot torrent files were in violation of US law, I would respectfully request that
18 any potential injunction not enjoin the SIS functionality.

19 16. I have reviewed Plaintiffs' motion and proposed injunction, which would
20 require filtering on the basis of a list of titles provided by Plaintiffs. Plaintiffs' proposal -
21 - also known as keyword filtering -- is not economically feasible in the BitTorrent
22 context. A keyword does not unambiguously signal whether the underlying file leads to
23 infringing materials and the volume of materials so referenced is beyond the processing
24 capacity of any resource I know. At any given moment, isoHunt's indices point to over
25 10,000 TB (Terabytes) of content files that are constantly undergoing changes.

26 17. isoHunt discontinued the "Box Office Movies" labels in or around 2005 and
27 defendants have no intention of instituting such a label in the future.
28

1 18. isoHunt maintains torrent categories for “Videos/Movies” and “TV.” These
2 are terms in common use by users who upload Dot torrent files, commonly found on
3 websites we index, and our search results have in turn reflected such categorization. If
4 use of such language on the website is to be restricted, defendants need a clear standard
5 for the restrictions.

6 19. As noted in the Court’s Order, isoHunt formerly provided reports to visitors
7 that were generated by automated modules that collected and compiled statistical
8 information about the most popular downloads and their P2P activity. Defendants would
9 like to provide such reports in the future to the extent the Court allows.

10 20. As a particular example of a module or feature, the online isoHunt and
11 TorrentBox systems now allow visitors to upload Dot-torrent files through “Release” or
12 “Upload” features, without disclosure of personal identifying information. This is a
13 critical step in the process used by independent authors who want to publish their works
14 using the BitTorrent protocol. Independent torrent sites, like isoHunt, have been a chief
15 tool for such authors.

16 21. isoHunt is currently supported by advertising such as that purchased by
17 MvixUSA. Attached as Exhibit G is a web page from the Mvix website that describes
18 their products. Defendants need a clear standard as to whether such advertising is
19 permissible under the terms of an Injunction.

20 22. The focus of my professional life is as an entrepreneur, with a focus on
21 development of cutting-edge online social applications and tools, which includes P2P
22 networking. I expect to continue to promote the widest possible and socially beneficial
23 use of file-sharing and to oppose paralyzing constraints and censorship, including those
24 sought by MPAA and plaintiffs in this case.

25 23. Plaintiffs’ proposed keyword filtering is not economically or legally feasible
26 in the BitTorrent context. The use of keywords is a slippery slope and would lead to
27 paralysis of search engines such as Isohunt. For example, using the keyword “Columbus”
28

1 may remove torrent files that pointed to downstream unauthorized copyrighted works but
2 would also be overbroad and remove works that are fair use or are otherwise authorized.
3 In addition there are likely all sorts of multiple spellings for words and given the number
4 of worldwide languages and local spelling and nuances tuning such keyword approach
5 for balancing overbreadth and underbreadth appears to be an exercise in futility and
6 would lead to serial arguments and threats of contempt. Indeed, if one were to take all
7 copyrighted works ever made and use the titles of the same along with their misspellings
8 and shortened titles in a keyword filtering system there would virtually be no words left
9 in the English language that would allow for search. Since it would be impractical to
10 discern the worldwide copyright authorization status of a given copyrighted title on the
11 net ahead of time or what are promotional or fair use implementations search engines like
12 Isohunt (or Google) would no longer be possible and speech would be unfairly chilled. In
13 addition, there is no practical way for discerning whether or not content located
14 downstream from given torrent files are protected by digital rights management (“DRM”)
15 technologies which in essence require a credit card payment before viewing and thus
16 keyword filtering would be overbroad and stifle worldwide innovation away from using
17 peer to peer technologies for monetizing ‘DRM’ protected or encrypted copyrighted
18 works. In light of the above underbreadth/overbreadth complexity regarding filtering,
19 and in an effort to not chill speech balanced against copyrights, I would respectfully
20 request that any potential injunction require plaintiffs to provide actual notice of specific
21 copyright unauthorized hashes to defendants before any URL or hash/file is removed or
22 filtered from the search engines’ index and/or search results.

23 24. In addition, since isohunt’s sites do not host or touch the downstream content
24 it is not practical to attempt to download and analyze such downstream content. First of
25 all, even if it were practical to fetch and download in continuous real time terabytes of
26 downstream content - no effective video based fingerprinting system exists, of which I
27 am aware, that we could employ to automate identification of Plaintiffs' works, in a way
28

1 that can accurately tie a work's title with a digital fingerprint as identifier and discern
2 authorization status, and fair use amongst other things.

3 25. Even if a video based fingerprinting system existed that covers Plaintiffs'
4 works, it would be economically unfeasible to implement. First, the process would
5 require the continuous and dynamic downloading of an ever changing 10,000 TB
6 (Terabytes) of content files to which isoHunt's index of Dot torrent files point in a given
7 moment. Even if we were to purchase an expensive 1 gigabit per second internet
8 connection for this purpose at a cost of approximately \$16,000.00 per month. Assuming
9 the full bandwidth can be sustained in downloading all content files available, I calculate
10 this will still take over 2.5 years to get caught up (but again the torrent files, downstream
11 content, and possibly copyright authorization status are dynamically changing during this
12 time period), based on the following calculation:

$$13 \quad 1000 \text{ megabit/s} = 125 \text{ MB/s}$$

$$14 \quad 10,000 \text{ TB} \times 1,024 \times 1,024 = 10,485,760,000 \text{ MB}$$

$$15 \quad 10,485,760,000 \text{ MB} / 125 \text{ MB/s} = 83,886,080 \text{ s}$$

$$16 \quad 83,886,080 \text{ s} / 86,400 / 365 = 2.66 \text{ years}$$

17 26. The total estimated cost for downloading 2.66 years x 12 months x 16,000
18 USD/month = \$510,720.

19 27. In order to develop a takedown system, Defendants would need to develop an
20 effective video fingerprinting system, and expend many man-hours for integration and
21 programming in using any video fingerprinting database that does not exist on the
22 market. The total time depends largely on how accurate and how easy the database is to
23 work with, if such database exists. Based in part on my understanding that YouTube
24 (who unlike isohunt hosted the actual content) took over a year in implementing their
25 proprietary fingerprinting system and database, I estimate Defendants would require at
26 least that long with four programmers working full time. At the average programmer
27 salary of \$90,000.00 per year, total implementation salary cost = \$360,000.00.

1 Accordingly, I estimate that a filtering system could, at the earliest, commence in over
2 2.5 years and, at a minimum, cost approximately \$890,720.00 to develop. In addition,
3 based on my experience in buying servers for the isoHunt website, hardware adequate to
4 store and compute on this dataset I estimate to be at least another \$1 million This again
5 assumes we have, as a prerequisite, access to a video fingerprinting database that fairly
6 and accurately covers all of Plaintiffs' works. I do not foresee how we can possibly
7 implement such a system independently, the costs and logistics appear prohibitive, and
8 thus any such filtering system would need to be developed in cooperation with Plaintiffs
9 and access to their video content and legacy technologies amongst other things.

10 28. In addition to the unfeasibility in the economics, technology, and time to
11 implement, such downloading may also be legally prohibited in multiple regions of the
12 world as it would require isoHunt to download worldwide not only Plaintiffs' works, but
13 also the copyrighted works of third parties without their authorization.

14 29. Defendants do not have information to state whether an effective ban on
15 further distribution of torrent files through isoHunt or a ban on its essential functions,
16 e.g., a ban on allowing visitors to upload torrents, would afford plaintiffs – and the
17 Entertainment Industry in general – the right to decide whether, and how, torrents can be
18 distributed. As shown in Exhibit H, from [http://torrentfreak.com/indie-movie-explodes-
19 on-bittorrent-makers-bless-piracy-091110/](http://torrentfreak.com/indie-movie-explodes-on-bittorrent-makers-bless-piracy-091110/), many independent creators need Internet
20 resources like isoHunt to distribute their creations.

21 I declare under penalty of perjury under the laws of the United States and the State of
22 California that the foregoing is true and correct.

23
24 Dated: February 19, 2010

25 Gary Fung

26
27
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