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16 UNITED STATES DISTRICT COURT  
17 CENTRAL DISTRICT OF CALIFORNIA

18 COLUMBIA PICTURES ) **Case No. CV 06-5578 SVW(JCx)**  
19 INDUSTRIES, INC., et al. )

20 Plaintiffs,

21 vs.

22 GARY FUNG, et al.,

23 Defendants.

) **DEFENDANTS' SUPPLEMENTAL**  
) **BRIEF IN OPPOSITION TO**  
) **PLAINTIFFS' MOTION FOR**  
) **SUMMARY JUDGMENT ON**  
) **LIABILITY**

) **DATE: November 19, 2007**

) **TIME: 1:30 p.m.**

) **CTRM: 6**

**Hon. Stephen V. Wilson**

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**DEFENDANTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO**  
**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY**

Columbia Pictures, *et al.* v. Fung, *et al.*  
U.S. Dist. Ct., Central Dist Cal., No. CV 06-5578 SVW(JCx)

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1 Defendants herewith submit their Opposition Supplemental Brief pursuant to  
2 the Court's Order of April 3, 2008.

3 **I. FACTUAL RESPONSE TO THE COURT'S INQUIRIES**

4 A. Components Involved in the Bit-Torrent Downloading Process

5 The Court states that it:

6 “would benefit from a further description of the separate components  
7 involved in the bit-torrent downloading process used by Defendants'  
8 website. ...it is unclear which of the components involved are distributed  
9 or provided by Defendants. ...also include a brief explanation of the  
10 interaction between these components and Defendant Fung's website, as  
11 well any connection with the copying of actual files and the services  
12 Defendants provide.”

13 Defendants are mindful that the Court has already been presented with  
14 descriptions of “components” in the original Memoranda, the original Declaration  
15 of Ellis Horowitz and the original Declaration of Gary Fung<sup>1</sup> relating to this  
16 Motion, as well as Plaintiffs' Supplemental Brief. Additional details are provided  
17 in the accompanying Supplemental Declaration of Gary Fung in Opposition to the  
18 Motion for Summary Judgment from which the following facts are taken.

19 As a preliminary matter, Fung notes that that “the bit-torrent downloading  
20 process” is a process carried out by a user, that the process has several different  
21 stages and that only certain stages involve Defendants' websites. It is more the case  
22 that “downloading processes use Defendants' website” rather than, as the court  
23 suggests, that there is a “bit-torrent downloading process used by Defendants'  
24 website.” Defendants provide tools that visitors use for their purposes rather than a  
25

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26  
27 <sup>1</sup> A copy of the original Declaration of Gary Fung in Opposition to Plaintiffs'  
28 Motion for Summary Judgment is attached as Exhibit A to the present,  
accompanying Supplemental Declaration of Gary Fung.

1 control center that organizes visitors' activities. (Supplemental Fung Decln., ¶ 4.)

2 To perhaps clarify the downloading process, it is possible to follow the course  
3 of events involving a representative user (more precisely, a "peer" in peer-to-peer  
4 networking) who uses BitTorrent technology to acquire content, namely, a copy of  
5 the movie "Phantom of the Opera." There are several movie versions of this story,  
6 one in the public domain and others subject to copyright. The user needs a software  
7 program running on his or her computer, called a "BitTorrent client application" or  
8 simply a "BitTorrent client." Two popular BitTorrent clients are Azureus and  
9 µTorrent. Defendants do not distribute or provide BitTorrent clients but have links  
10 to providers. Defendants do not distribute or provide any BitTorrent software.

11 In their Supplemental Memorandum or "Supp. Memo." at 3:16-17, Plaintiffs  
12 state that "after the client application is installed on the user's computer, the typical  
13 user has virtually no further interaction with a BitTorrent client application." This  
14 statement is false. BitTorrent clients have many features for user selections and  
15 adjustments. Probably, many users interact with the BitTorrent client during a  
16 typical lengthy (10 hours or more) downloading process, just to check the progress  
17 of the download. Azureus, the most popular BitTorrent client after the corporate  
18 BitTorrent, Inc. version favored by Plaintiffs, is supported by a user community  
19 that has produced hundreds of "plugins," small programs that connect to and  
20 support the main application and that provide greater user-client interactivity.

21 The representative user desiring "Phantom of the Opera" visits a torrent site,  
22 such as isoHunt. There are hundreds of public torrent sites, some limited to a  
23 specific subject matter, others general aggregators like isoHunt, who like Google,  
24 try to cover as much of the Internet as possible. The representative user's task at  
25 the torrent site is to locate and download a ".torrent" file that will be used to obtain  
26 "Phantom of the Opera."

27 The essential functions performed at a torrent site are also performed at a  
28 comprehensive search site like Google or Yahoo!. To visualize a visit to isoHunt,

1 start off with a visit to Google – only a few things are changed, mostly superficial,  
2 and the workings are very similar. A representative user going to Google obtains  
3 the desired .torrent file for “Phantom of the Opera” much the same as at isoHunt.

4 Just like a traditional search on Google, isoHunt provides to the visitor a  
5 means to obtain content rather than the content itself. The means is information  
6 provided by Google or isoHunt that the visitor uses to locate the desired content.  
7 Google provides a link to the visitor; isoHunt provides a .torrent file to the visitor.

8 The services provided by a torrent site like isoHunt involve functions of data  
9 collection, indexing, caching and downloading of a torrent file. At isoHunt .torrent  
10 data files are collected through uploads from visitors and by searching the Internet  
11 with automated systems that systematically investigate all accessible hyperlinks,  
12 looking for “.torrent files.” The .torrent files are cached in a database where there  
13 are many thousands of .torrent files.

14 The visitor to isoHunt enters a search query into a form on the home page of  
15 the website. For example, the visitor enters “Phantom of the Opera.” The search  
16 engine looks in the database and returns or produces “pointers” (or links) to any  
17 .torrent files in the database that contain the phrase “Phantom of the Opera.”

18 If one or more such links are returned by the search engine, the user may  
19 choose to download a .torrent file by clicking on a link that “points to” the .torrent  
20 file. For example, if the user clicks on a link that says “Phantom of the Opera - Lon  
21 Chaney,” the torrent site will send the .torrent file with that name to the user. This  
22 completes the task of the torrent site.

23 What happens after the user receives the .torrent file depends on the user and  
24 the user’s BitTorrent client application. A user does not need to have a running  
25 BitTorrent client to download a .torrent file but, rather, can simply save the .torrent  
26 file, e.g., to a hard drive, for use at a later time. If, however, a user’s installed  
27 BitTorrent client software is monitoring (based on the control and settings set by  
28 the user) the Internet traffic stream, it loads the .torrent file. A .torrent file is a

1 relatively small file, usually 20-50 kilobytes. The .torrent file is typically written  
2 and first uploaded by the person who is initiating or “seeding” the promulgation of  
3 particular content through BitTorrent technology. The .torrent file contains  
4 information that is specific to that particular BitTorrent promulgation, including a  
5 unique identifying number or “hash.” The .torrent file is designed to be copied and  
6 distributed broadly and its author presumptively authorizes copying and  
7 modifications that facilitate promulgation.

8 The .torrent file also contains a list of the URLs (Internet addresses) for one or  
9 more “trackers.” The user’s BitTorrent client application uses these URL’s to make  
10 contact with the listed trackers. Client applications often interact with a large  
11 number of trackers as listed in a .torrent file.

12 Suppose the representative user has a BitTorrent client running when he or she  
13 downloads the .torrent file for the string “Phantom of the Opera.” The BitTorrent  
14 client picks up the .torrent file and loads it. The client then sends an inquiry to a  
15 tracker that is on the list of trackers in the .torrent file. The inquiry includes the  
16 hash number that is unique to the content desired and a request to be introduced to a  
17 swarm exchanging the files. That tracker may or may not be handling such a  
18 swarm. If not, the user’s BitTorrent client sends a new inquiry to another tracker on  
19 the list.

20 Suppose the BitTorrent client makes contact with a tracker handling a swarm  
21 identified by the unique hash of the desired content. The tracker maintains a list of  
22 Internet Protocol (“IP”) addresses of users participating in that swarm. In response  
23 to the initial inquiry from the BitTorrent client to the tracker with respect to a  
24 specific hash, the tracker responds by sending the client a list of IP addresses of  
25 other users in the swarm who are known from their own previous inquiries. In  
26 addition, the tracker adds the user’s IP address to the list, to be sent in response to  
27 subsequent inquiries from other users. During the download process, the user’s  
28 BitTorrent client periodically sends inquiries to trackers and updates the user’s list

1 of IP addresses of other users involved in the file-exchange. During acquisition of a  
2 full-length movie – typically taking more than 10 hours to download to a home  
3 computer– peers and trackers drop out of the swarm and new ones join.

4 Defendants run trackers torrentbox and podtropolis. Defendants make the  
5 trackers available to the public and many seeders put torrentbox and podtropolis in  
6 the tracker list of the .torrent file. No copyrighted content is stored on or passes  
7 through such trackers and such trackers are involved at most in “transient” network  
8 connections. When a seeder uploads a .torrent files to Defendants’ sites,  
9 Defendants’ tracker is added to the list of trackers in the .torrent file (if it is not  
10 already there). Defendants do not remove other trackers from the list. The  
11 statement made at 6:12-14 of Plaintiffs’ Supp. Memo. is false.

12 Plaintiffs are misrepresenting the entire download process as if to pretend that  
13 Defendants’ websites have some sort of central position or power of control over  
14 the download process. There are over four hundred torrent sites run by different  
15 operators, who support each other through copying of .torrent files. Ideally,  
16 uploading a .torrent file to one torrent site is the same as uploading to numerous  
17 general purpose sites like isoHunt. There are close to two thousand different  
18 trackers run by various independent operators. Trackers cooperate with one  
19 another, at least from the user’s point of view in that multiple trackers are needed to  
20 support a single “huge” swarm during promulgation of an update for a popular  
21 Linux package or videogame. Torrent sites, trackers and peers (“users”) all exist in  
22 collectives and have no meaningful existence other than through collective  
23 existence. All functions are dispersed and collective. There is no central position  
24 for any participant. There is no power of control for anyone to exercise.

25 Plaintiffs also misrepresent the nature of BitTorrent technology when they  
26 argue, e.g., at 7:5-7, that the combination of a torrent site (isoHunt) and a tracker  
27 (torrentbox or podtropolis) somehow causes infringement by users of Plaintiffs’  
28 copyrights. The two functions are separate and distinct. It’s like saying that a “Gun

1 and Boot Store” caused the holdup because the crooks bought both guns and boots  
2 there. Torrent sites and trackers are not the essence of BitTorrent technology. For  
3 example, recent developments in the technology include BitTorrent client  
4 applications Xtorrent and Shareaza that have integrated search and download  
5 processes – users do not go to a torrent site. An alternative to trackers, called DHT,  
6 is being developed and is being used today.

7 Suppose that the representative user has downloaded the .torrent file named  
8 “Phantom of the Opera - Lon Chaney.” The user’s BitTorrent client loads the  
9 .torrent file, contacts a tracker and obtains a list of IP addresses of peers in a swarm  
10 of file-exchangers. To get the download, the user’s BitTorrent client must find and  
11 join an existing swarm of users who are already exchanging pieces of the content.  
12 Content is obtained only from other peers in the swarm and is processed through  
13 the user’s BitTorrent client application. No content is obtained from or passes  
14 through the torrent site or the tracker.

15 Defendants’ trackers at torrentbox and podtropolis provide only the minimal  
16 set of functions. It is possible to add other functions, e.g., some trackers record a  
17 user’s downloads and uploads, often requiring the user to upload a certain quantity  
18 to other users in order to obtain the desired downloads. Defendants do not do this.  
19 Plaintiffs are in error when they say in their Supp. Memo. at 2:22-24 that “The  
20 function of the tracker is to keep track of (a) all users currently in the swarm, and  
21 (b) the portion of the content file that each user has.” There is no such function as  
22 (b) performed by Defendants’ trackers.

23 It is not necessary for a tracker to maintain contact with peers in the swarm  
24 throughout the download process. Often this happens but it is not required. As  
25 long as one or more trackers is involved, new peers can join the swarm. Even if all  
26 the trackers on a list of trackers were to go down during a download, peers already  
27 participating in the swarm can continue to exchange pieces of content.  
28



1 their original Memorandum.

2 Plaintiffs' portrayal of Defendants is a false portrayal as shown in the original  
3 Fung Declaration and the accompanying Fung Supplemental Declaration.  
4 Plaintiffs' falsified and narrow focus is disputed and there are triable issues of fact  
5 and related issues of law that will be of weighty significance in determining how  
6 Internet development proceeds in the future.

7 A. Summary Judgment is Not Warranted Under an Inducement Rule.

8 "...one who distributes a device with the object of promoting its use to  
9 infringe copyright, as shown by clear expression or other affirmative  
10 steps taken to foster infringement, is liable for the resulting acts of  
11 infringement by third parties." *MGM v. Grokster*, 545 U.S. 913, 919,  
12 125 S. Ct. 2764, 162 L. Ed. 2d 781 (2005).

13 This is not a case suitable for the inducement rule of *MGM Studios*  
14 *Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919; 125 S. Ct. 2764; 162 L. Ed. 2d  
15 781 (2005) , which dealt with as stated above "one who distributes a  
16 **device** with the object of promoting **its use** to infringe copyright." Here,  
17 defendants did not distribute a "device" but defendants only distributed  
18 non-copyrighted "torrent" **data** files and links, nothing but information  
19 that, defendants submit, is protected by the First Amendment to the  
20 United States Constitution In a series of decisions, the United States  
21 Supreme Court and lower federal courts have protected speech over the  
22 Internet because the Internet provides "the most participatory form of  
23 mass speech yet developed," a statement that especially applies to  
24 BitTorrent technology at issue here. See *Universal City Studios, Inc. v.*  
25 *Corley*, 273 F.3d 429, 445-449 (2nd Cir. 2001). ("Communication does  
26 not lose constitutional protection as 'speech' simply because it is  
27 expressed in the language of computer code.") .

28 Plaintiffs seek to interpret current Supreme Court law relating to devices and

1 products (such as Software based copying programs like Grokster) so as to apply to  
2 a new kind of technology involving only data like Torrent files. Involving older  
3 technology, the *Grokster* Court dealt with a Software based copying program that  
4 handled the copying and depositing such allegedly infringing works on users hard  
5 drives. Here, defendants did not distribute such a “device” or “product” involved in  
6 copying alleged copyrighted works. Defendants sites and services never touched the  
7 copyrighted works, never copied the copyrighted works, never analyzed the  
8 copyrighted works, and certainly never distributed copyrighted works. There is no  
9 copying device or product at issue in this case.

10 One of the lessons assumed from Grokster but rarely scrutinized is that the  
11 now famous inducement holding, pled by the plaintiffs in the complaint upon which  
12 they are seeking a summary judgment, applies to search engines and almost any  
13 other type of web service. But a closer reading raises the question whether the  
14 inducement liability holding in *Grokster* even applies to Internet search engines or  
15 link sites like Google or isoHunt or other torrent file search engines. As stated in  
16 *Grokster*:

17 The question is under what circumstances the  
18 distributor of a product capable of both lawful and unlawful  
19 use is liable for acts of copyright infringement by third  
20 parties using the product. We hold that one who distributes a  
21 device with the object of promoting its use to infringe  
22 copyright, as shown by clear expression or other affirmative  
23 steps taken to foster infringement, is liable for the resulting  
24 acts of infringement by third parties. *Grokster, supra*, 545  
25 U.S. at 918-191.

26 Further down in the opinion Justice Souter further clarifies and states:

27 In addition to intent to bring about infringement and  
28 distribution of a device suitable for infringing use, the

1 inducement theory of course requires evidence of actual  
2 infringement by recipients of the device, the software in this  
3 case. *Id.* at 940.

4 If one were to read and "scrutinize" the actual issue and holding of *Grokster*  
5 above it would seem to only apply to "products" or "devices" that can be "used" by  
6 third parties to commit copyright infringement. The *Grokster* software "device"  
7 handled the allegedly illegal copying between computers - it was "used" for the  
8 copyright infringement.

9 But that is not the case with Internet search engines or sites that manifest  
10 hyperlinks to dot torrent files like Isohunt at the other sites at issue. First it is  
11 arguable that a search engine is not a device or product (like say the executable  
12 software "product" at issue in *Grokster*) **but even if it is** - it is hard to understand  
13 how a third party can use such a device for the actual commission of copyright  
14 infringement.

15 For example, if one were to query Google for a famous musician's song  
16 unauthorized to be on the net and then click on the link to download it from a third  
17 party site the Google search engine is not being used to commit copyright  
18 infringement as no copying is being done using the Google site or "device" - the  
19 copying is being done using the surfer's browser "device" directly connected to a  
20 third party site **after** the connection with Google is lost.

21 In other words search engine result hyperlinks are not a device that can be  
22 "used" to commit copyright infringement - that device usually is the user's browser  
23 (or like in the *Grokster* case the thin client software known as *Grokster*) directly  
24 connecting to a third party site or server (the recent case of *Perfect 10 v. Google,*  
25 *Inc.*, 416 F.Supp.2d 828, 842 (C. D. Cal. 2006), affirmed in part, reversed in part,  
26 *Perfect 10 v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007) provides support for  
27 this view related to the connection and relationship between the user and the third  
28 party site after a hyperlink is clicked through).

1 Isohunt and defendants’ other sites are arguably further removed from  
2 potential downstream infringements than Google as defendants sites provided  
3 hyperlinks to dot torrent files (text-like files) that, when clicked on, were  
4 downloaded to the user’s hard drive – after the connection with Isohunt and related  
5 sites were lost the user could if they wanted to then load up their software “device”  
6 namely the Bittorrent software , load the torrent file, and then possibly download  
7 potential infringing files – thus the notion that *Grokster* does not apply to web sites  
8 that provide mere hyperlinks or data is even more compelling for the *Isohunt*  
9 defendants as Torrent file data is even more passive and further removed than  
10 hyperlinks.

11 Users of the Isohunt search engine or a hyperlink device cannot use such  
12 device or “product” to commit copyright infringement and therefore *Grokster* and  
13 the inducement theory do not apply to Internet search engines. Plaintiffs’ claims  
14 which appear to be based on passive data Torrent files and tertiary liability are not  
15 legally recognizable under any case precedent.

16 As mentioned above the *Grokster* decision consistently speaks of “device” and  
17 “product.” What defendants distributed in *Grokster* were “software products.”  
18 *Ibid.* The inducement rule is grounded in principles of patent law, where “device”  
19 or “product” are implicit. *Id.*, at 545 U.S. 935-937. “For the same reasons that  
20 *Sony* took the staple-article doctrine of patent law as a model for its copyright safe-  
21 harbor rule, the inducement rule, too, is a sensible one for copyright.” *Id.*, at 545  
22 U.S. 936. “Sensible” rules call for careful application, not the easy elasticity  
23 Plaintiffs are seeking here.

24 The only thing Fung distributes is .torrent files. To call a .torrent file a device  
25 would require serious distortion because a .torrent file is passive, in contrast, e.g., to  
26 an executable file. A .torrent file contains data or metadata or, more generally,  
27 information that is used by active programs. The .torrent file has no other function  
28 than to package that data for communications. .torrent files are communications in

1 the form of computer code that are entitled to First Amendment protections.  
2 *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445-449 (2nd Cir. 2001).

3 In *Sony*, the Court rejected “the proposition that supplying the ‘means’ to  
4 accomplish an infringing activity and encouraging that activity through  
5 advertisement are sufficient to establish liability for copyright infringement. This  
6 argument rests on a gross generalization that cannot withstand scrutiny.” *Sony*  
7 *Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 436, 78 L. Ed. 2d  
8 574, 104 S. Ct. 774 (1984), distinguishing *Kalem Co. v. Harper Brothers*, 222 U.S.  
9 55, 62-63, 32 S. Ct. 20, 56 L. Ed. 92 (1911), on which Plaintiffs rely.

10 “The staple article of commerce doctrine must strike a balance between a  
11 copyright holder's legitimate demand for effective -- not merely symbolic  
12 -- protection of the statutory monopoly, and the rights of others freely to  
13 engage in substantially unrelated areas of commerce. Accordingly, the  
14 sale of copying equipment, like the sale of other articles of commerce,  
15 does not constitute contributory infringement if the product is widely  
16 used for legitimate, unobjectionable purposes. Indeed, it need merely be  
17 capable of substantial noninfringing uses.” *Sony* at 464 U.S. 442.

18 In the context of this case, “devices” or “copying equipment” means the  
19 Bittorent client software— as in the *Napster* and *Grokster* cases – that software that  
20 touches and copies the allegedly copyrighted works is the “copying equipment.”  
21 However, to quote *Sony*, it would be “a gross generalization that cannot withstand  
22 scrutiny” to extend such principles to this case, where Defendants do nothing more  
23 than cache and distribute text like data files that others may use for purposes of file  
24 exchanges away from the sites at issue. If any part of BitTorrent technology is a  
25 “copying machine,” it is the BitTorrent client installed on the user’s personal  
26 computer. In contrast, .torrent files are only data packets.

27 No authority cited by Plaintiffs in their Supp. Memo. at 11:19-12:20 supports  
28 extensions of principles they seek. In *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494

1 F.3d 788, 801 (9th Cir. Cal. 2007), the product was a credit card and the Court  
2 rejected the inducement rule for other reasons. *Perfect 10, Inc. v. Amazon.com,*  
3 *Inc.*, 508 F.3d 1146, 1171, n.11 (9th Cir. Cal. 2007), held that the inducement rule  
4 did not apply. The “ password-hacking websites” in *Perfect 10, Inc. v. CCBill LLC*,  
5 488 F.3d 1102, 1114 (9<sup>th</sup> Cir. 2007) fairly constituted devices in the *Grokster* sense.  
6 (There, as here, DMCA defenses prevented an early judgment.)

7 The *Grokster* inducement rule is limited to distribution of copying devices and  
8 products by its express language and according to reason. The center of application  
9 for the doctrine of contributory infringement is “copying machines” and, after  
10 development in this particular direction that rests on patent law, a “device” that can  
11 be “use[d] to infringe copyright.” *Grokster*, supra. The word “device” is not freely  
12 elastic because of the need to “strike a balance between a copyright holder's  
13 legitimate demand for effective -- not merely symbolic -- protection of the statutory  
14 monopoly, and the rights of others freely to engage in substantially unrelated areas  
15 of commerce.” *Sony*, supra.

16 Defendants submit that summary judgment is not warranted on an inducement  
17 claim. As argued in Defendants’ original Opposition MPA, the claim fails for  
18 many reasons. At the very least, the Court needs better information about “others”  
19 who want “freely to engage” in “areas of commerce” substantially unrelated to  
20 Plaintiffs’ monopoly. Large communities of Internet developers and independent  
21 producers and creators have interests at stake that are not being represented.  
22 Plaintiffs are adverse to these persons but pretend they do not exist. The pretense  
23 should not succeed. Plaintiffs’ Motion for Summary Judgment should be denied.

24 B. Summary Judgment for Contributory Copyright Infringement is  
25 Unwarranted.

26 The *Amazon.com* Court also applied the Sony rule:

27 “Assuming the principle enunciated in *Sony* is applicable to the operation  
28 of Google's search engine, then Google cannot be held liable for

1 contributory infringement solely because the design of its search engine  
2 facilitates such infringement. [Citation.] Nor can Google be held liable  
3 solely because it did not develop technology that would enable its search  
4 engine to automatically avoid infringing images.” 508 F.3d at 1170.

5 Plaintiffs are attempting to do precisely what the Court said they could not do.  
6 Plaintiffs’ Supp. Memo., particularly the factual assertions therein, is nothing other  
7 than an attempt to hold Defendants liable for contributory infringement solely  
8 because of the design and operations of the BitTorrent Network. More innocent  
9 than Google, Defendants have no part in the design or operational control of the  
10 BitTorrent Network and have no more than a membership role.

11 Plaintiffs’ factual distortions are serious and pervasive. Plaintiffs rely on  
12 fallacious “statistics” with whole-cloth defects raised by Defendants’ Objections.  
13 (See the Supplemental Fung Declaration ¶ 25, where Fung declares that “I know  
14 that their figures are false from my personal experience watching massive  
15 promulgations of authorized content by software developers, videogame developers  
16 and independent video producers.”)

17 It is a semantic game to argue that Defendants provide a “centralized index.”  
18 (Plaintiffs’ Supplemental Memorandum at 7:12, see also 7:17-18.) The words  
19 “centralized” and “central” are contrary to the principles that shape and define  
20 BitTorrent technology. Defendants’ index is largely copied from and representative  
21 of a class of indices maintained by other torrent sites and/or trackers. There are  
22 other indices in the class that are, at least *a priori*, equivalent in importance. None  
23 of the indices is “centralized” or “central” but they make up a dispersed collective.

24 Plaintiffs’ attempts to identify Defendants with Napster (Plaintiffs’ Supp.  
25 Memo. at 4:15-19, 8:3-3-11, 8:16-19) requires willful blindness to the BitTorrent  
26 ecosystem and to the drastic differences between the Napster defendants, who  
27 designed and operated a centrally-operated mass-marketing business, and  
28 Defendants, who participate as members in a worldwide community and who

1 provide data and other services, in competition with other community members, for  
2 a few stages during the BitTorrent downloading process.

3 The defendants whose servers are located in Canada and **not** touching,  
4 copying or hosting the alleged copyrighted works, are simply not in the pragmatic  
5 technical position to visit third party servers and download copyrighted works and  
6 then make an assessment on a worldwide basis, jurisdiction by jurisdiction, of what  
7 is available with authorization and without, what is an advertisement or teaser and  
8 what isn't, what is properly licensed and what isn't, what is parody and what isn't,  
9 what is protected by digital rights management (requiring a password to open) and  
10 what isn't, what is in the public domain for a country and isn't, what is  
11 extraterritorial under US law and what isn't, and what is fair use and what isn't for  
12 every such jurisdiction. Indeed, the Internet and search engines like isohunt.com  
13 would then only be as good as the most restrictive jurisdiction and that would also  
14 impact Free Speech and related Constitutional Protections in the United States and  
15 bring automated search engines and the Internet to a grinding halt.

16 As Plaintiffs assert at 7:14-16 of their Supp. Mem., the *Amazon.com* court held  
17 that Google *might* be liable for contributory infringement. At 508 F.3d 1172-1173,  
18 the court spoke of “factual disputes” that required a remand for further  
19 consideration in connection with the motion for preliminary injunction. The same  
20 “factual disputes” exist here, requiring denial of the summary judgment motion.<sup>2</sup>

21 C. Defendants Have Valid Defenses Under the DMCA.

22 Defendants have valid defenses under 17 U.S.C. § 512(a) (Fung Supplemental  
23 Declaration, ¶¶ 16-22, 26-27, 30), 17 U.S.C. § 512(c) (Fung Supplemental  
24

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25 <sup>2</sup> Defendants sites and search engines like Google in the *Perfect 10* case discussed  
26 above cannot be held liable for vicarious infringement as they do not have  
27 supervision or control over the third party servers where any allegedly infringing  
28 content is hosted or stored and where such allegedly infringing content would  
continue to exist even if all of Defendants sites were to shut down.

1 Declaration, ¶¶ 11-15 and original Opposition papers) and 17 U.S.C. § 512(d)  
2 (Fung Supplemental Declaration, ¶¶ 11-15 and original Opposition papers). *Perfect*  
3 *10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9<sup>th</sup> Cir. 2007); *Costar Group, Inc. v.*  
4 *Loopnet, Inc.*, 164 F. Supp. 2d 688 (D. Md. 2001) (summary judgment motions  
5 denied). As discussed above no copyrighted content is stored on or passes through  
6 such trackers and such trackers are involved at most in “transient” network  
7 connections and thus manifesting DMCA immunity. There are at least factual  
8 disputes and thus summary judgment should be denied.

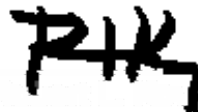
9 Respectfully submitted,

10 Dated: April 25, 2008

ROTHKEN LAW FIRM LLP

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13 Ira P. Rothken, Esq.,

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17 Robert L. Kovsky,

18  
19 Attorneys for Defendants

1 PROOF OF SERVICE

2 I am over the age of 18 years, employed in the county of Marin, and not a party to the  
3 within action; my business address is 3 Hamilton Landing, Suite 280, Novato, CA 94949.

4 On August 20, 2007, I served the within:

5 **DEFENDANTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO**  
6 **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY**

7 By EMAIL and FEDEX by depositing a copy in an envelope, postage prepaid in a FEDEX BOX  
8 addressed as follows:

<p>9 <b>VIA EMAIL AND EFILING</b>  <b>Karen B. Thorland</b>  <b>Walter A Edmiston</b>  Loeb and Loeb  10 10100 Santa Monica Blvd, Ste 2200  11 Los Angeles, CA 90067-4164  12 310-282-2000  13 Email: kthorland@loeb.com</p>	<p><b>VIA EMAIL AND EFILING</b>  <b>Steven B Fabrizio</b>  <b>Katherine A Fallow</b>  <b>Duane Charles Pozza</b>  Jenner and Block  14 601 Thirteenth Street NW, Suite 1200 South  15 Washington, DC 20005  202-639-6000  Email: sfabrizio@jenner.com  Email: kfallow@jenner.com  Email: dpozza@jenner.com</p>
<p>16 <b>VIA FEDEX</b>  <b>Gregory Paul Goeckner</b>  <b>Lauren T Nguyen</b>  Motion Picture Association of America  17 15503 Ventura Blvd  18 Encino, CA 91436  19 818-995-6600</p>	<p><b>VIA EMAIL AND EFILING</b>  Gianni P Servodidio  20 Sami J Valkonen  21 Ronald M Daignault  22 Jenner and Block  919 Third Avenue, 37th Floor  New York, NY 10022  212-891-1600  Email: gservodidio@jenner.com  Email: svalkonen@jenner.com  Email: rdaignault@jenner.com</p>

23 I declare under penalty of perjury under the laws of the State of California that the foregoing is true  
24 and correct. Executed on May 2, 2008.

25   
26  
27  
28